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Future Interests

James A. Amdur

George Downing

James A. Young

answered, "Don't know." An order by the trial court of a new trial was held proper on appeal. The significance of the opinion lies in the requirement of a definite answer from the jury on a question of fact, thereby implying an understanding of the facts by the jury.

FUTURE INTERESTS

DETERMINABLE FEES

In *PCK Properties, Incorporated v. City of Cuyahoga Falls*[1] the heirs of a grantor sought a judgment declaring them to be the owners in fee simple of certain real property which the grantor had conveyed to the city of Cuyahoga Falls by a deed containing the following limitation:

> The above-described land is to be used by said city of Cuyahoga Falls, Ohio, for the purpose of creating and maintaining a public park to be known as and called Fields Park.[2]

This limitation appeared immediately following the habendum clause. It was incorporated by reference into the granting clause, which stated that the property was conveyed to the grantee "as long as used as hereinafter set forth," and was also referred to in the habendum clause, which stated that the grantee was "to have and to hold said premises, . . . subject, however, to . . . the conditions hereinafter contained."[3]

It was found by the trial court as a fact that the city maintained the land as a park, but did not name the park "Fields Park," and this finding was held by the court of appeals to be sustained by the evidence.

The court of appeals noted the difference between determinable fees and estates subject to a condition subsequent: that a determinable fee automatically terminates upon the occurrence of a specified event, while an estate in fee simple subject to a condition subsequent merely gives the grantor or his successor in interest the power to terminate the estate upon the happening of the event. The court also mentioned the typical language used to create a determinable fee — "so long as," "during," or "until," and states that the words "so long as" were used in the conveyance in the instant case.[4] However, the court then proceeded to reach the conclusion that the conveyance in question created neither a

1. 112 Ohio App. 492, 176 N.E.2d 441 (1960). See also discussion in *Real Property* section, p. 513, *infra.*

2. *Id.* at 493, 176 N.E.2d at 443.

3. *Ibid.*

4. Actually the clause said "as long as," rather than "so long as," but this should not make any difference.

determinable fee nor fee simple subject to a condition subsequent, but rather a fee simple absolute.

Prior to 1929, Ohio courts followed the general common-law rule and held that a conveyance of an estate in fee simple for "so long as" a specified use of the land continued, created a determinable fee which would terminate automatically upon the cessation of the specified use.[5] In 1929, however, in the famous *Copps Chapel* case,[6] the Ohio Supreme Court held that a conveyance to a church passed a fee simple absolute despite the inclusion of the words "so long as said lot is held and used for church purposes." The decision of the majority of the supreme court in the *Copps Chapel* case was severely criticized in a well-reasoned dissent by Chief Justice Marshall,[7] and subsequent lower court decisions have limited the scope of the decision.[8]

In the *Copps Chapel* case the "so long as" clause appeared only in the habendum clause of the deed, not in the granting clause, and in subsequent cases this has provided a method of distinction. Thus, in *Schurch v. Harraman,*[9] where a deed to the trustees of a church provided in both the granting and the habendum clauses that the conveyance was "as long as used for church purposes," the court, distinguishing *Copps Chapel,* held that a determinable fee was created. In *Burdette v. Jones*[10] where the granting clause contained the words "as long as the same shall be used for school purposes" and there was no habendum clause, the court also held that a determinable fee was created, saying that "when there is a limitation or condition in the granting clause itself which imports a forfeiture, no clause of re-entry or forfeiture is necessary because all of the estate is not conveyed in the granting clause."[11]

In the *Copps Chapel* case the court distinguished a prior case, *Sperry v. Pond,*[12] by the fact that the limitation in the *Sperry* case read " 'so long' as . . . [used for certain purposes] 'and no longer,' " while in *Copps Chapel* the words "and no longer" were absent. A court of appeals in *Board of Education v. Hollingsworth*[13] grasped upon this distinction and held that the magic words "and no longer" created a determinable fee, even though they appeared in the habendum clause only.

