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Future Interests

Robert N. Cook

FUTURE INTERESTS

Of the cases involving future interest problems, only *Cleveland Trust Co. v. Frost*[1] was decided by the Ohio Supreme Court. In this case, four of the judges implied a gift to testatrix' heirs determined as of the death of testatrix' son. The son was the life beneficiary of a testamentary trust and also testatrix' sole heir and sole residuary beneficiary. Although the will was fairly carefully drafted, the draftsman failed to provide for the disposition of the corpus of the trust upon the death of the son without issue and after testatrix' death. A majority of the court implied, from the will as a whole, a gift upon the death of the son after testatrix' death and "without children" to "those of testatrix' heirs at law who were then alive."

Courts may imply a gift from the general language of a will.[2] In the *Frost* case, the testarix expressly provided that if her son predeceased her, leaving no issue, then the income was to be paid to testatrix' named brothers and sisters, the corpus ultimately to vest in the issue of these named brothers and sisters. Consequently, it would seem more logical for the court to have implied an identical gift when testatrix' son survived her but died without issue. The gift of the trust corpus implied by a majority of the court to testatrix' heirs who were alive at the son's death is hard to justify from the general language of the will.

The position of the dissenting judges that any interest of the textatrix not disposed of must pass either under the residuary clause or as intestate property to testatrix' son is partially true. However, if there is an implied gift in case the son survived the testatrix and died without issue, this gift would defeat any interest passing to the son under the residuary clause or as intestate property.

The court of appeals in *Cleveland Trust Co. v. McQuade*[3] reversed the probate court on the issue of the application of the rule against perpetuities to future interests created by the will of the donee of a general testamentary power. The probate court had held that the period of the rule should be computed from the death of the donee and not from the creation of the power.[4]

There is considerable similarity between the writer's comments in the 1956 Survey of Ohio Law[5] on the decision of the probate court and the

[1] 166 Ohio St. 329, 142 N.E.2d 507 (1957).

[2] 2 PAGE, WILLS § 930 (3d ed. 1941).

[3] 76 Ohio L. Abs. 324, 142 N.E.2d 249 (Ct. App. 1957).

[4] Cleveland Trust Co. v. McQuade, 72 Ohio L. Abs. 120, 133 N.E.2d 664 (Prob. 1955).

[5] 8 WEST. RES. L. REV. 325 (1957).

opinion of the court of appeals though each was written independently of the other.

The donee's will in the *McQuade* case was written on the assumption that the period of the rule against perpetuities would be computed from the donee's death and not from the creation of the power. Consequently, litigation was almost inevitable because the Ohio Supreme Court has not yet determined this point.

The court of appeals held invalid the donee's attempt to create a general testamentary power in several persons who were not alive at the creation of the power. These powers might have been exercised beyond the period of the rule and were therefore void.[6] All the gifts which vested at the donee's death were upheld because clearly within the period of the rule against perpetuities and also because not so closely related to the void future interests as to fall with them.[7] Among the present gifts upheld were two annuities which provided for the payment of $200 each Christmas to named persons who were not alive at the creation of the power but who, of course, were alive at the donee's death. It was immaterial that these annuities were to terminate upon the vesting of other gifts to the same beneficiaries and that these other gifts were void because they violated the rule against perpetuities. The annuities thus became indefeasible life interests.

The most troublesome provision in the *McQuade* case may be stated as follows for purpose of analysis:

> the donee of a general testamentary power appointed by his will the net income of a trust to B and C for their joint lives, at the death of B or C to the survivor for his life, at the death of the survivor of B and C to D or her legal representative until E reaches the age of 21 years or dies, whichever occurs first; when E reaches the age of 21 then to E for his life, if E dies before or after reaching the age of 21 years, then to D until F reaches 21 years or dies, when F reaches 21 years then to F for her life, when F dies then per stirpes to the lineal descendants of E living at the time of each distribution of income, if none, per stirpes to donee's lineal descendants.
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> B and C were the parents of D. D was the mother of E and F. Only B and C were alive at the creation of the general testamentary power.

The court of appeals correctly stated that in a series of simple life

[6] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1273 (2d ed. 1956); RESTATEMENT, PROPERTY, § 390 (1944).

[7] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS §§ 1262, 1263 (2d ed. 1956); RESTATEMENT, PROPERTY § 402 (1944).

estates each remainder is vested subject to being completely divested if the remainderman fails to survive to the time he is entitled to possession.[8] But, it did not clearly explain why in the testamentary gift outlined above each beneficiary received only a life estate. Therefore, a more complete explanation at this time may be useful.

