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## KING vs. ACKERMAN.

1. It is an established rule of the common law, that a devise of lands without words of limitation confers an estate for life only.
2. But because this rule generally defeated the intention of the testator, the Courts have been astute in finding exceptions to it.
3. Where land is devised without legal words of limitation, and a provision is added that the devisee may do therewith as he pleases, a fee is presumed to have been intended.
4. It is also well settled, that where a devisee whose estate is not defined, is directed to pay debts, legacies, or a sum in gross, he takes a fee.
5. This last rule though founded on inference is as technical and rigid in its application as that to which it is an exception; for Courts will not inquire into the relative value of the land and the charge, nor decide on the probability of the devisee being called on to pay the charge.
6. Where a testator gives one piece of land to his son with the privilege of doing therewith as he pleases, and makes another devise to the same son, without using those or any similar words, it does not follow that there was no actual intent to give a fee in the last mentioned land.
7. A Court may look beyond the face of the will, to explain an ambiguity as to the person or property to which it applies, but never for the purpose of enlarging or diminishing the estate devised.

This case came up on a writ of error to the Circuit Court for the Southern District of New York. It was an ejectment for certain lots now within the limits of the city, and formerly part of the estate of Lawrence Benson, deceased.

Lawrence Benson, at the time of his death, had two tracts of land, which he held in fee, one occupied by himself and one by George Williams. He had one son and two grand-daughters, the children of a deceased daughter. He died in 1822, having

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made the will copied in the opinion of the Court, by which he gave the Williams' place to his son Benjamin, "to do and dispose of as he may think proper;" and the Homestead, without words of limitation, charging the devisee with the payment of \$1,500, to his grand-children. The lots in controversy were part of the Homestead. The plaintiff, after the death of Benjamin Benson, claimed an interest therein, as one of the heirs-at-law of Lawrence Benson. The defendant asserted his right under conveyances made by Benjamin Benson in his lifetime. The question was, whether the will gave Benjamin a fee in the Homestead, or only a life estate.

On the trial before the Circuit Court, the plaintiff offered evidence, to show that the Williams' place, at the date of the will, and ever afterwards, was worth greatly more than the sum charged upon the devisee in favor of the testator's grand-children. This evidence was rejected, and Mr. Justice Nelson held that, by the legal and true construction of the will, Benjamin Benson took a fee in both places. Whereupon the plaintiff sued out this writ of error.

*Mr. Cutler*, of New York, and *Mr. Black*, of Pennsylvania, for the plaintiff in error, argued that the will, properly construed, according to the law of New York, as it stood in 1822, gave Benjamin Benson no more than a life estate in the Homestead place; that the fee simple remained undisposed of, and descended to the testator's heirs-at-law, of whom the plaintiff was one, and that she had a right, after the life estate terminated, by the death of Benjamin, to recover her share in it.

It is undeniable that a devise of real property, *to do and dispose of it as the devisee may think proper*, creates an estate in fee. It is equally clear that, by the common law, a devise of land without words which in any way denote the quantity of a donation of the estate, passes nothing but an estate for life. Benjamin, therefore, took a fee in the Williams' place, and by the words of the will, giving him the Homestead, he could have only a life estate in that

It is also admitted that where a testator gives land without

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words of limitation, as in this devise of the Homestead, and therefore, by the words of the devise, gives a life estate only such life estate will be enlarged to a fee if the same will imposes upon the devisee a personal charge with respect to the estate devised. This rule is founded on the *natural* presumption, that no testator would expose his devisee to the possible danger of becoming a loser by his bounty. The testator, in such a case, *must have meant* to give a fee; because, if it were a life estate, the devisee would, by accepting it, render himself personally liable for the sum charged on him, and he might die before the profits would be equal to the charge.

But there is no case in the books like this. Here were two devises, to the same person, of two different pieces of land, both of them greatly exceeding in value the amount of the personal charge upon the devisee. One is in fee, and the other for life. The devisee could take what was given by the words of the will; he could assume the charge, and he could not possibly be a loser, though he should die the next instant. To avoid the danger of a loss, it was not necessary to presume that a fee should be given in both places. The testator had provided against that danger by simply giving his son a fee in one of them.