5. Sperry v. Pond, 5 Ohio 387 (1832); Phillips v. Bd. of Educ., 12 Ohio App. 456 (1920); 19 AM. JUR. *Estates* § 36 (1939).

6. *In re* Matter of Copps Chapel Methodist Episcopal Church, 120 Ohio St. 309, 166 N.E. 218 (1929).

7. *Id.* at 320, 166 N.E. at 221 (dissenting opinion).

8. Board of Educ. v. Hollingsworth, 56 Ohio App. 95, 10 N.E.2d 25 (1936); Schurch v. Harraman, 47 Ohio App. 383, 191 N.E. 907 (1933); Burdette v. Jones, 72 N.E.2d 152 Ohio C.P. 1947).

9. 47 Ohio App. 383, 191 N.E. 907 (1933).

10. 72 N.E.2d 152 (Ohio C.P. 1947).

11. *Id.* at 153.

12. 5 Ohio 389 (1832).

13. 56 Ohio App. 95, 10 N.E.2d 25 (1936).

Thus, ever since *Copps Chapel* was decided, Ohio courts have tended to seize upon technical distinctions to avoid the effects of that decision. However, in the *PCK Properties* case, the court has carried the reasoning of *Copps Chapel* even further than it was carried in that case itself. The court in the instant case ostensibly based its decision upon a syllabus of the supreme court in *Miller v. Village of Brookville*,[14] which reads as follows:

> When a conveyance of land owned in fee simple is made to and accepted by a municipality in perpetuity for use as a park, and there is no provision for forfeiture or reversion, the entire estate of the grantor is divested, and the title of the municipality thereto is not a determinable fee but a fee simple.[15]

However, in the *Miller* case, the deed did not contain a "so long as" clause, but merely stated that the land was to be used "in perpetuity for a park and pleasure ground purposes."[16] The *Miller* case is merely an example of the rule that a bare statement in a deed of the use or purpose for which the conveyance is made, unaccompanied by other words indicating an intention to qualify the estate, will not prevent the passing of a fee simple absolute.[17] But the case is not authority for the proposition that words which do indicate an intention to qualify the estate, such as a "so long as" provision appearing in the granting clause, may be ignored.

In the instant case, the court cited the *Copps Chapel* case, which is distinguishable, if on no other grounds, by the fact that the limitation in *PCK Properties* appeared in the granting clause, as in the *Schurch*[18] and *Burdette*[19] decisions. The only other case cited by the court is *Village of Ashland v. Greiner*,[20] which is also inapplicable as an authority, since in that case the habendum clause merely stated that the grantees "shall not at any time use or occupy the aforesaid premises for any other purpose or purposes than [specified]."[21] There were no words of reversion or forfeiture and no "so long as" clause.

Although one might suppose that the court in the instant case was influenced by the fact that the land conveyed was actually used as a park, and by the fact that the only breach consisted of the failure to name the park "Fields Park," the court stated that ". . . the failure . . . even to create a park on the premises at all, does not automatically terminate the estate

14. 152 Ohio St. 217, 89 N.E.2d 85 (1949).
15. *Ibid.*
16. *Id.* at 219, 89 N.E.2d at 86.
17. 20 OHIO JUR. 2d *Estates* § (1956).
18. Schurch v. Harraman, 47 Ohio App. 383, 191 N.E. 907 (1933).
19. Burdette v. Jones, 72 N.E.2d 152 (Ohio C.P. 1947).
20. 58 Ohio St. 67, 50 N.E. 99 (1898).
21. *Id.* at 68, 50 N.E. at 100.

upon such occurrence, nor would it justify a re-entry . . . ."[22] The reason for the court's departure from prior decisions appears rather to be an example of the "common judicial aversion toward the termination of estates or their forfeiture upon the exercise of rights of re-entry, where the . . . [grantee] is a public entity such as a state, county or municipal corporation."[23]

While the court's objective may be commendable, this clearly appears to be judicial legislation. If the public interest demands that no conveyance of an estate to a public entity be determinable or subject to a condition subsequent, the legislature should act accordingly. The desired end should not be obtained by a disregard by the courts of the established rules of conveyancing, for by this method only confusion can result.