The gift to B and C creates present life estates as tenants in common with cross remainders so that on the death of either B or C the survivor is entitled to all the income. The cross remainders being only for life and to living persons are vested.[9] These cross remainders to B and C are followed by the vested remainder to D or her personal representative for the life of E or until E reaches the age of 21 years. Thus, D received an estate for the life of E with a special limitation. The phrase "or her personal representative" is one of purchase and not of limitation having been used to provide for the disposition of the income if D predeceased E before E became 21 years of age.[10]

Having determined that D has a determinable life estate for the life of E, then E had a vested remainder for his life because his estate follows D's and does not cut it off as an executory interest would.[11] The next estate is to D for the life of F or until F becomes twenty-one years of age. Here, the draftsman probably inadvertently omitted the phrase "or her legal representative" because it is possible that D and E might both die before F became twenty-one years of age.

The final alternate remainders to the lineal descendants of E or to the lineal descendants of the donee are both contingent because to persons who will be living at a future time. Both contingent remainders violate the rule against perpetuities when the period is measured from the creation of the general testamentary power.

The devise before the court of appeals in *Gould v. Porter*[12] was a life estate to the testator's widow with a general power to consume the corpus as the life tenant may deem best, followed by a vested remainder of the unconsumed portion to named persons. The court of appeals in accordance with early decisions of the Ohio Supreme Court[13] construed the power of sale as one for support only and not a general power.

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[8] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 113 (2d ed. 1956); RESTATEMENT, PROPERTY § 157, comment f, Special Note (1936).

[9] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 843 (2d ed. 1956).

[10] 1 AMERICAN LAW OF PROPERTY § 2.26 (1952); RESTATEMENT, PROPERTY § 151 (1936).

[11] 1 AMERICAN LAW OF PROPERTY § 4.25 (1952).

[12] 103 Ohio App. 156, 144 N.E.2d 555 (1956).

[13] Baxter v. Bowyer, 19 Ohio St. 490 (1869); Johnson v. Johnson, 51 Ohio St. 446, 38 N.E. 61 (1894).

Consequently, an inter vivos conveyance of the real property by the life tenant as a gift to her son was void because not within the power.

Section 2105.21 of the Ohio Revised Code not only states the presumption as to the order of death when there is no evidence as to the time of death of two or more persons, but also provides that "when the surviving spouse or other heir at law, legatee or devisee dies within thirty days after the death of the decedent, the estate of such first decedent shall pass and descend as though he had survived such surviving spouse, or other heir at law, legatee or devisee. . . ." However, the statute specifically provides that it "shall not apply in the case of wills wherein provision has been made for distribution of property different from the provisions of this section."

There is some uncertainty as to what specific provisions of a will make Section 2105.21 inapplicable. In *Weir v. Weir*,[14] the testator had provided for the disposition of his property in case his wife predeceased him or both died "as a result of a common accident." Testator's wife survived him but died testate two days after testator's death. The court of appeals applied Section 2105.21 because testator failed to provide for the death of his wife within thirty days after testator's death. This decision is consistent with testator's probable intent. The statute thus provides for a situation which was probably inadvertently overlooked in drafting the will.

In the construction of inter vivos trusts, the common pleas court in *Provident Savings Bank and Trust Company v. Pettengill*[15] construed the word "issue" as including children adopted after the creation of two of the trusts but before the creation of the third trust. The first two trusts in the *Pettengill* case were created in February, 1928.

In December, 1928, one of settlor's daughters adopted a child. There is evidence that prior to December, 1928, the daughter discussed with her father, the settlor, the adoption of a child and that the settlor believed it would be the wise thing to do. However, the opinion does not state whether this conversation occurred before or immediately after the creation of the first two trusts in February, 1928. Settlor's daughter adopted a second child in 1930 and settlor executed a third trust in 1934. All three trusts had identical provisions. The income from the trust corpus in each trust was payable to the settlor during his life, at his death to settlor's children, at the death of any child that child's portion of the income to be paid to her issue. The settlor and the daughter died. The daughter was survived by two natural children who were apparently born after 1934 and by the two adopted children. The common pleas court

[14] 102 Ohio App. 231, 139 N.E.2d 361 (1957).

[15] 143 N.E.2d 884 (Ohio C.P. 1957).

considered the fact that the settlor approved the adoption of the children by his daughter, including testimony of the person who had been the family nurse from 1925 to 1951. This person testified not only that settlor considered the adopted children as though they were the natural children of his daughter but also that she heard him say: "Never refer to my grandchildren as adopted."

