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Future Interests

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of the act, but apparently neither the judge nor counsel for either side knew of its application. There was a thorough examination of the panel, but not under oath. No request was made to swear them, no objection was made for failure to do so, and none was made as to the manner of the selection of the jury. On appeal, however, it was assigned as error.

The Court of Appeals for Montgomery County held that if it were to sustain the assignment of error, "it must be solely upon the letter of the statute."²⁴ It refused to do so, "in view of the fact that it is clear that no prejudice resulted to appellant by the procedure followed in the selection of the jury."²⁵

Another error of a technical nature occurred in the same case. After deliberation, the jury indicated that it had reached a verdict. The jury was brought into court and the clerk read the verdict, which the judge accepted. He thanked the jury and excused them, only to discover half an hour later that only eight jurors had signed the verdict. They were reconvened and it was discovered that one other juror concurred in the verdict, but had failed to sign it. The judge instructed this one to sign, which he did, whereupon the verdict was accepted in original form with the added signature.

Citing Ohio Revised Code section 2315.11, the court of appeals held that the original verdict was defective in form only, and, with the assent of the jurors, subject to correction. While the statute prescribes that the correction shall be "before their discharge," the first discharge had been unauthorized by statute and, therefore, actually not a discharge at all.

The court distinguished two older cases in which the verdict first brought in had been complete, and in which the attempted changes were ones of substance.²⁶

SAMUEL SONENFIELD

FUTURE INTERESTS

JUDICIAL OPINIONS BASED UPON ARCHAIC, INACCURATE, AND MISLEADING STATEMENTS

Prior to the Statute of Uses (1536) it was not possible in England to create any form of legal future interest in a third person other than a remainder. A remainder could neither cut off nor follow a fee simple estate. Consequently, statements appeared in cases and texts that there could not be a fee simple estate after a fee simple

24. *Id.* at 196.

25. *Ibid.*

26. *Boyer v. Maloney*, 27 Ohio App. 52, 160 N.E. 740 (1927); *Niebling v. Laidlaw*, 12 Ohio C.C.R.(n.s.) 463, 22 Ohio C.C. Dec. 371 (1909).

estate or, more briefly, there could not be a fee after a fee.¹ The same idea was expressed in another form by the statement that there cannot be a remainder after a fee simple estate.² These statements were certainly true with respect to legal future interests prior to the Statute of Uses.

After the Statute of Uses (1536) it was possible to create a legal future interest in a third person by an inter vivos conveyance which would either defeat or follow a fee simple estate, and this fact was recognized by early texts and decisions.³ Thus, it was possible to create a fee after a fee. The future interest which defeats or follows a defeasible fee simple estate is called an executory interest, to distinguish it from a remainder.⁴ The only limitation imposed upon these executory interests is that they must either vest or not vest within the period of the Rule Against Perpetuities. With the adoption of the Statute of Wills in 1540, executory interests could be created also by will, subject only to the limitations of the Rule Against Perpetuities.

Unfortunately, the statement that there could not be a fee after a fee, which was accurate prior to 1536 but inaccurate thereafter, has been repeated as if still valid in some American cases.⁵ The confusion which resulted from this repetition has plagued some jurisdictions, including Ohio, to the present time. The opinion in *Sheldon v. Lewis*,⁶ although written in 1959, at a time when the inaccuracy of the earlier statements had been repeatedly explained in many reliable texts and carefully written opinions, is an example of the failure of the court to understand the nature of executory interests and the effect of the Statute of Uses.

In the *Sheldon* case the testator, in item two of his will, left all his real and personal property to his brother, *A*, and his two sisters, *B* and *C*, so that each received one-third, charged with the payment of certain legacies. In item three, testator qualified the gift in item two by providing that upon the death of either *A* or *C*, "the interest

1. "The rule that a fee could not be limited upon a fee had its foundation in the necessity of livery of seizin to the transfer of a fee." *Harder v. Matthews*, 309 Ill. 548, 557, 141 N.E. 442, 445 (1923).

2. 4 KENT, COMMENTARIES *199 (13th ed. 1884).

3. 2 BLACKSTONE, COMMENTARIES *173, *334 (Lewis' ed. 1902); 4 KENT, COMMENTARIES *199 (13th ed. 1884).

4. 1 AMERICAN LAW OF PROPERTY § 4.53 (1952); SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 221 (2d ed. 1956); RESTATEMENT, PROPERTY § 25, comments *d* and *e* (1936).

