to be good law and might certainly be a helpful rule if there were any evidence in the cases as to what the nature of these powers must be. From the opinions in *Newton County Fruit Growers Association v. Southern Railway* and *Ruggles v. Iron Workers Association* it appears that these powers must be derived from the statutes and that the statutes must be pleaded before the suability attribute will attach. With *Clark v. Grand Lodge* as a precedent it can be said that an association which has made a contract of insurance is a suable entity in so far as the association may be sued upon that contract. Whether a suit or an ordinary contract would be allowed seems doubtful in view of the decision in *Ruggles v. Iron Workers Association.* The opinion in the case of *Clark v. Grand Lodge* shows a reluctance to recognize an unincorporated association as a suable entity for purpose of a suit in nature of a tort. However, it is submitted that allowing such a suit would not be without precedent.[31]

To-day there are many unincorporated associations, such as the labor unions. They have thousands of members, are efficiently organized, hold valuable property and large sums of money, and conduct business in furtherance of the ends of the organization. The need for a practical method of suing these groups as entities is self-evident. The Missouri Courts have met this situation only partially, but effectively in some instances.

LESTER E. BARRETT '33.

ENLARGEMENT OF LIFE ESTATES TO FEES SIMPLE BY THE ANNEXATION OF A POWER

There seems to be a great deal of learned argument on the part of the courts and the authorities in the State of Missouri as to the status of executory limitations. It has been suggested by Mr. McCune Gill[1] that there is a "remarkable body of law" on the subject in this state. "An analysis of these elements in these forty-nine cases shows that it is quite impossible to deduce a rule from the decisions. The limitations seem to have been upheld or disregarded and the supposed intention of the testator or grantor

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[31] Consider the case of State v. Kansas City Stock Exchange note 9, supra. See also Wiechtuechter v. Miller note 16 supra.

Professor Sturgis suggests in an article found in 33 Yale Law Journal 383 (1924) that the power to sue or be sued in their association name is denied the unincorporated groups not because they have no legal entity separate and distinct from their members, but because the courts feel the power is usurped from the corporate franchise, which must lie in grant from the sovereign.

[1] A Limitation After a Fee Simple (1927) pamphlet written by McCune Gill and published by the Title Insurance Corporation of St. Louis.

declared at random."[2] In this view he is partially supported by Professor Hudson[3], who speaks of "the vacillation in the decisions of the Supreme Court on the question as to whether the first taker has a life estate with the limitation over good as a remainder." However, it seems to the writer that this view is not entirely correct. There are several problems which must be carefully distinguished in order to arrive at a full appreciation of the authorities in this state.

Neither weeds out the cases involving the problem of the enlargement of life estates, and it is submitted that the following review of the subject will show that a great deal of the alleged confusion in the cases is attributable to this. There are several factors to be observed before the problem can be clearly perceived. In this type of cases there are three interests involved, the primary estate—that estate granted or devised to the first taker—, the subsequent estate—that estate set up by the limitation over—, and the power of disposition given to the first taker. Both Mr. Gill and Professor Hudson base their analyses largely upon the fate of the subsequent estate—the limitation over. It is submitted that the real point of departure is that estate which is first in order of enjoyment. If that estate can be established and its nature truthfully determined, the disposition of the subsequent estate follows as a logical incident thereto. If the primary estate is one for life, then the subsequent estate will be a remainder either vested or contingent; and this group of precedents can be set apart in its proper category. The remaining cases will be found to have involved primary estates which were held to be fees and as to them the subsequent limitation can only be sustained, if at all, as an executory limitation. In the latter instance the question is not whether all executory limitations are to be held valid or invalid, but whether an executory limitation can be conditioned to arise upon the contingency of non-disposition of the property by the holder of the fee. Consequently, this note will be devoted to a discussion of the problems involved in determining the nature of the primary estate. Unfortunately limitations of space will not permit of a discussion of the second question.[4]

I. In General

(A) The Majority Rule

The great majority of the cases support the view that where an estate for life is given, with a remainder over, and a power of dis-

[2] Ibid. l. c. p. 2.

[3] Executory Limitations in Missouri (1916) 11 Mo. L. Bull. 50.

[4] The Missouri decisions reduce considerably the importance of this problem by their tendency to construe the estate granted to be a life estate.

position of the fee is annexed the limitation for the life of the first taker will control, and the life estate will not be enlarged to a fee, notwithstanding the power of the life tenant to dispose of the fee.[5] In an Illinois case the court stated the rule in the following language: "It is the rule that where a will devises a life estate with general language indicating a power of disposal, although the life tenant could dispose of the estate devised without the express power, the power is regarded as only pertaining to the estate devised, and is interpreted as meaning such disposal as the life tenant could make. . . . If, however, the will indicates an intention to confer power to convey a fee, effect will be given to such intention, but the existence of the power will not enlarge the life estate into a fee."[6] Of course this raises the question as to the interpretation of the scope of the power, but inasmuch as the rule is clear and the matter is merely one of interpretation of the language in the deed or will, the main problem still involves cases wherein the power is deemed to include authority to convey a fee.

