October Term 1869.

Baltimore. June 9. 1851. Saml. T. Donaldson.

Defendants' Exhibit Reverdy Commission R. Johnson No. 1

The question submitted to me upon the will of the late Mr. David Barnum, is, what estate in their respective shares in the City Hotel, devised to them, his children take? It is by no means far from doubt, and the opinion I am about to give is not the one which I at first entertained, but upon careful reflection, I believe it to be right.

There are three clauses in the will to be considered, the first, second and residuary. By the first, it is perfectly clear, the interest was an absolute one, and vested the entire estate in each share in each child. Each, therefore, could dispose of it, without other qualification or restraint as perfect owner, than the existence of the outstanding legal estate in trust in the trustees, and the only effect of that was to make their interest an equitable as contradistinguished from a legal one. By the residuary clause, under which everything undisposed of, in whole or in part, by either of the preceding clauses, passes, the estate of the children is the same that is to say, absolute.

The doubt then arises from the second clause. That provides that should the testator's object, as stated in the first, be disappointed, of having the hotel continued as such, for the benefit of his children, by a sale of it "judicially or otherwise" that then the proceeds of any such sale, so far as the children are concerned, shall be invested for their benefit, during life, and at their deaths, for their respective children. The question is, what effect has this upon the interest given by the first or residuary clause? Does it prevent either child from selling out his or her interest to any other child, or to a stranger, so as by such sale, to —

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narrow his or her interest from a fee simple to a life interest.

I think it does not. Each child could surrender or give away the right to the rents, or might agree to the hotel being occupied free of rent, without diminishing his or her estate in the hotel itself.

The object of the testator was, as long as he could do so, to have the property occupied as it had been, believing that such an use of it would be most advantageous, and he has done it by providing that if the hotel &c. should be sold, that is the whole property, so as to lead to its destruction as a hotel, that then, the entire proceeds of the entire property shall be invested and appropriated under the second clause.

A different construction would put it out of the power of the children to devise his or her interest, although, at the period of the death, that interest was clearly, as it certainly would be, a fee simple property. I have not time to give my reasons further, except to say that I have well considered those stated in the opinion of Mr Meyer of the 4th October, and concur in them. The result is that I think with him, that Mr. McSaughlin has a good title to the share he has purchased from his brother-in-law and Mrs Stannard.

Reverdy Johnson

For Mr. McSaughlin. 3d Oct. 1848.