But it is suggested that the farm in which a fee was given might possibly not be equal in value to the charge, and *if that be the case*, then a loss might possibly ensue to the devisee, by his death, before he could make the deficiency out of the life estate in the other. Surely the principle of no decided case, nor no logic that is sound, can justify this argument. Where a testator gives land without saying for what estate, the Courts must ascertain his actual intent as well as they can. From the naked devise the inference is, that he meant a life estate only; but if a personal charge in respect of it be imposed, you infer fairly and naturally that he meant a fee, because nothing less than a fee can make the devisee absolutely safe. You reason here, as in other cases, from a fact that is known to another fact which is not known. But if you infer the testator's intent from the supposed inadequacy of the fee simple, you reason to one unknown fact from another fact equally unknown. To justify a Court in

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saying that the testator meant to give a fee without saying so, it is necessary that the possibility of loss should be clearly and plainly established as an undisputed fact. It is not to be assumed and imagined, and then made the basis of presumption for another fact.

That the possibility of loss to the devisee is established here as a known fact, will hardly be contended; nor can we suppose that the Court will consider it even probable in the face of the plaintiff's rejected offer to prove the contrary.

The presumption that a testator meant a fee, because the devise is coupled with a charge, is not a presumption of law, but of fact; not legal and conclusive, but natural and open to be repelled by counter proof. It was, therefore, erroneous to reject the plaintiff's evidence.

But the plaintiff did not need the evidence. It was for the defendant to show that the Williams' place was worth less than the charge. The error of the Circuit Court consisted in assuming the possibility of loss to the devisee when that fact was not proved, and upon evidence which shewed it to be at least as probably false as true.

Again, it will be agreed that if the testator's intent to give no more than a life estate is apparent on the face of the will, it will not be enlarged to a fee by implication from a personal charge. In this case it is clear that he could have intended no more than a life estate. He gave one place with words of perpetuity and followed it with a gift of another omitting those words, and omitting all words of equivalent import. I give Benjamin the Homestead to dispose of as he thinks proper, and I give him the Williams' place. Is not this as clear as if he had said I give him the Homestead and the Williams' place, and as to the former he may do with that as he pleases? Is not the omission of the enlarging words in the latter devise as plain an indication of the testator's intention to make it a life estate as if he had expressed it in words?

*Mr. O'Conor*, of New York, for Defendant in Error.

This case does not differ in principle from other cases in which

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the Courts have held it to be settled law that a devise of an estate in land without words of perpetuity is enlarged to a fee by charging the person of the devisee with the payment of money. The fact that other property was given in fee by the same will to the same person may furnish the ground for an argument, but not for a sound distinction.

It was not the intention of the testator that Benjamin should take the property in question with the power of alienating it; but as it had come to him from his father, he meant that it should pass from his son to his heirs. The words connected with the other devise, "to do and dispose of," &c., were intended to give the power of alienation, not to increase the estate. To give was, in his mind, to give absolutely and forever, and "to do and dispose of as he might think proper," could add nothing to the duration of the estate bestowed in the Williams' place, and the absence of those words in the devise of the Homestead would not make the estate in that any less. The supposed necessity for the use of those words arose out of the testator's opinion that in the case of a family estate the right to alienate did not legally exist as an incident of ownership, but must be created by superadded words expressly giving the power.

It is not denied that where property is given in a will without words of limitation, the donee can by force of the words alone take nothing but an estate for life. The testator has not expressed the idea of giving him any more, and the Courts cannot see any method of giving him any less. Consequently it is a necessary implication that he should take for life.

This rule is too old and too well settled to be questioned or shaken. But there is another rule equally well established—as old as the days of Coke—which insures our safety. Where, on a gift of lands without limitation, there is a charge on the person of the devisee, which the devisee will incur as a binding personal obligation, if he accepts the devise, he becomes a purchaser. And as a purchaser under a will and not a deed, purchasing without words of limitation or qualification, he, by reasonable inference and construction buys the thing absolutely. As in all other like cases of purchase, the Courts will supply

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any words of limitation or any assurances that may be deemed necessary to make the title absolute and perfect.

Such being the principle upon which the rule is founded its application to this case is clear as to any other. What difference can be made in the right of the devisee to take the Homestead absolutely as a purchaser by the fact that another estate is expressly given him in full property? Having acquired them both for a consideration and having paid or bound himself to pay the price he is certainly not compelled to take one as a mere life tenant because the testator declared that he should have the other in fee. If the testator had been totally silent concerning the quantity of estate—had omitted to couple either devise with words of limitation, the law would have given both in fee. But the testator as to one devise *expresses the legal conclusion*. Does that destroy the devisee's right to have a legal conclusion drawn from the other?