In *Peckham v. Lego*[7] the will contained a devise to a man and his wife of, "the use and enjoyment of the whole of the remainder of the estate of which I may die possessed both real and personal during their natural lives. Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so exercising good judgment and saving as much of it as possible for the children born to them." In deciding that only a life estate was created the court said, "The language is doubly restrictive. In the first place the bequest is guarded by

[5] Brant v. Virginia Coal & I. Co. (1876) 93 U. S. 326; Glover v. Stilson (1888) 56 Conn. 316, 15 Atl. 752; Adams v. Lillibridge (1901) 73 Conn. 655, 49 Atl. 21; Mathis v. Glamson (1920) 149 Ga. 752, 102 S. E. 351; Funk v. Eggleston (1879) 92 Ill. 515; Mann v. Martin (1898) 172 Ill. 18, 49 N. E. 706; Powers v. Wells (1910) 244 Ill. 558, 91 N. E. 717; South v. South (1883) 91 Ind. 221; Booher v. Deane (1928) 88 Ind. App. 72, 163 N. E. 287; Hamilton v. Hamilton (1908) 140 Iowa 282, 115 N. W. 1012 rehearing denied (1908) 140 Iowa 285, 118 N. E. 375; Greenwalt v. Kellar (1907) 75 Kan. 578, 90 Pac. 233; Payne v. Johnson (1893) 95 Ky. 175, 24 S. W. 238; Pickering v. Langdon (1843) 22 Me. 413; Loud v. Poland (1927) 126 Me. 45, 136 Atl. 119; Smith v. Hardesty (1898) 88 Md. 387, 41 Atl. 788; Cowman v. Classen (1929) 156 Md. 428, 144 Atl. 367; Rail v. Dotson (Miss. 1850) 14 S. & M. 176; Krause v. Krause (1924) 113 Neb. 22, 201 N. W. 670; Lord v. Roberts (N. H. 1931) 153 Atl. 1; Cory v. Cory (1883) 37 N. J. Eq. 198; Patrick v. Morehead (1881) 85 N. C. 62; Helms v. Collins (1930) 200 N. C. 89, 156 S. E. 152; Fetter v. Rettig (1918) 98 Ohio St. 428, 121 N. E. 696; Henninger v. Henninger (1902) 202 Pa. 207, 51 Atl. 749; Wagnon v. Wagnon (Tex. Civ. App. 1929) 16 S. W. (2d) 366; Re Tilton (1899) 21 R. I. 426, 44 Atl. 223; Re Hayward (1919) 93 Vt. 404, 108 Atl. 345; Porter v. Wheeler (1924) 131 Wash. 482, 230 Pac. 640.

[6] Barton v. Barton (1918) 283 Ill. 338, 119 N. E. 320.

[7] (1889) 57 Conn. 553, 19 Atl. 392.

the words 'use and enjoyment', which alone would distinguish the gift from a fee, but, to put it beyond all controversy the tenure of the holding is expressly given as 'during their natural lives'. If the section stopped here it is conceded that a doubt as to the meaning would be impossible; but the words which follow 'Should it be necessary . . . to use any of the property it is my will that they should do so . . .' it is contended, remove the restriction twice applied, and enlarge what was plainly a life estate and convert it into a fee. We fail to discover any such intention . . . this clause was never intended to sweep away the life estate." It is obvious that the court in this case felt that it was following the intention of the testator, a procedure which is certainly a cardinal rule in the construction of wills. This is certainly the accepted view of the cases where there is a devise of a life estate in express terms.[8]

However, in a great many instruments there is no express grant of a life estate. In fact the primary interest is limited in terms which, if they stood alone might be construed as conveying a fee. Thus the court is faced primarily with a problem of construction. For instance, in an Illinois case[9] the court was called upon to determine the nature of an interest created by the following provision in a will: "I give, devise and bequeath, to my wife . . . all of my property . . . , with full power to convey and dispose of same in any way she may see fit. . . ." While the words used are sufficient to convey a fee, and this would be their effect standing alone, the court felt that when this clause was construed with the following clause—"It is my will that whatever

