PROBATE JUDGE:)
) Construction to be placed
WILLS:) on various clauses in a will as to what estate is vested - whether life estate or life estate with power to sell.

January 6, 1939

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Hon. M. D. Brown
Probate Judge
Pulaski County
Waynesville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 31, 1938, enclosing a copy of the last will of L. N. Hufft, deceased. It appears that you have been, or will be, asked to make an order permitting the executrix to dispose of certain real estate. You ask, concerning this instrument, what estate is conveyed to the widow of deceased, and more particularly: May the widow (executrix) dispose of the real estate with which testator died seized because it perhaps is not a good investment?

Her right to do this, of course, depends upon the title and powers vested in her under the terms of the will. Our opinion assumes that the widow has elected to take under the will, and has not been discharged as executrix.

Exclusive of formal matters the will provides for the burial of testator and the marking of his grave, the cost of which "shall be considered as funeral expenses."

The controversial features are contained in the third paragraph of the will, which reads: "And I direct that my funeral charges, the expenses of administering on my estate, and all my just debts, be paid out of my personal estate, and if that be insufficient, I expressly authorize my executrix hereinafter mentioned to sell at public or private sale, the whole or such part of real estate, as may be sufficient for that purpose, first selling such property as she shall designate. And the remainder that is left, of whatever kind, to go to my beloved wife Emma J. Hufft during her

natural life time, she to have entire control of the same, it consisting of real estate, personal property, notes and accounts, so long as she lives, and after her death what is left to be equally divided between", the persons and class named by testator.

The fourth paragraph appoints the widow executrix and authorizes her to compromise and settle debts due testator's estate if she deems it advantageous to do so.

Before attempting to decide what powers and estate are vested in the widow (executrix), we must set forth some of the general principles, that have been formulated by our courts, applicable to the construction of wills.

The leading principle is that the intention of testator, if ascertainable, must be given effect, and this intention is to be ascertained from the instrument as a whole. Stevenson v. Stearn, 29 SW (2d) 116, (Mo. Sup.), and that rules of construction only come into play when there is doubt as to what testator intended. Burrier v. Jones, 92 SW (2d) 885 (Mo. Sup.).

The intent of the testator, as expressed in the first sentence of paragraph three of the will is clear and there can be no doubt but what he desired his debts to be paid out of his personal estate first, but if that estate be not ample to pay the same he expressly authorized executrix to sell such real estate as she might choose to pay the same.

The difficulty is contained in the second sentence of this paragraph. It is not so clear and unambiguous that no doubt can arise in a reasonable mind as to what testator meant. This doubt existing we must apply rules of construction to ascertain testator's intent.

As we see it, without resort to rules of

construction, this will may be susceptible to two meanings, these are: (1) That it vests a life estate in the widow with remainder over in fee to the persons and class named; and (2) that it vests a life estate in the widow, with an unconditional right of disposal and remainder over in fee to the persons and class named.

If our conclusion is in the first then the widow (executrix) may not dispose of this real estate. If the latter, of course, our conclusion will be the opposite.

We shall only deal with the real estate since that is all that is involved, or called for in your request.

Due to the ambiguities apparent in the second sentence of paragraph three of the will we must resort to rules of construction to ascertain testator's intent, and will set forth one of these rules which we think is applicable.

It is said that the terms of one provision of a will "cannot be cut down or their meaning modified by subsequent words not clear and decisive". Stevenson v. Stearns, 29 SW (2d) l.c. 118 (Mo. Sup.) (and cases cited). It will be noted the court used the term "cut down or modified". By this use we think it was the court's intention, though we find no case so holding, to say that the terms of one provision cannot be cut down or enlarged upon by subsequent words not clear and decisive. This to us seems to be the reasonable meaning to be applied because a modification is merely an alteration and an alteration may be one of reduction or enlargement.

In Chapman v. Chapman, 77 SW (2d) l.c. 90 (Mo. Sup.) the court had occasion to review a number of cases which we think are illustrative of the kind of estate this will vests in the widow. The court reviewed these cases as follows:

"In Freeman v. Maxwell, 262 Mo. 13; 170 SW 1150, the will read,'I bequeath to her sole and

separate use * * * the balance remaining after the death of my said daughter to go to her surviving children share and share alike'. The court held that the daughter took a life estate. In that case a life estate was created by implication, because the testator disposed of the remainder.

" In Cross v. Hoch, 149 Mo. 325, 50 SW 786, the will read, 'provided that the property here devised to Sarah Cross be subject to the trust, care, and control of my son Turner Maddox, for her use.' The will furtherprovided that if she died without children, then it should be divided among his other daughters. The court held that Sarah Cross took only a life estate by implication.

" In Mace v. Hollenbeck (Mo. Sup.) 175 SW 876, 877, the will stated, 'I hereby give and bequeath to my beloved wife * * * th be used for her benefit and assistance in whatever manner she chooses during her natural life * * * the remainder to be divided' equally between the testator's and her heirs. In that case the will specifically created a life estate in the wife and also by implication because it disposed of the remainder."