5. "Older cases, and an occasional recent case following anachronistic practice, find difficulty in permitting the interest of the first transferee, created by language which if left unqualified would have created an estate in fee simple absolute, to be cut down to an estate in fee simple subject to an executory limitation by the subsequent language of the instrument. This reasoning disregards the generally accepted constructional practice of reading an instrument as a whole, rather than reading its sentences seriatim." 2 POWELL, REAL PROPERTY § 189 (1950).

6. 158 N.E.2d 919 (Ohio C.P. 1959).

of the one so dying shall revert to [his] other two surviving sisters or brother and sister. . . .”⁷ *B* predeceased *A* and *C*, so that item three never became effective.⁸ *B*’s sole heir was *B*’s son. The son also predeceased *A* and *C*, who were his heirs. Consequently, *A* and *C*, prior to their deaths, owned undivided half interests in fee simple absolute in the property which they received under testator’s will.

Under items two and three of testator’s will, *B* received an undivided one-third interest in fee simple absolute in the residue of testator’s real and personal property, subject to the charge of the legacies. *B*’s interest was not defeasible, because, by its terms, item three related only to the situation where either *A* or *C* predeceased *B*.

A received an undivided one-third interest in this property in fee simple defeasible, subject to the charge of the legacies and to the executory interests in *B* and *C*, which would vest only if *A* predeceased both *B* and *C*. Similarly, *C* received a fee simple defeasible in another undivided one-third, subject to the charge of the legacies and subject to the executory interests in *A* and *B*, which would vest only if *C* predeceased both *A* and *B*. When *B* predeceased *A* and *C*, the interests of *A* and *C* were no longer defeasible. *A* and *C* were tenants in common in fee simple absolute with *B*’s son, who received by descent *B*’s undivided one-third interest.

The court’s explanation of its decision in the *Sheldon* case, that *A*, *B*, and *C* each received a vested indefeasible one-third of the residuary estate, consists of inappropriate, inapplicable, and misleading statements. First, the court quotes from *Ohio Jurisprudence*.

A fee simple estate cannot be made defeasible, even under R.C. Section 2131.07 (G.C. 10512-7), unless the words of the instrument devising such estate indicate the specific real property upon which the limitation is intended.⁹

The two cases cited in support of this statement are *Sweigart v. Sweigart*¹⁰ and *Gill v. Leach*.¹¹ This statement is certainly applicable to the facts of *Sweigart v. Sweigart*, but not to the facts of *Sheldon v. Lewis*. In the *Sweigart* case testatrix willed all her real and personal property to her husband absolutely, and then in the next item of her will she provided that after her husband’s death “all his real and personal property” should go to testatrix’ son. The court, on the point under consideration, properly noted:

As we view the language of the testatrix, she gave to her husband unrestricted title to her property, both real and personal, and then she

7. *Id.* at 921.

8. *Cf. In re Campbell’s Will*, 307 N.Y. 29, 119 N.E.2d 577 (1954) (estate to be divested only upon death of *A* before *B* and *C*; no divestment when *B* predeceased *A* and *C*, then *A* later predeceased *C*).

9. 20 OHIO JUR. 2d *Estates* § 180 (1956).

10. 89 N.E.2d 686 (Ohio Ct. App. 1949).

11. 81 Ohio App. 480, 80 N.E.2d 256 (1947).

attempted to will for her husband all of the real and personal property which he might have at his death. She made no reference to any specific property whatsoever, but simply undertook to will for her husband *all of his property*, without reference to kind, description or how acquired. Of course, the law does not permit her to execute a will for her husband, nor can a fee simple estate be made defeasible even under Sec. 10, 512-7, G.C. unless the words of the instrument devising such estate indicate the specific real property upon which the limitation is intended.¹² (Emphasis added.)

The case of *Gill v. Leach* did not consider the question whether the property was specifically identified. Although the testamentary gift was of "all the rest and residue" of testator's real and personal property, the court properly assumed without comment that the property had been sufficiently identified.

The decision in the *Gill* case is subject to criticism because it is based upon the erroneous theory that if a fee is conveyed, it cannot be made defeasible. The testator, in item three of his will, left all his real and personal property to his wife without words of general inheritance, such as "and her heirs in fee simple." In item four testator provided that at his wife's death all of this property "that shall remain unused," was to be divided among four named persons. The probate court, construing the will in its entirety and in accordance with basic property law, properly held that the wife received a life estate and the four named persons received the remainder. The court of appeals reversed this decision because it was based upon a "practical construction," which this reviewing court believed was not in accordance with the law of Ohio, although it was in accordance with the law of some other jurisdictions.¹³

Returning to the opinion in the principal case, *Sheldon v. Lewis*, the court's second reason for ignoring item three of the will was that "there can be no estate left in testator after the devise of an absolute estate."¹⁴ This statement begs the issue. Testator must not have intended to devise, and under basic rules of construction did not devise, the fee simple absolute to *A* and *C* in item two, because in reading the will as a unit, item two is qualified by item three.¹⁵ Therefore, the quoted statement is incorrect. As its third explanation, the

12. 89 N.E.2d 686, 687 (Ohio Ct. App. 1949).