[8] To quote the devise in such cases would be mere reiteration. The following cases involve devises of life estates in such words as "for life", "for widowhood or until death", etc. Funk v. Eggleston (1879) 92 Ill. 515; Skinner v. McDowell (1897) 169 Ill. 365, 48 N. E. 310; Mann v. Martin (1898) 172 Ill. 18, 49 N. E. 706; Powers v. Wells (1910) 244 Ill. 558, 91 N. E. 717; Wiley v. Gregory (1893) 135 Ind. 647, 35 N. E. 507; Rusk v. Luck (1896) 147 Ind. 388, 45 N. E. 691; Bryson v. Hicks (1922) 78 Ind. App. 111, 134 N. E. 874; Booker v. Deane (1928) 88 Ind. App. 72, 163 N. E. 287; Graham v. Sinclair (1929) 89 Ind. App. 119, 165 N. E. 768; Paxton v. Paxton (1909) 141 Iowa 96, 119 N. W. 284; Olson v. Weber (1922) 194 Iowa 512, 187 N. E. 465; Hicks v. Connor (1925) 210 Ky. 773, 276 S. W. 844; Evans v. Leer (1930) 232 Ky. 358, 23 S. W. (2d) 553; Lickteig v. Lickteig (1931) 236 Ky. 540, 33 S. W. (2d) 641; Pickering v. Langdon (1843) 22 Me. 413; Mallet v. Hall (1930) 129 Me. 148, 150 Atl. 531; Lord v. Roberts (N. H. 1931) 153 Atl. 1; Stafford v. Washburn (1913) 208 N. Y. 536, 101 N. E. 1122; Helms v. Collins (1930) 200 N. C. 89, 156 S. E. 152; Kiplinger v. Armstrong (1930) 34 Ohio App. 348, 171 N. E. 245; Stiffler v. Pa. Coal & Coke Co. (1929) 289 Pa. 152, 148 Atl. 71; Arrington v. McDaniel (Tex. Comm. of App. 1929) 14 S. W. (2d) 1009. See also cases footnote 5.

[9] Williams v. Elliott (1910) 246 Ill. 548, 92 N. E. 960.

property remains at the death of my wife shall go to my four sisters."—it clearly appeared that the testator intended to create only a life estate in the widow. A similar situation arose in an Indiana case.[10] The court held that the primary estate was for life saying, "This is not a case where a fee simple has been granted in clear and concise language, and afterwards taken away or modified by a subsequent clause in the will which is repugnant to such devise in fee. The fee was not given, in the first instance, in clear and concise language. We have given force to all the language used in disposition of the property . . . and construed as a whole, it clearly expresses an intention to give the widow a life estate, with remainder over to the heirs of the devisor." In *Barry v. Austin*,[11] the first clause of the will is, "I give devise and bequeath . . . all the rest, residue and remainder of my estate." It was held that a life estate was created and that the subsequent limitation took effect in remainder subject to a complete power of disposal given to the life tenant. In granting the primary estate the testatrix did not say specifically whether a fee or a life estate had been devised to the husband, and had the devise stopped there with no other accompanying words a fee would have been conveyed.[12] But the testatrix did not stop there. She went on to give the husband complete power of disposal, which would be unnecessary if he were holder of the fee. She also provided a gift over. This seemed to indicate that the intention existed to create merely a life estate with a gift over by way of remainder.

The Kansas cases are illustrative of a similar attitude. In one case[13] it was held that a life estate with a power of disposal and not a fee was created by the following language: "All the residue and remainder of my estate . . . I hereby give, bequeath and devise to my wife . . . to have, enjoy, sell or dispose of in any manner she may see fit, or in her judgment may conduce to the interest or value of said estate . . . (specific gifts over upon her death)." The court said: "The will in question is one which could be construed as giving a fee simple or a mere life estate, and is one on which legal minds might well differ each supported by abundant authorities. To give bequeath and devise to the wife, 'to have . . . etc.' would of itself be deemed to pass absolute title. But when as a part of the same sentence the provision is made that upon the devisee's death all the property be distributed as directed,

[10] Eubank v. Smiley (1892) 130 Ind. 393, 29 N. E. 919.

[11] Barry v. Austin (1919) 118 Me. 51, 105 Atl. 806.

[12] Under the Maine statute (R. S. Me. (1925) ch. 79 sec. 16) a fee can be conveyed in general terms without the magic words "heirs". Such statutes exist in many states (R. S. Mo. (1929) sec. 563).

[13] Scott v. Gillespie (1918) 103 Kan. 745, 176 Pac. 132 cert. den. (1919) 249 U. S. 606.

such provision is entitled to attention and consideration." In another case[14] involving a very similar devise the court said, "The language of the will is crude but easily understood. No one can read the will and misunderstand it. The testator *intended*[15] that his wife should during her life control and dispose of all property, but that at her death that which was left undisposed of should go to his children".