Prior to the Amendment in 1932 of Section 10512-19 of the Ohio General Code (Section 3107.13 of the Ohio Revised Code), the primary construction of the word "issue" was that it applied only to natural descendants. However, from the circumstances surrrounding the settlor at the execution of a trust or will, the court might find that the settlor or testator intended to include adopted persons.[16] It is not entirely clear what the settlor meant when he used the word "issue" in the two trusts created in 1928. But it is clear from the fact that prior to 1934 his daughter had adopted two children, and from settlor's general attitude toward these adopted children, that the settlor must have used the word "issue" as including the adopted children in the 1934 trust. Under all the circumstances, the common pleas court properly allowed the adopted children to take under all three trusts.

Monroe v. Leckey[17] was an action of ejectment by one of testator's great-granddaughters. The action was based on the theory that plaintiff's great-grandfather died partially intestate in 1904. Consequently, the problem in this case dates from sometime prior to 1904 when testator probably either drafted his own will or had it drafted by some layman. The pertinent portions of testator's will read as follows:

> Item 3d I give and bequeath to my wife Mary E. Dilbone in lieu of dower all the balance of land, until my daughter Effie M arrives to the age of twenty one years also all my household good-
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> Item 4 When my daughter Effie M arrive at the age of twenty one years I give and bequeath to her the Seventy acres known as the Croy farm
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> Item 5 After the death of my wife Mary E. Dilbone I desire that the balance of land being about one hundred and twenty one acres be divided between my Son and daughter or the heirs of their bodeys Share and Share and Share alike according to value Bilding not to be included in valuation Should either of them die without children their Interest to revet back to one living or the heirs of their Bodies So that the land Shall remain in the family. . . .[18]

Testaor was survived by his widow, a son, a daughter, and a grandson. The grandson was the child of a deceased daughter. The plaintiff in the ejectment action is the daughter of this grandson.

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[16] Reinhard v. Reinhard, 23 Ohio L. Abs. 306 (Ct. App. 1936).

[17] 142 N.E.2d 314 (Ohio C.P. 1956), *aff'd*, 75 Ohio L. Abs. 570, 143 N.E.2d 168 (Ct. App. 1956).

[18] 142 N.E.2d 314, 321 (Ohio C.P. 1956).

Testator's daughter died unmarried in 1911 over the age of 21 years; his widow died in 1922. Testator's son, after the death of his mother, recorded in one of the deed books of Miami County an affidavit that since the death of his mother he owned a certain tract of land in fee simple absolute. After the recording of this affidavit, testator's son conveyed the land by deed to third persons. Testator's son died in 1950 survived by his widow but without issue. The common pleas court and the parties assumed that testator's widow received a life estate by implication. Plaintiff, testator's great-granddaughter, contended that testator's will created only statutory fee tails in testator's son and daughter, leaving a reversion to descend as intestate property. Since the son and daughter both died without issue, plaintiff claimed that as owner by inheritance of an undivided portion of this reversion she was entitled to possession.

The common pleas court reached the proper decision, though some of its terminology is not that of the Restatement of Property nor of the leading texts on real property. It held that testator's widow received a life estate, and that the remainder vested in his son and daughter; the undivided interest of each was subject to be divested and to vest in the other should either of them die without issue before the life tenant, but survived by the other. The court refused to construe "or" as "and" in the phrase "be Divided between my Son and daughter or the heirs of their bodeys." It also construed the phrase "should either of them die without children" as "die without issue."[19] Since the phrase "die without issue" under Ohio decisions[20] means definite failure of issue, this fact also prevented a construction in favor of the statutory fee tail.

The writer believes that a few comments on the language of the opinion of the common pleas court may be useful. The court found that "the son and daughter each took a fee simple title — a base fee simple title with an executory devise in the event either died without children." Since technically a "base fee" arose when a donee in tail levied a fine, thereby barring the donee's issue but not the donor or his heirs,[21] more acceptable terms to describe the interest of the son and daughter would be a fee simple subject to an executory limitation, fee simple subject to an executory devise, defeasible fee simple, or vested remainder subject to being divested.

Carelessness in terminology may sometimes cause incomplete analysis. When the court refused to construe the word "or" as "and" in the devise of the remainder to testator's "Son and daughter or the heirs of their

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[19] It is interesting to note that in the majority opinion in Cleveland Trust Co. v. Frost, 166 Ohio St. 329, 142 N.E.2d 507 (1957), the phrase "die without children" was used by the court to mean "die without issue."