Alienability of Rights of Re-entry and Possibilities of Reverter

In *PCK Properties, Incorporated v. City of Cuyahoga Falls*[24] the court also in dictum stated that section 2131.04 of the Ohio Revised Code[25] makes rights of re-entry and possibilities of reverter alienable.

Prior to the enactment of this statute in 1932, the Ohio cases followed the common-law rule that rights of re-entry and possibilities of reverter were not estates and, hence, were not alienable or assignable.[26] It was further stated that an attempt to convey a right of re-entry extinguished the right in the grantor and left the grantee with the unconditional fee.[27] Although clearly dictum, the statement in the *PCK Properties* case is apparently the first indication in a reported case that the statute changed the common-law rule, and that the term "other expectant estates" in the statute includes rights of re-entry and possibilities of reverter. Courts in jurisdictions having similar statutes have generally tended to construe such statutes as including these two interests.[28]

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22. PCK Properties, Inc. v. City of Cuyahoga Falls, 112 Ohio App. 492, 497, 176 N.E.2d 441, 445 (1960).

23. *Id.* at 495, 176 N.E.2d at 444.

24. 112 Ohio App. 492, 176 N.E.2d 441 (1960).

25. The statute reads as follows:
"Remainders, whether vested or contingent, executory interests, and other expectant estates are descendible, devisable and alienable in the same manner as estates in possession."

26. Babb v. City of Cincinnati, 4 Ohio Dec. 464 (C.P. 1893), *aff'd*, 55 Ohio St. 637, 48 N.E. 1110 (1896); Walker Branch v. Wesleyan Cemetery Ass'n, 11 Ohio C.C. R. 185, 5 Ohio C.C. Dec. 326 (1896); *In re* Vine Street Cong. Church, 20 Ohio Dec. 573 (C.P. 1910); 33 AM. JUR. *Life Estates, Remainders, and Reversions* §§ 206, 209, 210 (1941).

27. *In re* Vine Street Cong. Church, 20 Ohio Dec. 573 (C.P. 1896); 33 AM. JUR. *Life Estates, Remainders, and Reversions* §§ 206, 209 (1941).

28. See Annot., 53 A.L.R.2d 224 (1957).

"ISSUE" WITHIN PURVIEW OF ANTI-LAPSE STATUTE

In *Third National Bank and Trust Company v. Clendening*[29] an Ohio court was called upon, apparently for the first time, to decide whether or not the word "issue," as used in the anti-lapse statute, was limited to "children." This statute provides that:

> When a devise of real or personal estate is made to a relative of a testator and such relative was dead at the time the will was made, or dies thereafter, leaving *issue* surviving the testator, such issue shall take the estate devised as the devisee would have done if he had survived the testator . . . . (Emphasis added.)[30]

In this case testatrix left all of her property to her sister, who predeceased testatrix. The sister's only son predeceased her, leaving one son, the defendant herein. The court held that the word "issue" as used in this statute was not limited to "children" and, therefore, the grandson of the sister of testatrix was an issue of a relative within the purview of the anti-lapse statute. This result is consistent with other Ohio decisions which have liberally defined the word "issue."[31]

RULE AGAINST PERPETUITIES

The interesting case of *Gwinner v. Schoeny*,[32] decided by the Court of Appeals for Hamilton County in 1960, dealt with the application of Ohio's rule against perpetuities to the terms of an unusual testamentary trust. Here the testator had left the residue of his estate in trust, with directions to the trustee to distribute the income and corpus as an annuity in the following manner:

> Out of the income and/or principal of said trust there shall be paid the sum of two hundred ($200) dollars each month to my son, John Robert Schoeny, during his lifetime and after his death the said payments of $200 each month shall continue to be paid to his issue, per stirpes.