In treating of these devises in general terms the courts are faced with a venerable rule that where an estate is given to a person in general terms with a power of disposition, such gift carries the entire estate.[16] This is probably an outgrowth of the much misconstrued dictum in *Attorney General v. Hall*[17] which led to the cases of *Ide v. Ide*,[18] *Jackson v. Bull*,[19] and *Jackson v. Robins*.[20] These cases have been so fully treated by Professor Gray that it would be a work of supererogation to do so here.[21] The chief difficulty with *Ide v. Ide* is that a careless extension of the rule may lead to the invalidation not only of executory devises conditioned upon non-disposition but all executory devises, however conditioned.[22] This rule is obviously intended to be a rule of prop-

[14] Otis v. Otis (1919) 104 Kan. 88, 177 Pac. 520.

[15] Italics the author's.

[16] Benesch v. Clark (1878) 49 Md. 497 (dictum). This case involves a life estate expressly granted and it was held not to be enlarged to a fee. This case is only one of many in which the dictum is voiced, but not applied. Cf. Carroll v. Herring (1920) 180 N. C. 369, 104 S. E. 892. In this case the rule is clearly stated and would seem to have the effect of creating a fee in the primary taker. Thus, the subsequent estate could only be an executory limitation, which, incidentally, the court thought would be void for repugnancy. See also Chewning v. Mason (1912) 158 N. C. 578, 74 S. E. 357.

[17] (1731) Fitzg. 314, 94 Eng. Repr. 772. Professor Gray points out that the Mass. court misread this case in deciding Ide v. Ide (infra).

[18] (1809) 5 Mass. 500.

[19] (1813) 10 Johns. 19.

[20] (1819) 16 Johns. 537 also reported in 15 Johns. 169.

[21] Gray, Restraints on Alienation (2d ed.) sec. 67, *et seq.*

[22] Leflar (1930) 8 Tenn. L. Rev. l. c. 92. The doctrine of Ide v. Ide has been expressly repudiated in Missouri in the case of Walton v. Drumtra (1899) 152 Mo. 489, 54 S. W. 233. Judge Marshall said "Under our statutes and these decisions it seems clear to me that the harsh construction announced in Ide v. Ide (supra), has melted away like the hideous skeleton in a nightmare before the Roentgen rays of common sense and the gladsome light of modern American judicial advancement. Even in Massachusetts, Ide v. Ide, is no longer worshipped or blindly followed". This language seems to leave no doubt as to the learned Chief Judge's opinion of Ide v. Ide. It is interesting to note at this point that the Missouri Supreme Court en banc, decided the case of Walton v. Drumtra and in that case expressly overruled the celebrated Cornwell cases (Cornwell v. Orton (1898) 126 Mo. 355, 27 S. W. 536 and Cornwell v. Wulff (1898) 148 Mo. 542, 28 S. W. 162) which held

erty. Nevertheless a majority of the American cases adverted in this instance to an examination of the instrument to ascertain the intention therein expressed and have little trouble in declaring it to be manifest that a life estate was intended. They thus apply a rule of construction rather than a rule of property. In this group of cases there are at least two factors which have weight, the completeness of the power and the terms of the gift over. These factors may form the substance of a rule of property, or, on the other hand, they may serve as the basis for a construction of the intent of the devisor or grantor. For instance, in a recent Kentucky case,[23] testator devised the residue of his estate to his wife, "to use, manage, control as she wished without any restriction whatever, hereby investing with power to sell and convey by deed or otherwise any property herein willed to her. But when my said wife shall come to die, if she so desires, she may give or will . . . (to designated beneficiaries in determined proportions)." It was held that the widow did not take a fee because the power of disposition by will was not unlimited. In the habendum of this devise, it would seem that a fee has been granted. Furthermore in the subsequent language there is no express gift over, whereas the power seems to be fairly complete. If the court is applying a rule that a gift of property in general terms coupled with a complete power of disposition carries a fee and is determining in this case that the power falls short of being complete enough to accomplish this result, we could say that the court has applied a rule of property. However, from the earlier cases[24] in this state it appears that almost all devises coupled with a power will fall short of giving a fee because the power in some way or other will, to the court's mind at least, be incomplete in some detail. If testator had expressly granted a fee—or had granted an estate in general terms and added thereto all possible powers of disposition which attend the ownership of a fee then we are faced with a problem of the cutting down of a

a primary devise such as those under discussion to be a fee and the subsequent limitation was consequently invalid as a remainder repugnant thereto. Mr. Gill, in his analysis above referred to, cites these cases as conflicting.