The court reviews a number of other cases in this same vein and to the same effect and then said:

"In the case of Tisdale v. Prather, 210 Mo. 402, loc. cit. 410, 109 SW 41,43, we said: 'It is now well settled that a conveyance which confers an absolute power of disposition creates a fee-simple estate in the grantee, if by deed, or in the devisee, if by will, in the absence of an expressed intention to devise a life estate only.'"

In the case of Presbyterian Orphanage of Mo. v. Fitterling, 114 SW (2d) 1004, 1007, a suit to set aside certain deeds, which necessitated construction of the will under which the grantor in said deeds obtained his title, the will provided: "I give, devise and bequeath to my beloved brother * * * all the rest, * * * of my estate, real, personal or mixed, to have,

hold and enjoy the rents, issues and profits thereof with full power to sell and dispose of the same * * * and whatever portion of my estate may remain after the death of my said brother * * * I give, devise and bequeath to the" plaintiff in that suit. The court held as to this will, "that a devise limited to enjoyment of the rents and profits of land, which is followed by a devise of the premises, as the testator's property, after the death of the devisee to whom he gave the right to enjoy the rents and profits thereof, must be construed to create a life estate in such first devisee."

It is clear, under the principles above announced that the widow (executrix) of testator Hufft has only a life estate in said real estate. The will provides "and the remainder that is left, (that is after the payment of just debts, funeral and administrative expenses) of whatever kind, to go to my beloved wife * * * during her natural life time, * * * and after her death what is left to be equally divided between" the persons and class named. Similar terms and language in the above cases have been held to specifically and also by implication to create only a life estate. In our opinion a life estate is all the widow has under this will. Also the terms of the will expressly creating a life estate by the use of the expression "during her natural life" cannot be enlarged upon by other subsequent vague and indecisive expressions such as appear in this will.

Whether or not an unconditional right of disposal is created under this will, if at all, must be gleaned from these expressions. The will after vesting a life estate in the widow provides, "she to have entire control of the" real and personal estate, then further provides "what is left" after the widow's death shall go to certain named persons.

In Owen v. Trial 258 SW 699 (Mo. Sup.), a case in which it was contended the use of the word "control" in a deed conveying certain land in which the grantors retained "control" of the lands until their death, affected the title conveyed, it is said: "Control means to 'exercise a restraining or directing influence over; to regulate' as applied to physical property. It does not apply to the title or estate granted."

In Rice v. Fields 232 SW 385 (Ky) the will read, "I desire to bequeath to my wife, * * * all my property both personal and real of whatsoever kind to be held and controlled by her and used by her for any purpose she may see fit, during her natural life time and after her death I desire that whatever may remain of my estate be distributed euqally among my heirs." The court in construing this will said: "The last part of this clause, 'whatsoever may remain of my estate', would seem to indicate that the testator intended the widow to consume or dispose of a part or all of the estate, but this no doubt had reference to the personal property which was susceptible of destruction by use * * *." The court then sets forth definitions of the words "hold, control and use" and says that from said definitions, "It will * * * readily be observed that the words employed by the testator did not invest the widow with the power of disposition of the property either by sale or otherwise * * *."

In Bramell v. Cole, 136 Mo. 201 the will reads, "I will that all my just debts be paid at as early a day as practicable, and the remainder that is left, to go to my beloved wife,* * * during her natural lifetime; she to have the entire control of the same, it consisting of the following * * *(real and personal property) * * *". After describing the property the testator added: "to go to her, for her to have full control of the same as long as she lives * * *."

It was contended in that case that a life estate was created in the widow with an unlimited right to dispose of the property, this because the will gave the widow entire control of the property during her life and that only what is left at her death went to the remainders.

The court in disposing of this contention said, l.c. 212, 213: "By the will in question the testator not only devised to his wife real estate, but he also bequeathed to her all money, cash, notes or bonds, and evidences of debt of every description whatsoever, and also all his personal property 'and effects of all kinds'. Personal property and effects being thus distinguished from money, notes, bonds, etc., must have included such perishable property as one would have in his residence and upon the land upon which he resided, and the words 'what is left,'

as used in the will, can apply to such personal property.

"But does the language used and repeated in the will, that the devisee should have 'full control' of the property during her life strengthen the contention that a power of disposition is to be implied? We are of the opinion that it does not, but that it has rather the contrary effect.

"The intention of the testator that his wife should have the control of all the property left by him is made prominent. In the most careful and judicious management of an estate like this, losses are liable to occur. By a devise over of 'what is left' the testator evidently had in mind such possible losses, and did not intend that the legatee for life should be chargeable with them.

"The ordinary meaning of the word 'control', when asserted of a person in charge of an estate, is that he has its management. It might imply a power to invest and reinvest, but does not imply a power to dispose of the estate itself so as to defeat the rights of those entitled to its future use."

A further exposition of the effect of words in a will of similar import to "what is left" on the right of a person with a life estate to dispose of the property, appears in Foote v. Sanders, 72 Mo. 616, 620, where it is held such an expression does "not confer a power of sale upon the widow."

Therefore it is our opinion that under this will the widow takes only a life estate in the property. That she is not authorized to sell or dispose of the real property vested in her for life, either as beneficiary or executrix except as directed and that is to pay all just debts, funeral and administration expenses if the personal estate be insufficient to pay the same.

Respectfully submitted,

APPROVED:

T. W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

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