Identical provisions were made, by separate paragraph, for each of the testator's five sons. Following these provisions there appeared a final clause which stated that "the payments out of said trust fund shall begin as of the first day of the month following my death and shall continue until said trust fund is depleted."

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29. 175 N.E.2d 239 (Ohio P. Ct. 1960).

30. OHIO REV. CODE § 2107.52.

31. See Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946), "issue" in anti-lapse statute included adopted child; Cochrel v. Robinson, 113 Ohio St. 526, 149 N.E. 871 (1925), designated heir was "issue" within meaning of "half and half" statute; Watson v. Watson, 34 Ohio App. 311, 171 N.E. 257 (1929), "issue" included children, grandchildren, and all degrees of descendants when used in will.

32. 111 Ohio App. 177, 171 N.E.2d 728 (1960). A motion to certify was overruled June 8, 1960.

These trusts were attacked by the five sons on the ground that the controlled distribution of the trust fund to the respective "issue" of the sons was violative of the rule against perpetuities. While it was admitted that the gifts to earlier generations of issue might vest within the required period, it was argued that the use of the word "issue" indicated that the general scheme of the trust was to benefit successive and remote generations of the testator's descendants. Accordingly, the rule was invoked that where the general scheme and dominant purpose of a trust is to give the testator control over the trust fund for a period beyond that allowed by the rule against perpetuities, the entire trust must fail, the invalid provisions "dragging down" with them the provisions which might otherwise have been valid.[33]

In defense of the trust the trustee argued that the language of the provisions did not warrant a finding that the dominant purpose of the testator was to tie up the trust property for an excessive period, and that the intent to benefit his sons and grandchildren was sufficient to sustain those life interests despite the invalidity of the more remote gifts.

The arguments having been advanced in this manner the court was left to decide the case on the basis of its own opinion as to the testator's intentions. Disagreeing with the probate court, which had ruled that the entire trust must fail, the court of appeals found that the testator would have intended the valid portions of the trust to stand should other portions of the trust be held invalid. In reaching this result, the court observed that

> . . . it seems natural for a parent to have a greater regard for his own children than for remote descendants, who exist only in contemplation — or even his grandchildren, with whom he may, or may not, be acquainted.[34]

On the basis of this opinion as to the testator's intention, the court sustained the trusts so far as they applied to the life interests of the sons and to the interests of the grandchildren and great-grandchildren of the testator who were living at his death.

There is little reason for finding fault with this finding in regard to the testator's intention. Although it would seem apparent that the general scheme of the trust (or trusts)[35] was to control the distribution of

33. See 41 AM. JUR. *Perpetuities and Restraints on Alienation* § 61 (1942).

34. Gwinner v. Schoeny, 111 Ohio App. 177, 183, 171 N.E.2d 728, 732 (1960).

35. In considering the nature of the trust provisions of this case, the court said: "[E]ach son and his issue was made a separate and distinct gift. No stirpes or branch can ever receive more than one-fifth of the trust estate. It is true that identical language was used and the bequests were payable out of the same trust, the legal title to which was in the same trustee, but the gifts to the sons were in no sense a gift to a class. They must be considered distinct from one another in applying the rule against perpetuities. The trustee is required to set aside for each son and his issue one-fifth of the residue, and, at least on the record of its administration of these trusts, treat them as separate and distinct trusts . . . ." *Id.* at 183, 171 N.E.2d at 731-32.

the fund for a period beyond that allowed by the rule against perpetuities, the court's finding to the contrary permitted it to avoid the harsh effect of the "dominant purpose" rule. This rule has in recent years been viewed with growing disfavor by a number of courts and writers.[36] It is now agreed that whatever the "dominant purpose" of the testator, it is reasonable to sustain the valid portions of a trust unless that part which has been held invalid so affects the valid portions that their administration becomes impracticable or impossible.[37] In the usual case this approach leads to a fairer result, since the "dominant purpose" rule, while supposedly based on what the testator would have wanted, is often applied with little real regard to the testator's wishes. More often than not, it simply provides a convenient means for invalidating the entire trust.