[23] Wintuska v. Peart (1931) 237 Ky. 666, 36 S. W. (2d) 50.

[24] In Kentucky the rule is stated to be that where an estate is devised for life expressly, or by necessary inference from the intention of the testator as expressed in the will, a power of disposal in the devise will not enlarge the life estate into a fee. But if the devise does not specifically or by necessary inference create a life estate the power of disposition invests the devisee with a fee. Goss v. Withers (1913) 153 Ky. 5, 154 S. W. 398; Mason v. Tuell (1914) 161 Ky. 392, 170 S. W. 950. But see, Wintuska v. Peart, supra, Angel v. Wood (1913) 153 Ky. 195, 154 S. W. 1103, and Robertson v. Robertson (1926) 215 Ky. 14, 284 S. W. 109. The cases seem to apply a more liberal rule of testamentary intention. See also cases footnote 5.

fee by the subsequent devise, not a question of enlargement. There remains no doubt about the status of the primary estate and we are faced with a problem of the second class referred to in the introductory paragraphs of this note. But in any case where there is less than a fee expressly given in the primary devise the court must solve a problem in construction, and while it is the completeness of the power that is being determined, it is submitted that this is a matter of construction.

Language from these opinions has been quoted liberally in order that the attitude of the court might be observed. Examples of this sort of thing might be multiplied but they would add nothing. Throughout the cases in the jurisdiction which follow the majority rule one finds this type of language used. It is submitted that the implied prophecy voiced by Professor Gray in his criticism of the rule in *Ide v. Ide* is materializing.[25] In dealing with cases in this category, a majority of the courts seem to operate upon the words of the devise, by rule of construction, and although the mechanics of this procedure may vary in the different jurisdictions, the ultimate question is, "What is the nature of the primary estate?" It furthermore seems to be the tendency in a majority of the states to give effect to the apparent intention of the instrument by construing the primary estate as one for life with a power of disposition in the life tenant, and a gift over by way of remainder, even though the primary estate has been granted in general terms rather than in the express language of a life estate.

(B) Minority Rule

In a few jurisdictions the rule obtains that where an absolute power of disposition, either express or implied is annexed to a

[25] Gray, Restraints on Alienation (2 ed. 1895) pp. 66-7. "The establishment of this doctrine is an interesting example of what the naturalists call a reversion to primitive type. In the barbarous stages of law courts thwart the intention of parties to transactions by rules and restrictions which are not based on considerations of public advantage, but are formal, arbitrary, and often of a *quasi* sacred character. The process of civilization consists in the courts endeavoring more and more to carry out the intentions of the parties or restraining them only by rules which have their reason for existence in considerations of public policy . . . for the courts to invent a new rule, not called for by any considerations of public policy, . . . is unusual at the present time. What are the reasons given . . . these are only words. They merely mean that the court has set up a certain rule and that the proposed provision is inconsistent with it. . . . It is to be observed that the rule is not a rule of construction, it is not a rule to carry out the intention of the parties, but its avowed purpose is to defeat that intention."

[26] Gibson v. Gibson (1921) 213 Mich. 31, 181 N. W. 41; Dills v. La Tour

life estate in real property, the life estate is thereby enlarged to a fee.[26] In *Burwell v. Anderson,*[27] which is frequently cited as authority for this so-called minority rule, the devisee was given the absolute disposal of 500 pounds, and the question was whether it was a gift of money or merely a power. In that case it was said, "And where an interest is given generally and without limitation that gift is not converted into a mere power by annexing thereto a general power of disposition. . . . But where there is an express and inconsistent estate for life given, the construction of that instrument is different. For an express intention negatives any intention to give the absolute property, and converts these words into words of mere power." While these views, expressed with great clearness, seem to support the majority rule rather than the minority rule, nevertheless this case has been interpreted in Virginia and the other minority states as a foundation for the minority rule. The subsequent Virginia cases have firmly established the latter doctrine. In *Coffman v. Coffman,*[28] the testator gave "his entire interest in the farm on which we now live, to my wife for as long as she may live. After her death I will and bequeath . . . (here follow specific gifts over)." It was held that the wife took fee by reason of the annexation of a power expressed in a subsequent sentence ". . . with my wife to dispose of as she thinks proper." There might seem to be some conflict in the Virginia decisions at first glance, but they are reconcilable when the intention of the testator is taken into consideration. In this jurisdiction the intention of the testator is said to control where not in conflict with a rule of law. So in *Davis v. Kendall,*[29] a will was held to create a life estate merely. The testator had devised to his wife "all my estate . . . for her