13. "That, after a devise to one in general terms, without any words of inheritance or other language showing an intention to create a fee simple, it is stated to whom the property shall go upon the death of the devisee named, tends to show that he was intended to take, not a fee simple estate, but one merely for life." 1 TIFFANY, REAL PROPERTY 75 (3d ed. 1939).

14. 158 N.E.2d 919, 923 (Ohio C.P. 1959).

15. "The meaning expressed by the language employed in a conveyance is to be derived from reading such conveyance as an entirety. Each sentence or paragraph is a single element in one whole. It is reasonable to infer that their complementary or modifying force upon each other was intended by the conveyor and this inference must be given effect by the construer. When the clauses or paragraphs, read seriatim, involve repugnancies but, read as mutually modifying one another, permit a construction as a consistent whole, the latter construction is adopted." RESTATEMENT, PROPERTY § 242, comment *c* (1940).

court stated that a remainder cannot be grafted onto a fee. This statement is true but inapplicable, because if the first estate is a fee, it can be defeated by an executory interest. Item three is neither irreconcilable nor repugnant to item two of testator's will. Courts should seek the law not merely in their own cases and the cases of other jurisdictions, but also in learned and critical discussions and evaluations of these cases by recognized authorities. These discussions are readily available in current texts on property law.¹⁶

The practice of creating legal undivided interests in real property in two or more persons, especially when these interests are subject to future interests, is not to be commended. If possible, the real property of a deceased person should be sold as part of the administration of the estate and the net proceeds divided among the beneficiaries. If a sale is not immediately desirable, then the real property should be placed in trust with broad powers of administration and sale in the trustee. If a trust is not acceptable, the draftsman should fully advise the donor or testator of the hardship and problems which will probably arise if future interests are imposed upon the legal ownership in common of real or personal property. Perhaps the donor or testator will then decide not to create the future interests. If all of these methods fail and the donor or testator, although fully informed, steadfastly insists upon legal common ownership of realty plus future interests, the draftsman should use simple language that a court can easily understand.

"DEATH WITHOUT CHILDREN" — ALTERNATIVE FUTURE INTERESTS

In *Trumbo v. Trumbo*¹⁷ testator left certain land to his wife for her life and at her death to his son, subject to the executory limitation that if the son should "die leaving no children," the land was to go to the son's wife "as long as she may remain his widow." If the son's widow remarried, the land was to go to testator's daughter "or her children."

There are a number of points of poor draftsmanship which are evident from testator's will. *First*, as a general rule the creation of a legal future interest is not desirable. When management and sale of realty require the consent of two or more persons, difficulties will probably develop. *Second*, the phrase "die leaving no children," is too restrictive, because testator probably meant "die leaving no issue."¹⁸ *Third*, whenever there is a gift over upon death of a person without issue, it raises the question which was before the court in *Trumbo v. Trumbo*, that is, does the clause mean (1) death of the

16. SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* (2d ed. 1956); POWELL, *REAL PROPERTY* (1950); AMERICAN LAW OF PROPERTY (1952); TIFFANY, *REAL PROPERTY* (1939).

17. 106 Ohio App. 382, 155 N.E.2d 62 (1957).

18. SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 548 (2d ed. 1956).

named person without issue before testator's death, (2) death of the named person before the termination of life estates, or (3) death of the named person at any time?¹⁹ The court, in accordance with the *Restatement of Property*²⁰ and a number of courts, held that when the son, who was the named person, survived his mother, who was the life beneficiary, the son had a fee simple absolute which, of course, would not be divested upon his later death without issue. The draftsman should have specifically stated as of what time death without issue must occur to divest the son's interest.