This old rule which presumes that a testator meant to give land, only for life when he uses no words to express the quantity of the estate, defeats the actual intent in most cases. Experience has shown it to be mischievous. The justice and good sense of the world has abolished it. It has ceased to exist in England and in nearly (perhaps all) the States of this Union. The Courts were always more anxious to find exceptions to the rule than to enforce the rule itself. If, therefore, it be doubtful whether this case is within it or not, the Court will give the benefit of that doubt to the devisee.

It was proposed to show upon the trial that, at the time the decedent made his will, and at the time of his death, this Williams' lot was worth enough in the market to have paid the \$1,500.

The title to land should not be permitted to turn on questions of that character. If it should be thought proper to look at the question of value, you would perceive that the testator could not have had any knowledge what would be the value of the land, in which it is said a fee simple was unmistakably given, at the point of time when his son might be coerced to pay this sum of money; and consequently the value of that land, as a

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distinct subject from which to obtain the means of paying this legacy of \$1,500 could not have entered into his contemplation, consequently the gift of these two pieces of land, placed as it is in one section, must be taken as an entirety; and the sum specified in the second clause of the will must be regarded as a condition imposed upon the devisee in respect to the whole property mentioned in that section.

There is one view of the case in reference to the words of limitation which deserves attention concerning the Williams' lot, the devisee was to do and dispose of it as he might think proper. This certainly meant that he was to have it *free of all charges and incumbrances whatever*. If he was bound to raise \$1,500 out of it he would not have power to dispose of it, as he might think proper. On the contrary the residue only would be delivered over to his absolute disposition. The Homestead is not declared to be unfettered and the intent of the testator must therefore have been to impose the charge with respect to that alone. This seems a conclusive answer to that part of the argument on the other side which asserts that the charge was imposed only with respect to the Williams' place.

Mr. Justice GRIER. It has been an established rule, in the construction of wills, that a devise of lands, without words of limitation, confers on the devisee an estate for life only. This rule was founded rather on policy than on reason; for while it favored the heir-at-law, it generally defeated the intention of the testator. This is acknowledged by Lord Mansfield in *Love-acre vs. Blight*, (Cowper); and the interference of modern legislation, to abolish the rule and establish a contrary one, is evidence of the correctness of his remark. This change has been effected by statute in England and most if not all of the States of this Union.

The will now presented for our consideration was made before this obnoxious rule was repealed in New York, and we are compelled to examine its provisions fettered by this technical, artificial, and now nearly obsolete rule of construction. Courts have always been astute in searching for some equivalent

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popular phrase, or some provision of the will incompatible with such imputed intention, to rescue it from the effect of this rule. Thus, when a testator devises land without legal words of limitation, but adds that the devisee "may sell or do therewith as he pleases," he is presumed to have intended to give a fee, because such a power would be incompatible with a less estate. It is a long settled rule also, that where a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee. The reason on which this rule is founded is, that if the devisee took a less estate he might be damnified by the determination of his interest before reimbursement of his expenditure. This rule, though founded on inference or implication, is nevertheless as technical and rigid in its application as that to which it is an exception; for the Court will not inquire into the relative value of the land and the charge; or, if the charge be contingent, will not weigh probabilities as to whether the devisee will ever be called on to pay it. The intention of the testator as to the limitations of an estate devised can be judged and decided only from his own language as contained within the "four corners" of his will. Parol evidence cannot be received to show that such inference was not founded on probability, or that this rule of construction ought not to apply under certain circumstances. This would in effect be delivering the power and duty of construing the will to a jury.

The will of Lawrence Benson is very brief and is as follows:

*"In the first place,* I give and bequeath unto my son, Benjamin L. Benson, all that estate now occupied by George Williams, to do and dispose of as he may think proper.

I also give and bequeath unto my son, Benjamin L. Benson the Homestead where I now live, situated on Harlem River.

*Secondly.* My will and intention is, that my son, Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of \$1,500.

*Thirdly.* The income of these legacies, and also of my estate, real and personal, I give unto my loving wife, Maria Benson,

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during her widowhood, to do and dispose of as she may think proper."