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(1904) 136 Mich. 243, 98 N. W. 1004; Jones v. Jones (1872) 25 Mich. 401; Vandeventer v. Vandeventer (1928) 157 Tenn. 571, 11 S. W. (2d) 867; Emert v. Blair (1908) 121 Tenn. 240, 118 S. W. 865; McKnight v. McKnight (1907) 120 Tenn. 431, 115 S. W. 134; Bradley v. Carnes (1894) 94 Tenn. 27, 27 S. W. 1007; Bristow v. Bristow (1924) 138 S. E. 67, 120 S. E. 859; Coffman v. Coffman (1921) 131 Va. 456, 109 S. E. 454; Rolley v. Rolley (1909) 109 Va. 449, 63 S. E. 988; Burwell v. Anderson (Va. 1831) 3 Leigh 348 (there are at least twenty additional Virginia cases in point not cited here because of space limitation); Ogden v. Maxwell (1927) 104 W. Va. 553, 140 S. E. 554; Meyer v. Barnett (1906) 60 W. Va. 467, 56 S. E. 206; Smith v. Schlegel (1902) 51 W. Va. 245, 41 S. E. 161; Mulhollen v. Rice (1878) 13 W. Va. 510.

It should be noted however, that Michigan is tending away from the minority rule. Gibson v. Gibson, supra, has been dubious authority since Quatron v. Burton (1930) 249 Mich. 474, 229 N. W. 465.

[27] (1831) 3 Leigh (Va.) 348.

[28] (1921) 131 Va. 456, 109 S. E. 454.

[29] (1921) 130 Va. 175, 107 S. E. 751.

sole use and benefit so long as she lives." The court was not unmindful of other Virginia cases in which it had held very similar devises to be absolute estates in fee. "This frequent reference in the cited cases to the intention of the testator shows that the language used is construed to pass a fee, because the words of the testator indicate that intent." On the other hand, in *Ogden v. Maxwell*[30], a devise to a widow for her natural life with full power of disposition and an express gift over on her death, was held to create a fee in the widow. It does not seem that these cases are quite satisfactory. In fact, this is true of all the cases which purport to follow the minority rule. The great trouble in these states is that the courts must "ride two horses". They desire to follow the intent of the testator on the one hand, and yet they are reluctant to permit him to keep "his tongue in his cheek" while making his primary devise. It seems that these courts are allowing themselves to be governed by the terms of the power rather than by a consideration of the effect of the primary devise. This procedure is undoubtedly proper where the primary devise itself is in general terms and the reference to the power is made for purposes of determining intent—in other words, for purposes of construing the whole instrument. But where the primary devise expressly and unequivocally grants an estate for life, such reference to the power is not justified. It is well settled[31] that a power carries with it no interest in land—no quantum of estate, but is merely an authority.[32]

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[30] (1927) 104 W. Va. 553, 140 S. E. 554.

[31] Melton v. Camp (1905) 121 Ga. 693, 49 S. E. 690, referring to the power of disposal, the court said that a power was not property but mere authority; and that any absolute power of disposal was not inconsistent with a life estate.

[32] In several states, statutes have been enacted which in some measure impinge upon this problem. These sections are all similar varying but slightly in language and are prototypes of the original New York statute on the matter. In substance they provide that when an absolute power of disposal, not accompanied by a trust, shall be given to the owner of a particular estate for life or for years such an estate shall be changed into a fee absolute with respect to creditors, purchasers and encumbrancers, but subject to any future estates limited thereon in case the power should not be executed or the land should not be sold for the satisfaction of debts; that when a like power of disposal shall be given to one to whom no particular estate has been limited, such person shall also take a fee subject to any future estates limited thereon, but absolutely with respect to creditors, purchasers, and encumbrancers.

However such statutes do not affect materially the central problem under consideration here because they do not change the status of the parties to the will or deed. Such has been the construction placed upon them. New York, for instance, in which the statute originated, still deals with a con-

II. The Missouri Cases

It has been said that in Missouri a limitation to A and his heirs with full power to convey or devise a fee and with a proviso that if the power is not exercised the land shall go over to B and his heirs creates a fee in A, the subsequent limitation being void.[33] It is also true in this state that a limitation to A for life, remainder over with a complete power of disposal annexed is not enlarged to a fee by reason of the power.[34] As to the latter proposition there can be no doubt that Missouri is in accord with the majority rule as stated above. Clearly, if there has been a grant of a life estate expressly made, that life estate will not enlarge. In such a case there would be a valid contingent remainder following a life estate. If the primary estate is, on the other hand, a fee, the subsequent estate can only be an executory limitation and its validity must rest upon whatever fate is accorded to executory limitations. It becomes apparent therefore that the two separate problems referred to in the introduction exist in this state.