[20] Parish's Heirs v. Ferris, 6 Ohio St. 563 (1856).

[21] RESTATEMENT, PROPERTY c. 4, Introductory Note, Special Note (1936).

bodeys," it made the phrase "heirs of their bodeys" one of purchase and not of limitation. Therefore, upon the death of the daughter survived by testator's widow and son, the son as remainderman did not, as the common pleas court stated, receive a fee simple absolute. Had the son predeceased his mother leaving issue, the issue would have taken as purchasers, and under one view, these issue would not have had to survive the life tenant to take.[22] This misleading statement fortunately was not necessary to support the decision of the court because the son survived the life tenant and therefore received the fee simple absolute at the life tenant's death.

It is unfortunate that in *Monroe v. Leckey* neither the court of appeals nor the common pleas court, in their opinions, focused their attention on the question whether the remainders to the son and daughter were subject to a condition precedent or to a condition subsequent. They treated the remainders as vested because the law favors early vesting. In the case before these courts, it is not material whether survival by the remainderman is a condition precedent or whether death during the life of the life tenant survived either by issue or by the other remaindermen is a condition subsequent. But the language in this case, that the remainders were vested subject to being divested, may be a controlling or confusing factor in a later decision by the same courts or by other Ohio courts. It is interesting and somewhat confusing to read in *Kiester v. Kiester*[23] that a devise of a remainder to testator's son "or in the event of his previous death, to the issue of his body, or in the event he shall die without such issue then to testator's brothers and sister or their legal representatives," clearly required the son to survive the life tenant to take. In a subsequent paragraph, the court, in the *Kiester* case, makes this qualifying statement: "It might be stated that the son of testator had a remainder subject to a condition precedent, or that he had a vested defeasible estate."[24]

Kiester v. Kiester is an interesting case because it involves the construction of a will and codicil which, though apparently carefully drafted, fail to set forth in clear language the testator's specific intentions. Although the testamentary gifts included personalty, this fact will be ignored because it is unimportant in connection with an analysis of the court's opinion.

Testator in his will devised to his widow an undivided one-half inter-

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[22] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 581 (2d ed. 1956); RESTATEMENT, PROPERTY § 252, comment f (1940); Kiester v. Kiester, 144 N.E.2d 336 (Ohio C.P. 1957).

[23] 144 N.E.2d 336 (Ohio C.P. 1957).

[24] *Id.*, at 347.

est in all his realty so long as she remained his widow with power to use the principal "of the estates so devised" if necessary "for her keep and maintenance." Testator devised to his son the other undivided half interest in his realty. As in the devise to T's widow, there is no express gift of a life estate to T's son. But, upon the remarriage or death of T's widow, then the entire realty was to go to T's son. If, however, the son should predecease T's widow, leaving no issue, then upon the remarriage or death of T's widow, two-thirds of the realty was to go to T's brothers and sisters and one-third to the sisters of T's widow. After the son's death and prior to the remarriage or death of T's widow, the widow was to enjoy the proceeds of one-half of the estate given to the son.

By codicil, testator gave his widow an express life estate in the residence thereby increasing her interest in the residence from an undivided half to the whole for her life. He also provided in the codicil as set forth above by the writer in connection with *Monroe v. Leckey,* that at his widow's death "said tract . . . shall pass to my son . . . or in the event of his previous death, to the issue of his body, or in the event he shall die without issue then to my brother and sister. . . ."[25]

At testator's death, he was survived by his widow and his son. Testator's estate included five parcels of realty in Ohio and one in Canada. The son died in 1919 survived by a son and daughter. T's widow is alive. T's grandson brought the action in the common pleas court to have the will construed.

The common pleas court properly held that T's widow received a determinable life estate, which the court called a "conventional or base life estate," in the residence. As previously stated by the writer, the adjective "base" is improperly used for the more appropriate adjective "determinable."[26] The common pleas court also held that as to the residence, T's widow had no power of sale for her support. However, as to an undivided half-interest in realty other than the residence, T's widow did have a power of sale for her support so long as she did not remarry. The writer has some reservations as to the marketability of an undivided interest in realty, and therefore as to the wisdom of creating a power to sell for support any interest less than the entire fee simple absolute.

The common pleas court construed the will as giving T's widow an "executory determinable life estate" in the undivided half-interest devised to the son. Since this future interest is a remainder, and a vested one, it is somewhat confusing for the court to describe it as "executory."[27]

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[25] *Id.,* at 341.

[26] See note 21 *supra.*

[27] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 191 (2d ed. 1956).