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## Wills--Devise or Bequest for Life With Power of Control or Disposition

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session, equity will not give relief unless the injury is substantial and irreparable. —J. D. D.

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WILLS—DEVISE OR BEQUEST FOR LIFE WITH POWER OF CONTROL OR DISPOSITION.—The testator by the residuary clause of his will, gave to his wife “all the residue of my personal property, consisting in money, credits or bonds to her for her own individual use during her lifetime and at her death after paying all her just debts and funeral expenses the residue, if any be left, to be divided equally among my four children.” The wife in her bill against the executor, *inter alia*, asks the court to construe this clause. *Held*, the wife takes the property absolutely. *Blake v. Blake*, 115 S. E. 794, (W. Va. 1923).

Conceding that the language in the foregoing clause is such as to confer upon the wife an absolute power of disposal, the question of law presented is as to what effect the added power will have upon the life estate previously created by express language and further as to whether a gift over in such a case is well limited. The general rule is universally recognized and uncontroverted that where there is a perfectly general devise and the quantum of the estate can be determined only by implication, an added absolute power of disposal will pass the fee or absolute property. *Borden v. Downey*, 35 N. J. L. 74; *Jackson v. Robins*, 16 Johns. 537, (N. Y.); *Burwell v. Anderson*, 3 Leigh. 348, (Va.); Note, 6 L. R. A. (N. S.) 1186; Note, 17 Am. & Eng. Ann Cas. 480. Except in a few jurisdictions there is a well established exception to the above stated general rule to the effect that where a life estate is expressly limited to the first taker an added power of disposal will not elevate the life estate previously created to a fee or absolute property, nor render subsequent limitations over void. *Welsh v. Woodbury*, 144 Mass. 542, 11 N. E. 762; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Burleigh v. Clough*, 52 N. H. 267; *Stuart v. Walker*, 72 Me. 145. The cases so holding treat the power of disposal not as property but as mere authority which the life tenant may or may not exercise as he pleases. In *Jackson v. Robins*, *supra*, the court said that a will should, if possible, be construed according to the intent of the testator and the power bestowed should be treated as a power and not as property in order to give effect to the limitation over. In *Stuart v. Walker*, *supra*, the court said that there was nothing inconsistent in these three

elements of a devise: (1) Life estate; (2) Absolute power of disposal; (3) Limitation over; and that each part could be literally executed. See also *Burleigh v. Clough*, *supra*, in which the court said that a power when conferred by a will was a bare authority derived from the will not an estate and having none of the elements of an estate. The court goes further and says that while it might divest the estate in remainder, it could not enlarge an estate for life expressly declared to a fee. In Virginia and West Virginia the general rule stated is adhered to, but the exception seems not to be recognized. The courts lay down the rule, without condition or qualification, that where a power of disposal absolute in its nature is given to the first taker, the fee or absolute property passes and subsequent limitations over are repugnantly and void. This rule is applied indiscriminately without reference to whether the estate previously created is an express life estate or is such only by implication. *Meyer v. Barnett*, 60 W. Va. 467, 56 S. E. 206; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731; *Milhollen v. Rice*, 13 W. Va. 510, 519; *Farish v. Wyman*, 91 Va. 433, 21 S. E. 810; *May v. Joynes*, 20 Gratt. 692 (Va.). A case much cited and relied upon by the Virginia and West Virginia cases as establishing or at least supporting this proposition is that of *Burwell v. Anderson*, *supra*. But it is submitted that a careful analysis of that case will show that no such doctrine was promulgated. So far from doing so, the case as a matter of fact lays down the rule that where there is a devise of property generally or indefinitely an absolute power of disposal will pass the fee or absolute property, but specifically points out that had there been a life estate expressly limited to the first taker the rule would have been otherwise. It may be urged that different rules are applicable to devises of realty and bequests of personalty. The jurisdictions recognizing the exception as to realty hold that the same exception is applicable to a bequest of personalty. *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49; *Wooster v. Cooper*, 53 N. J. Eq. 682, 33 Atl. 1050; *Ramsdell v. Ramsdell*, 21 Me. 294; *Surman v. Surman*, 5 Madd. 123; KALES, ESTATES FUTURE INTERESTS, 2 ed. § 726. By the West Virginia rule needless violence is done to the intention of the testator by destroying the limitations over, whereas the other rule actually detracts nothing from the enjoyment of the first taker and at the same time gives life to the whole instrument.

—W. B. H.