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Property—Trusts and Future Interests—Power of Sale

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The decisions below were predicated upon the application of the canon of construction known as *ejusdem generis*. This court, examining the words of the bequest, found an intent so clearly expressed as not to permit the application of any rules of construction.⁵⁸ The word "whether," following words of an essentially negative character, excluding all control over the trustees, eliminated any restriction on their judgment and rendered the special items enumerated words of description only—the words "or otherwise" being another and more general descriptive category. The inclusive character of the prior terms evidenced an intent that the words "or otherwise" was a term of enlargement to include every conceivable situation outside those stated.

The court necessarily finding that the testatrix contemplated and in fact provided for such a contingency, the trust was allowed to be destroyed before it was ever actually in existence. Such an intention seems extremely doubtful, and it would appear that the decision encroaches upon the principle that a court may intervene in the administration of a trust when it appears that the trustee no matter how broad the discretion bestowed upon him, is so administering his trust that it fails to accomplish the purpose for which it was created.⁵⁹ The effect of the decision may well be qualified by a careful application by the lower courts of the principle involved. Recent decisions⁶⁰ indicate that this has been the fate of *Matter of Wollard*,⁶¹ and a like treatment is appropriate in this instance.

Power of Sale

Where a trustee is given the power to sell real property or other trust property the courts by interpretation determine whether the power ceases or survives the termination of the trust.⁶² The general rule is that if the tenor of a will does not limit the power of sale expressly or impliedly upon the trust term, the power is deemed to continue unaffected even though the title to the trust *res* passes to the beneficiaries.⁶³

58. *Matter of Watson's Will*, 262 N. Y. 284, 186 N. E. 787 (1933); *Matter of Rollin's Will*, 271 App. Div. 982, 68 N. Y. S. 2d 116 (2d Dep't 1947), *aff'd*, 297 N. Y. 612, 75 N. E. 2d 627 (1947), 1 DAVIDS' NEW YORK LAW OF WILLS § 491 (1924).

59. *Matter of Vandecar*, 49 Misc. 39, 98 N. Y. Supp. 309 (Surr. Ct. 1905). But see *Corkery v. Dorsey*, 223 Mass. 97, 111 N. E. 795, 796 (1916).

60. *Matter of Britt*, 272 App. Div. 426, 71 N. Y. S. 2d 405 (3d Dep't 1947); *Matter of Hart*, 189 Misc. 171, 71 N. Y. S. 2d 488 (Surr. Ct. 1947); *Matter of Cass*, 68 N. Y. S. 2d 666 (Surr. Ct. 1946).

61. *Supra* note 1.

62. 3 SCOTT, TRUSTS, 1890, 1891 (1939).

63. *Cussack v. Tweedy*, 126 N. Y. 81, 26 N. E. 1033 (1891); *Hutkoff v. Winmar Realty Co.*, 211 App. Div. 726, 208 N. Y. Supp. 25 (1st Dep't 1925).

THE COURT OF APPEALS, 1953 TERM

In the case of *In Re Jones' Will*,⁶⁴ the court followed the general rule and held that where a will gives a trustee full power and authority at any time to sell the trust realty the will should be construed by the court as giving the trustee an unrestricted power of sale which survives the trust. It was pointed out however, that when the trust terminated, the trustees could not exclude the remaindermen from managing the property or performing acts of administration in respect thereto, including collection of rents.

In the instant case the contention of the trustee was that he had the power to manage and control the trust property, to the exclusion of the remaindermen, pending final accounting and discharge by the court. The court approved this contention where personal property is concerned,⁶⁵ but stated that where real property is involved the title immediately vests in the remaindermen upon expiration of the trust⁶⁶ hence the remaindermen have complete power of control over the property.

Construction of Testamentary Grants

Among the many rules available to the courts for use in the construction of grants of property are: (1) the presumption of early vesting of interests, with its ancillary rule favoring early indefeasibility of vested interests;⁶⁷ (2) the preference for the blood line of the grantor;⁶⁸ (3) the rule that a devise of an absolute interest will not be deemed to be cut down by later language in the instrument unless such language is clear and unambiguous.⁶⁹ The application of these rules is supposedly for the purpose of ascertaining the intent of the grantor where the language of the grant is not clear.⁷⁰ The courts are, however, in search of their own version of the intent (what has been described as "judicially ascertained intent"⁷¹), which may actually differ from the actual intent and even from what the court believes to be the actual intent.⁷²

64. 306 N. Y. 197, 117 N. E. 2d 250 (1954).

65. Where personal property belonging to a terminated trust is involved the rule is that the duty remains with the trustee to divide the personalty and to distribute it, and the trust is not complete until the trustee has finally accounted, distributed the property to the person entitled to it and been discharged. See *Matter of Miller's Will*, 257 N. Y. 349, 355, 178 N. E. 555, 556 (1931); *Nearby v. City Bank Farmers' Trust Co.*, 260 App. Div. 791, 24 N. Y. S. 2d 264 (2d Dep't 1940).

66. See REAL PROPERTY LAW § 109; *Watkins v. Reynolds*, 123 N. Y. 211, 25 N. E. 322 (1890); *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805 (1891).

67. *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20 (1901).

68. *Matter of Rooker's Will*, 248 N. Y. 361, 162 N. E. 283 (1928).

69. *Matter of Krooss*, 302 N. Y. 424, 99 N. E. 2d 222 (1951).

70. *Close v. Farmer's Loan & Trust Co.*, 195 N. Y. 92, 87 N. E. 1005 (1901).

71. RESTATEMENT, PROPERTY § 241 (2).

72. See *Matter of Watson's Will*, 262 N. Y. 284, 299, 186 N. E. 787, 791 (1933).