In the early case of *Ruby v. Barnett*[35], it was held that the widow took a life estate under a devise to her as follows: "It is my will that my wife . . . shall have all my property . . . as long as she shall live." This case has been cited as authority for both of the above stated rules in this state, but the court was addressing itself solely to the problem of the wife's estate. The court in this case determined the nature of the primary devise. In arriving at its decision the court seems to be thoroughly in line with the general American view, and on principle, it is correct, since the will expressly used the terms of a life estate—namely "as long as she shall live". But the court seems to have gone farther than the later cases have wished to follow in establishing by way of dictum the rule of *Jackson v. Robins*,[36] which it cited. The court said, "It always has been held that an abso-

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troversy between the devisees according to the majority rule which it had adopted in its decisions prior to the passage of the statute. Therefore, this brief reference is made here only for the sake of completeness. Ala. Code (1923) sec. 6928; G. S. Minn. (1923) sec. 8115; C. S. N. Y. (Cahill 1930) ch. 51, sec. 150; Okla. Stat. (1931) sec. 11877. Missouri has no such statute. Some of the recent cases construing this type of statute are: Showalter v. Showalter (1928) 217 Ala. 418, 116 So. 116; Larson v. Mardaus (1927) 172 Minn. 48, 215 N. W. 196; Stafford v. Washburn (193) 208 N. Y. 536, 101 N. E. 1102; Watkins v. French (1931) 153 Va. 614, 151 S. E. 300; Zweifel's Will (1927) 197 Wis. 428, 216 N. W. 840.

[33] Hudson, op. cit. l. c. 37. See R. S. Mo. (1929) sec. 563.

[34] Ibid. 38.

[35] (1848) 12 Mo. 5.

[36] Note 20 above.

lute power of disposition over property conferred by will not controlled by any provision or limitation, amounted to an absolute gift of the property. A power to dispose of a thing as one pleases must necessarily carry with it a full property in it. Hence whenever property is conveyed in words conferring a power of disposition as one pleases, or as he may think best, it is in law an absolute gift of the property to him on whom the power of disposition is conferred. . . . But a devise to a wife for life, and after her decease she to give the same to whom she will, passes but an estate for life with a power; yet if an express estate for life had not been given to the wife, an estate in fee would have passed by the other words." This dictum seems to have been followed in *Gregory v. Cogwell*[37]. In *McDowell v. Brown*[38], there was a primary estate in fee followed by an executory limitation contingent upon the non-execution of a power by the first taker. The language creating the primary estate was clear; thus the court was plainly faced with a problem—not of the nature of the primary estate—but with the validity or invalidity of an executory limitation conditioned upon the exercise of a power of disposal by the holder of the primary estate. The court held the limitation invalid. This case was followed a few years later by *Jecko v. Taussig*[39]. In this case an estate was granted to the first taker in general terms (there was no express language indicating either a fee or a life estate) with a power of disposal annexed. The court was faced solely with the problem of the power of the first taker to dispose of a fee, and as Professor Hudson points out[40], whether the subsequent limitation was a remainder or an executory limitation makes little difference in the actual decision reached. But Professor Hudson thinks that this case is an implied recognition of a contingent executory limitation because the court referred to it as being "*contingent* upon the non-exercise of the power". But it is not altogether clear in many states whether such a subsequent estate is a contingent remainder, or a vested remainder subject to divestiture. The court could have been thinking of contingent remainders instead

[37] (1854) 19 Mo. 415.

[38] (1855) 21 Mo. 57. This seems to be the distinction upon which the seeming inconsistency, so deplored by Mr. Gill can be resolved. Whether or not an executory limitation conditioned upon non-exercise of a power of disposal should or should not be valid is one matter. But it is an entirely different matter to lump all "subsequent" devises together and call them "limitations" and then point to a variance in the treatment of them with an almost naive disregard for distinctions in their legal nature.

[39] (1869) 45 Mo. 167.

[40] Hudson, op. cit. l. c. 39 ftn. 155.

