

which forbid a court to supply the latter, apply with equal force to the former. The tax, when assessed, is not a fund which can be dealt with by a court as an equitable asset or a chose in action subject to an implied trust. The levy and assessment is a step in a process of which the collection is another, and that proceeding is the only agency known to the law by which the desired result can be affected. The jurisdiction of this court is confined to compelling the state officers to perform their duty under the state laws, and no substitute can be invented.

The bill, consequently, must be dismissed.

BAXTER, C. J., dissents; and a division is certified to the supreme court of the United States.

NOTE. For Judge Baxter's views upon this question see *Garrett v. Memphis*, 5 FED. REP. 860, delivered upon entering the mandate of the supreme court in the case of *Meriwether v. Garrett*, 102 U. S. 472.—[REP.]

GILES v. LITTLE.

(Circuit Court, D. Nebraska. January, 1881.)

WILL—CONSTRUCTION—POWER TO CONVEY FEE.

A bequest, "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, *the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper*, so long as she shall remain my widow," gives to the legatee unlimited power to dispose of any or all of the property bequeathed, so long as she remains a widow.

On Demurrer to Petition.

J. M. Woolworth, for plaintiff.

Marquett, Deweese & Hall, for defendant.

MCCRARY, C. J. Was Edith J. Dawson empowered by the will of Jacob Dawson to convey the fee of the premises? The answer to this question depends upon the construction of the will.

In its determination very little assistance can be derived from the consideration of adjudicated cases, since testamentary conveyances, unlike most others, present an endless variety of form and expression, and each must be construed very largely by a consideration of its own language and circumstances.

We have found great difficulty in arriving at a satisfactory conclusion as to the true construction of the will now under consideration.

but, upon the best consideration we are able to give it, we hold that the widow was authorized to convey the fee, and that the judgment must therefore be for the defendant. We base this conclusion upon the following considerations:

1. This construction is, we think, the only one by which we can give effect to the very comprehensive terms in which the bequest is expressed, to-wit: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, *the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper*, so long as she shall remain my widow." The whole property was to be hers. The power of disposal was given by words well chosen to express the most unlimited control. The whole instrument must be construed together, and the words just quoted must have their ordinary meaning, except in so far as they are controlled by the other terms employed. The concluding words in the above quotation, "so long as she shall remain my widow," do not restrain or limit the *power* of disposal, but only the *time* of its exercise. The devisee had unlimited power to dispose of any or all the property bequeathed, provided she exercised it during her widowhood.

2. The condition can have full effect by giving the whole instrument the meaning above stated. The words are: "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike." If the language here employed had been such as to convey the idea that the estate bequeathed was to remain for the children it would have greatly strengthened the position of plaintiff. But, on the contrary, the language used clearly shows that the testator contemplated the possibility, at least, that the widow might, under her unlimited power of disposal during widowhood, sell and convey a part or all of the property, and hence in case of her marriage the children were to receive the estate bequeathed, "or whatever shall remain." It is only by conceding the power of disposal as to part that we can conceive of a remainder, and if she had power to dispose of a part she had power to dispose of all. Her control was precisely the same over every part of the estate.

3. The construction we have adopted is the only one that will give effect to every clause of the will. As we have seen, no other construction is consistent with the terms of the first clause of the will, which declares the property hers, with power to dispose of it as to her

shall seem meet and proper. To hold that she took only an estate for years, with power to dispose of no more, would be to nullify so much of the instrument as gave her the property "with power, right, and authority to dispose of the same as to her shall seem meet and proper." The construction contended for by plaintiff is also inconsistent with some of the language used in the condition, while that we have adopted will give effect to all the clauses. Unless we hold that the power of disposal was conferred upon the widow by the will, we can give no meaning or effect to that clause in the condition which gives to the children, in case of the marriage of the widow, the estate bequeathed "or whatever may remain." As already suggested, this implies that a part may be disposed of, and proceeds upon the theory that there was a power of disposal given by the will. It is insisted that the words "or whatever may remain" apply only to the personal estate; but an examination of the terms of the instrument will show that there is no room for this construction. It is "the estate herein bequeathed," whether real or personal, or both, "or whatever may remain;" that is, whatever may remain of the estate that is to go to the children. By recognizing the power of disposal we can give meaning to this clause, and in no other way can it have any meaning or effect.

4. The construction we adopt seems to us the most reasonable. The power to sell the widow's interest during her widowhood would have been so uncertain as to the extent of the interest to be conveyed as to be almost valueless. A title which could be ended the day after it was given by the marriage of the grantor would be too uncertain to be of any value. It is scarcely conceivable that the testator would have been so careful to employ the well-chosen words found in the will giving the widow such unlimited discretion as to the disposal of the estate, if he had intended only to empower her to convey an interest that might be at any moment defeated by her marriage.

5. The statute of Nebraska, according to which the will must be construed, provides as follows, (Gen. St. p. 300, § 124:) "Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

This statute clearly requires that construction of the will which favors the theory that the whole estate was transferred thereby.

The demurrer to the petition is sustained, and if plaintiff stands upon his petition there will be judgment for defendant.

TABORECK v. B. & M. R. R. CO. IN NEBRASKA.

(Circuit Court, D. Nebraska. January, 1881.)

1. LAND GRANT TO RAILROADS—CONSTRUCTION.

Land grants to railroads take effect from the time that the line of the railroad is definitely fixed or located, notwithstanding the lands may not be selected till a later date.

2. SAME.

The land-grant act of July 2, 1864, was a definite and explicit grant of all the land embraced within 10 alternate sections on each side of the line of the road, on the line of the road, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed; and the fact that congress did not prescribe any lateral limit in the selection of lands in lieu of those previously sold or disposed of by government, cannot affect the construction of the grant.

3. HOMESTEAD AND PRE-EMPTION RIGHTS.

The act of April 21, 1876, (19 St. 35,) passed for the protection of settlers on public lands, by pre-emption and homesteads, does not apply to a case where, prior to such pre-emption or homestead entry, the lands had been specially granted by act of congress, and had fully vested in the grantee.

Suit in Equity.

H. H. Blodgett, for complainant.

T. M. Marquett and *J. W. Deweese*, for respondent.

McCARY, C. J. The controlling question in this case is, did the grant to the Burlington & Missouri River Railroad Company attach to the land in controversy on the fifteenth day of June, 1865, the date at which the line of the railroad was definitely fixed under the provisions of the act of congress approved July 2, 1864, making a grant of land to said company? 13 St. p. 364, § 19. Complainant insists that the title did not pass to the company until the land was actually selected by the company and patented to it.

Section 19 of the act above named provides as follows:

“Sec. 19. And be it further enacted, that for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington & Missouri River Railroad Company every alternate section of public land (excepting mineral lands, as provided in the act) designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time that the line of said road is definitely fixed: provided, that said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the secretary of the interior, and shall