It is plain that this instrument has been written by a person "*inops concilii*," and wholly ignorant of proper legal phraseology.

He uses the term "bequeath" instead of "*devise*" in the gift of his real estate.

By the first clause he gives his two pieces of real estate to his son Benjamin, who appears to be the chief object of his bounty.

By the second, he charges the sum of \$1,500 on Benjamin to be paid to the grandchildren of testator.

By the third, he gives to his wife a life estate on all of his estate, real and personal, to be forfeited if she marry again.

Now, we must observe,

1st. That the son has clearly but an estate in remainder in the lands devised to him.

2d. That it is a vested remainder.

3d. That this testator not only postpones the possession and enjoyment of the land devised to his son for an indefinite time, but charges him with the payment of a gross sum of money, which he will be personally liable to pay, for land which he may never personally possess or enjoy.

If the charge is sufficient in law to give the devisee an estate in fee by implication or presumption, how much stronger is this presumption when his enjoyment of it is indefinitely postponed.

But it is contended, that, because the testator has used the phrase "*to do and dispose of as he may think proper*," as regards the Williams' farm, and in the devise of the Homestead has omitted it, such omission as to the latter is equivalent to an express limitation of it to the life of the devisee; and that the Court ought to presume that the sum to be paid was intended as a consideration for the first only; and if they will not presume it for want of evidence of its sufficiency, that parol evidence ought to be admitted to show the value of the Williams' property to have been more than sufficient to pay the sum plainly charged on both.

Now there is no established rule of construction that if a

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testator having devised two messuages to his son and charged the devisee with the payment of legacies that if he add this informal power as to one, it is equivalent to an expressed limitation as to the other. Nor is it a necessary inference or logical conclusion, arising from the omission to use certain informal words, which have been construed to show an intention to give a fee as to one, that the testator did not intend to give a fee in the other of the messuages charged. Besides, it is clear that Benjamin could not repudiate his obligation to pay the legacies by refusing to accept the gift of the Williams' farm, while he retained that of the Homestead. To conclude, therefore, from this fact that the testator did not intend to give a fee in both, would be mere conjecture, and that, with no sufficient reason to support it.

The face of this will shows that the testator did not suppose these informal words, giving a power to sell as to one, were necessary to enlarge the estate to a fee, much less that their omission would limit the devise of the other to a life estate, for he adds the same power to the life estate given to his wife.

If we were to indulge in conjecture, why this phrase was coupled with one of the estates devised and not with the other, it would be, that the testator intended to confine the charge of the legacies to the "Homestead" and not the Williams' farm, or that he wished the one to remain in the family and name, while the son should be at full liberty to dispose of the other as he might think proper.

The rule of law which gives a fee, where the devisee is charged with a sum of money, is a technical dominant rule, and intended to defeat the effect of the former rule which itself so often defeated the intention of the testator.

Courts have always been *astute*, as we have said, to find reasons for rescuing a will from the artificial rule established in favor of the heir-at-law, and will not even be *acute* in searching for reasons to restore its force, where the statute has not abolished it. We are not compelled to make this inference or implication through submission to any established rule of construction; on the contrary, we are required to make an exception to one on

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mere conjecture, and to introduce parol testimony as to value to justify a departure from it. A Court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.

We are of opinion, therefore, that Benjamin L. Benson took an estate in fee in both the messuages described in the will.

The judgment of the Circuit Court is therefore affirmed with costs.

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CHICAGO CITY vs. ROBBINS.

1. A municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; if this duty be neglected, and in consequence thereof, any one is injured, the corporation will be liable for the damages sustained.
2. The corporation, has, however, a remedy over against a private party who has so used the streets as to produce the injury, unless the corporation concurred in the wrong.
3. A private party is concluded by a judgment recovered against a corporation for his act or negligence, if he knew that the suit was pending and could have defended it.
4. An express notice to such party to defend the suit, is not necessary to create his liability.
5. But in an action brought by a corporation, against such party, to recover back the damages it has been compelled to pay for his assumed neglect, it is competent for the defendant to show that he was under no obligation to keep the street in safe condition, and that it was not through his default that the accident happened.
6. In such case, if it appears that there was fault both on the part of the corporation and defendant, the former cannot recover