Fourth, presumably testator intended that in order for the son's wife to take upon the son's death without issue the wife would have to survive her husband. However, testator failed to state specifically that the wife would have to survive to take. As a general rule, survivorship is not implied because a future interest is subject to another form of contingency, such as death of testator's son without issue before his mother's death.²¹

Fifth, the gift to testator's daughter "or her children" left unanswered whether the daughter, as a condition precedent, had to survive to the time of the son's death without issue, assuming his death occurred before the termination of the life estate, or to the time of the life beneficiary's death.²² For example, suppose that the son died without issue, survived by no widow, but survived by his mother and his sister. At this point, under general rules of construction, the future interest of testator's daughter may be a contingent remainder and, as a condition precedent, the daughter must survive her mother (the life beneficiary) in order to take. Consequently, if the daughter predeceased her mother and left no surviving issue, the daughter's estate would not be entitled to take upon the mother's death. This is the position taken by the *Restatement of Property*.²³ Another view of the fact situation is that after the death of testator's son without issue and survived by no widow, the daughter's interest is a vested remainder subject to divestment only if the daughter predeceases her mother and is survived by "children." The word "children," of course, might be construed to have been used in the sense of issue. Consequently, if prior to the mother's death the son died without issue, and without a surviving widow, and the daughter died without "children," the daughter's estate would be entitled to the property at the mother's death.²⁴

Sixth, if the daughter's survival of the life beneficiary is a condi-

19. *Id.* § 540.

20. RESTATEMENT, PROPERTY § 269 (1940).

21. 5 AMERICAN LAW OF PROPERTY § 21.25 (1952); SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 594 (2d ed. 1956); RESTATEMENT, PROPERTY § 261 (1940).

22. SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 581 (2d ed. 1956); 5 AMERICAN LAW OF PROPERTY § 21.24 (1952); RESTATEMENT, PROPERTY § 252 (1940).

23. RESTATEMENT, PROPERTY § 252 (1940).

24. SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 581 (2d ed. 1956).

tion precedent, is survival by her "children" also a condition precedent? For example, suppose the son predeceases his mother survived by no issue and by no widow, and that the daughter thereafter also predeceases her mother but is survived by a child. Later the daughter's child dies without issue, then the life beneficiary dies. Would the child's estate take?²⁵

Seventh, did testator mean to restrict the alternative gift to the daughter's "children" to immediate descendants of his daughter, or did he intend that the word "children" should include grandchildren and more remote descendants if their ancestors were dead? If "children" is construed as "issue," what effect, if any, does this construction have on the question of the death of some or all of the issue prior to the death of the life beneficiary? Suppose the daughter predeceases her mother survived by one grandchild who later also predeceases the life beneficiary and is survived by no issue. Assuming that the son has predeceased his mother survived by no issue and by no widow, does the grandchild's estate take?²⁶

Eighth, assuming that "death of the son without issue" means death without issue prior to the termination of his mother's life estate, if the son is survived by a widow is her estate defeated if she remarries after the termination of the life estate?

Even though the ambiguities listed above may be resolved in a specific jurisdiction by its courts' decisions, there is always a high probability that such resolution may not be strictly in accordance with testator's intention. In addition to the probability that litigation would be required to resolve many of these ambiguities, the legal draftsman and the testator can not always be certain when a will is drafted as to what law will be applied in construing it. Since the law where land is located controls, and since the land may be located outside the state in which the testator's will is drafted and executed, the ideal will would contain no ambiguities such as those enumerated above.

"DEATH WITHOUT ISSUE"

*Avery v. Avery*²⁷ involved the will of a testator who died in 1917. In this case testator devised 160 acres of land to his wife for life, then devised to each of his four children 40 acres of this land with the provision that "if, however, either of my children should die leaving no issue, then the property devised to such shall be divided equally between the brothers and sisters then living." In 1955 the last surviv-

25. RESTATEMENT, PROPERTY § 252, comment *f* (1940); SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 581 (2d ed. 1956).

26. RESTATEMENT, PROPERTY § 249, comment *i* (1940); SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 153 nn.35-37 (2d ed. 1956).

27. 107 Ohio App. 199, 157 N.E.2d 917 (1958).

ing son of testator died, leaving no issue but survived by a sister, two nieces, and a nephew.

According to the decision in *Trumbo v. Trumbo*,²⁸ if the testator in the *Avery* case had been survived by the life tenant, testator's wife, death without issue of the son would have had to occur prior to the death of the life tenant in order for the gift over to be effective. But since the life tenant predeceased the testator, the court in the *Avery* case held that each of the four children received a present fee simple estate subject to its being defeated by death without issue, and perhaps subject also to their being survived by at least one brother or sister.