of contingent executory limitations, and in the light of the *McDowell* case it seems that this is more likely. Furthermore, subsequent cases have borne this out. In *Harbison v. James*[41], there was a devise in general terms with a power of disposal and a gift over of all "property undisposed of". This, it was held, created a life estate in the widow and a valid gift over by way of remainder. The court determined from the whole will that the primary estate was a life estate and that it was not enlarged to a fee by the annexation of the power. Likewise in *McMillan v. Farrow*[42] there was a gift in the primary devise, to the wife of the testator, to hold absolutely with full power to dispose of all or any part thereof at her option. Following this clause there was a gift over of all property undisposed of at her death. The court said that it could not be that if the testator had intended to give her the property in fee, he would have said "my property remaining undisposed of at her death". Such a construction would make the provisions of the will inconsistent with each other, whereas, when construed as giving her a life estate only, the provisions were perfectly consistent and in harmony. This, it will readily be seen, is an adoption of the tendency of the courts in the majority rule states to determine the nature of the primary estate by reference to the testator's intention as it appears from the whole will[43]. In fact, the Missouri court has gone rather far in this direction in the more modern cases. It must be noted that the primary devise can be phrased in three different ways. It can grant a life estate to the first taker expressly, it can grant an estate to the first taker in general terms which do not expressly indicate either a life estate or an absolute interest, or it

[41] (1886) 90 Mo. 411.

[42] (1897) 141 Mo. 55, 41 S. W. 890.

[43] The cases seem to bear out the application of this "rule of intention". Garland v. Smith (1901) 164 Mo. 1, 64 S. W. 188 (in trust for the wife's sole and separate use held to create a life interest in wife); Underwood v. Cave (1903) 176 Mo. 1, 75 S. W. 451; cf. Threlkeld v. Threlkeld (1911) 238 Mo. 459, 141 S. W. 1121 (absolute power of disposal not inconsistent with a life estate); Gibson v. Gibson (1912) 239 Mo. 490, 144 S. W. 770; (a leading case on this subject which reviews the authorities and seems to support the indicated analysis); Burnett v. Burnett (1912) 244 Mo. 491, 148 S. W. 872 (another case to same effect, but which mainly construes the nature and effect of the power); Trigg v. Trigg (Mo. 1917) 192 S. W. 1011; Cook v. Higgins (1921) 290 Mo. 402, 235 S. W. 807; Bowles v. Shocklee (Mo. 1925) 276 S. W. 17. Although the significance of intention is peculiarly great in the case of wills, the application of this principle of construction has so colored the whole treatment of the instant problem that, it is submitted, the courts will react very similarly when it arises out of a trust instrument or deed. See Rayl v. Golfinopolus (Mo. 1924) 264 S. W. 911; Garland v. Smith, supra.

can grant an absolute interest to the first taker in express terms (which standing alone would clearly convey a fee simple). In the first two situations the result which the court achieves is not only clear, but satisfactory. But there are cases in this state, in which the primary devise is couched in terms clearly importing a fee. For instance in *Bowles v. Shocklee*[44] the devise gave to the widow all testator's property "absolutely." There were several repetitions of this language. Yet, the court held that the will, in view of all the circumstances surrounding the testator as they appeared in the evidence, gave to the widow a life estate with power to sell as she might deem best and proper.[45] It may be hard to justify the court's decision in holding such primary devise to be life estate in the face of the express language embodied in the devise which would seem to create a fee. But on the whole it was probably not the testator's intention to create a fee simple absolute. This he could have done, and most probably would have done, by the simplest of language. The fact that he added the power of disposal, and the gift over of the undisposed portion at the death of the first taker, patently reveals some other and different purpose. Indeed when such testamentary paragraphs are read it will appear that in all probability the testator, in using the "absolute" terminology merely desired to insure the first taker of an absolute freedom to dispose of the property during the latter's lifetime.

It is true that this extension does not leave much room for the existence of a primary estate which is a fee simple absolute, with an executory limitation contingent upon non-disposal by the first taker. In other words, such an extension would go very far towards minimizing the importance of the second problem referred to in the introduction—that of the validity of an executory devise contingent upon non-disposal by the first taker. While the cases which indicate a trend in the direction of this liberal extension are few, it is entirely possible for the courts to avoid the invalidity of the subsequent limitation by construing the primary estate to be one for life whereupon the subsequent limitation becomes a remainder. Of course it may still fall as a remainder, if the remaindermen are unascertainable. The determination of the nature of the primary estate is by no means a magic touchstone.

But such an analysis of the cases will lead to a practical appreciation of their relative significance and will furnish a valuable method of legal technique, a thing which is much needed by any

[44] (Mo. 1925) 276 S. W. 17.

[45] There are other cases of a similar variety but it would be redundant to recite each one at length since it is only the principle that is being commented upon here.

lawyer who attempts to thread his way through the maze of apparently conflicting principles which surround the determination of the rights of the parties when the deed or will contains limitations of the nature here involved. The proper application of this technique shows that the Missouri courts have definitely adopted more or less complete power of disposition; that they are very liberal in interpreting ambiguous terminology so as to give the first taker a life estate rather than a fee simple; and that seeming conflict among the cases involving limitations of this type can be resolved upon this basis. ALFRED W. PETCHAFT, '33.