Serious objection may, however, be taken to the assumption made by the court that the interests of the grandchildren and great-grandchildren of the testator who were living at his death could not be affected by the rule against perpetuities because of their "vested" classification. While it is true that these interests were vested (subject to partial divestment), it does not follow that they were therefore immune from the operation of the rule against perpetuities. By the trust limitation in this case, annuity payments of $200 per month were to be paid for an indeterminate future period to the "issue, per stirpes" of each of the testator's five sons. No time for the distribution of the *entire* corpus of each of the five separate trusts was set out in the trust agreement. The maximum or minimum membership of the classes described in the trust could not, therefore, have been determined at any given point in time. Since the annuity payments were to continue until the corpus had been depleted, the class of "issue, per stirpes" could continue to fluctuate for a period far exceeding that allowed by the rule against perpetuities. As to each separate payment of $200, the "issue" who would be entitled to that payment could not be specifically determined until the time for payment had arrived.

When the trusts are considered in this light, it is submitted that the court should have been guided by the following rule laid down by the *Restatement of Property:*

> [A] limitation in favor of a class is invalid because of the rule against perpetuities, when, under the language and circumstances of such limitation, membership in the class can continue to increase for longer than the . . .. [period of lives in being and twenty-one years].[38]

The rationale of this rule, as given in the *Restatement,* points out the error of the present court's assumption that the "vested" interests of the

36. See, *e.g.,* Payne, *The Rule Against Perpetuities and Its Application to a Private Trust.* 1 CLEV.-MAR. L. REV. 59, 66 (1952).

37. See SIMES & SMITH, FUTURE INTERESTS § 1262 (2d ed. (1956).

38. RESTATEMENT, PROPERTY § 383(1) (1944).

grandchildren and great-grandchildren could not be affected by the rule against perpetuities:

> [A] limitation in favor of a class violates the rule against perpetuities and is completely ineffective as to all class members when the maximum number in the class may continue uncertain for longer than the . . . [perpetuities period]. Such a limitation suspends the power of alienation. The ascertained members of the class do not constitute its intended full membership. Furthermore the size of the shares of the ascertained members remains unfixed. For these two reasons those in existence cannot, by joining, transfer complete ownership of the subject matter of the conveyance. Thus such a limitation would inconveniently fetter property if sustained. The interests of the class members, whether subject to a condition precedent *or vested,* are separately and collectively invalid. *As to the vested interests this is a direct consequence of the basic policy of the rule against perpetuities.* (Emphasis added.)[39]

It is evident that the application of this rule and rationale to the present case would have resulted in the total invalidation of each of the five separate trusts in favor of the respective "issue, per stirpes" of the testator's sons. The question which then remains is whether there is some other method by which the court could have partially sustained the trusts to the issue without violating the rule which has just been stated.

It is believed that a method would have been available in this case to sustain in part the five separate trusts. This method would stake reliance on rulings which have been laid down in cases involving a series of separate gifts of income.[40] These cases have arisen where a testator has provided that regular installments of income are to be paid over to such persons as his "lineal descendants" or his "issue, per stirpes," for a period exceeding the permissible perpetuities period. In determining the validity of such gifts, the courts have been faced with the same problem as was present in the case under discussion, that is, whether a gift to a class which may fluctuate in size for longer than the allowable period may be permitted to stand for a shorter period than that envisioned by the testator. A number of courts, taking the approach of such writers as Professor Gray, have attempted to sustain at least in part such trusts for the payment of income by finding that the testator had "intended" to make each installment a separate and distinct gift. Using this theory the courts have concluded that the separate installments of income can be permitted for a period of lives in being and twenty-one years following the testator's death.[41]

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39. *Id.* § 371, Comment a.

40. Cases of this description are discussed in SIMES & SMITH, FUTURE INTERESTS § 1261 (2d ed. 1961).

41. See, *e.g.,* Woodruff Oil & Fertilizer Co. v. Estate of Yarborough, 144 S.C. 18, 142 S.E. 50 (1928).