When there is a gift to two or more persons with a gift over to the survivors upon the death of any without issue, the problem may arise as to the disposition of the original interest of the last person to die when he dies without issue, and also as to the disposition of any subsequent interest which might have accrued to this survivor. For example, property is willed to *A*, *B*, and *C* in fee simple subject to the executory limitation that upon the death of any without issue, his interest shall go to the survivors. *A* dies without issue and his one-third interest is divided between *B* and *C*. *B* dies without issue. *B*'s undivided one-third interest goes to *C*. But what about the one-sixth which *B* received from *A*? *C* dies without issue. Who takes *C*'s original one-third? Who takes the one-sixth *C* received from *A* and the one-third *C* received from *B*?²⁹

It is interesting to note that with respect to the phrase "death without issue," or a similar phrase, all of the Ohio cases except *Avery v. Avery* are in accord with the preferred construction set forth in the *Restatement of Property*. First, "death without issue" means definite, and not indefinite failure of issue.³⁰ Second, a testamentary gift by *T* "to *B* and his heirs but if *B* dies without issue then to *C* and his heirs" creates in *B*, if he survives *T*, a fee simple subject to an executory limitation, and in *C* an executory interest which will vest if *B* dies survived by no issue.³¹ Third, a testamentary gift "to *B* for life then to *C* and his heirs but if *C* dies without issue then to *D* and his heirs," where *B*, *C*, and *D* survive *T*, creates in *C* a fee simple subject to an executory limitation, and in *D* an executory interest which will vest if *C* predeceases *B*, and *C* is not survived by any issue. If *C* survives *B* then *C* has a present fee simple absolute.³² Fourth,

28. 106 Ohio App. 382, 155 N.E.2d 62 (1957).

29. See SIMES & SMITH, THE LAW OF FUTURE INTERESTS §§ 547, 773, 774 (2d ed. 1956); RESTATEMENT, PROPERTY § 271 (1940).

30. RESTATEMENT, PROPERTY § 266 (1940); Parish's Heirs v. Ferris, 6 Ohio St. 563 (1856).

31. RESTATEMENT, PROPERTY § 267 (1940); Briggs v. Hopkins, 103 Ohio St. 321, 132 N.E. 843 (1921).

32. RESTATEMENT, PROPERTY § 269 (1940); Trumbo v. Trumbo, 106 Ohio App. 382, 155 N.E.2d 62 (1957).

a testamentary gift "to *B* for life, then to *C* and his heirs but if *C* dies without issue then to *D* and his heirs" creates in *C*, when *B* predeceases *T* but *C* and *D* survive *T*, a fee simple absolute according to the *Restatement of Property*.³³ But according to *Avery v. Avery*, *C* receives a fee simple subject to an executory limitation and *D* receives an executory interest which will vest if *C* dies survived by no issue. The reason for the position of the *Restatement of Property* is that the limitation employed by *T* manifests *T*'s intent "that *C* be able to acquire an indefeasible interest before he dies, and this interest must be observed despite the expiration of the interest limited in favor of *B*."³⁴

There is in the United States a definite need for greater uniformity in the area of real property law. If the courts of states in which there is no strong or persuasive local policy opposed to the position of the *Restatement of Property* on a specific issue would follow the position of the *Restatement*, there would be a substantial increase in uniformity. If, on the other hand, a particular jurisdiction decides not to follow the position of the *Restatement*, then it should clearly and specifically set forth its reasons for not doing so. In this way sound and uniform legal principles would become more widely recognized throughout the country.

MARITAL TRUST AND SPENDTHRIFT PROVISIONS

In *Corey v. National Bank of Toledo*,³⁵ the draftsman of testator's will provided in Item IX for a separate trust, Trust A, of "assets equal in value to one-half ($\frac{1}{2}$) of the value of [his] adjusted gross estate as determined for Federal estate tax purposes. . . ."³⁶ The income from Trust A was payable to testator's wife for her life. She was also given the

power, at any time and from time to time, and in all events, by means of a written instrument signed by her and delivered to the Trustee during her lifetime, or at her death by provision in her will which expressly refers to her power of appointment hereunder, to appoint all or any part of the principal to such one or more person or persons (including herself and/or her estate), in such share and amounts and in such manner, as she may designate.³⁷

Unfortunately, Item X of the will was written in language which apparently applied to all trusts, including Trust A, created by testator's will. Item X read in part:

If any beneficiary of any trust hereunder shall attempt at any time or times to alienate . . . any part of the income and/or principal reserved

33. RESTATEMENT, PROPERTY § 269 comment *f* (1940).

34. *Ibid.*

35. 159 N.E.2d 814 (Ohio C.P. 1958).

36. *Id.* at 815.

37. *Id.* at 816.