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Future Interests

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sel. The trial court had denied defendant access to it for use in cross-examining the city's witnesses. This was held error by the appellate court, which based its decision on the distinction between routine reports and "reports of inquiries and investigations made by or for a party to a legal controversy for his own use and benefit." The opinion cites numerous leading Ohio decisions.

JUDICIAL NOTICE

In *McCoy v. Gilbert*,[15] an action to recover for personal injuries received in an automobile collision, the trial court had, in his charge, taken judicial notice of a supposed "reaction time" which elapses before a driver can apply his brakes, and of the distance which a vehicle traveling at various speeds will travel after braking and before stopping. He relied upon a well-known encyclopedic work on automobile negligence.

Some courts have approved judicial notice of such statistics, but this practice is by no means universal and it does not appear that there are any Ohio reported decisions approving it.

The Court of Appeals for Madison County held that there were "too many variables," such as the individual driver's reaction time, and the condition of the street, and likewise, that there was not the requisite notoriety or certainty for judicial notice to have been taken. The charge was therefore prejudicially erroneous.

SAMUEL SONENFIELD

FUTURE INTERESTS

For almost a century, Ohio has been troubled by a series of cases involving carelessly drafted wills in which the first taker, usually the surviving spouse, was given the power "to consume," "to sell," or "to convey" with a gift over, usually to the deceased spouse's children or collateral relatives, of whatever portion of the original property remained at the first taker's death.[1] In order to bring about uniformity in the decisions involving gifts of this type the following provision, effective January 1, 1932, was included in the Ohio Probate Code prepared by the Ohio State Bar Association, and now appears as section 2131.07 of the Ohio Revised Code.

> An estate in fee simple may be made defeasible upon the death of the holder thereof without having conveyed or devised the same, and the limitation over upon such event shall be a valid future interest. For the purpose of involuntary alienation, such a defeasible fee is a fee simple absolute.[2]

15. 110 Ohio App. 453, 169 N.E.2d 624 (1959).

It has been suggested that because the word "devised" appears in this statute that therefore it relates only to realty.[3] This suggestion is based upon an unwarranted assumption. Section 2107.52 of the Ohio Revised Code uses the verb "devise" as including a testamentary disposition of either real or personal property. For instance, the introductory clause of this section reads, "When a devise of real or personal estate is made to a relative. . . ." Therefore, section 2131.07 should apply to conveyances or devises of either real property or personal property, or of both. Any other construction would add to an already adequately confused area of the law.

LIFE ESTATE AND REMAINDER

If in a particular case the court finds that the first taker received only a life estate then there is no need to refer to section 2131.07. For example, in *Kuhn v. Kuhn*[4] the testatrix by the second item of her will left to her husband all her "Real Estate, Money and Chattels of any and every kind with the power and privilege to sell real estate at any time he may desire."[5] Then in the next and third item of her will testatrix provided:

> Whatever of my estate should be left at the time of the decease of my husband Frank L. Kuhn, I want disposed of as follows: First Five Hundred Dollars to go to our son John L. Kuhn and the balance to be divided share and share alike between my two sons John L. Kuhn and Roy A. Kuhn.[6]

In the language of the court of appeals, "This will bears intrinsic evidence of having been drafted by a person inexperienced in such matters."[7]

When testatrix' husband as executor applied for a certificate of transfer to himself of the title to the real estate owned by the testatrix he inserted under the heading "Portion" the word "Full." However, the probate court in issuing the certificate of transfer inserted under the heading "Portion" the phrase "Portion devised."

Testatrix' husband remarried after his wife's death and died testate survived by his second wife and the two sons John and Roy. The son John instituted in the probate court an action for a declaratory judgment as to the interest which his father received under testatrix' will. The probate court found that testatrix' husband received only a life estate with power of sale during his life, and whatever remained of testatrix' estate

1. White, *Life Estate or Fee?*, 1 U. CINC. L. REV. 405 (1927); White, *Life Estate or Fee? A Sequel*, 6 U. CINC. L. REV. 429 (1932).
2. OHIO REV. CODE § 2131.07.
3. White, *Life Estate or Fee? A Sequel*, 6 U. CINC. L. REV. 429, 447 (1932).
4. 168 N.E.2d 583 (Ohio Ct. App. 1960).
5. *Id.* at 584.
6. *Id.* at 584.
7. *Id.* at 586.

at her husband's death passed to their two sons. The husband's second wife appealed from this decision.

Although the power of sale in item two of testatrix' will specifically applied only to "real estate," the court of appeals apparently read this power in connection with item three which refers to whatever part of testatrix' estate is left at her husband's death. The pertinent portion of the opinion by the court of appeals reads:

> In the second item, there is no express devise of an absolute title. Absence of such language, coupled with the express power and privilege *to sell the real estate* at any time the devisee may desire, is certainly significant. It certainly shows that the testatrix did not consider that her *prior devise* included her entire power over *her estate*.[8] (Emphasis added.)

Presumably the court of appeals used the phrase "prior devise" to refer to gifts of "Real Estate, Money, and Chattels," and the words "her estate" may refer to these three forms of property. Yet, it is possible that the action for the declaratory judgment involves only the real estate.

The court of appeals, taking into consideration all the language of items two and three of testatrix' will in the *Kuhn* case concluded that the verb "want" in the third item constituted a testamentary disposition and not a mere wish.

Presumably testatrix' will was not drafted by a lawyer and thus well illustrates the savings in time and money which would have resulted if testatrix had paid a small amount to have her will drafted properly.

Defeasible Fee and Executory Interest

The case of *In re Shira's Will*[9] was decided by a lower court. Therefore, the failure of the court to consider the applicability of Ohio Revised Code section 2131.07 to the facts before it and to realize the distinction between a remainder and an executory interest is not surprising. Mr. White in his article *Life Estate or Fee? A Sequel*[10] stated, in 1932, that all of the seven pertinent Ohio Supreme Court cases found that the first takers received life estates and that the limitations over were valid remainders. But, of the pertinent Ohio appellate court decisions, thirteen held that the first takers received fee simple absolute estates and only two of these decisions held the first takers received life estates. "The astonishing thing about this," in the words of Mr. White, "is that our appellate courts have ignored the almost unbroken line of supreme court cases which decide in favor of the life estate construction."[11] The fundamental

8. *Id.* at 586.
9. 165 N.E.2d 60 (Ohio P. Ct. 1959).
10. 6 U. Cinc. L. Rev. 429 (1932).
11. *Id.* at 444.

distinction between remainders and executory interests need not be pointed out since it was considered only last year in connection with *Sheldon v. Lewis*.[12]

The real issue is whether there can be an executory interest which will vest only if the first taker in fee simple fails to convey the property prior to his death. Kent in his commentaries erroneously stated that an executory interest must be indestructible and therefore if the first taker has the power to destroy the executory interest, the executory interest must be void.[13] Although courts have subsequently followed Kent's statement,[14] its unsoundness has been periodically explained in scholarly texts.[15]

Since a life estate with either a power to convey by deed alone or by deed or will is valid in Ohio,[16] and most states,[17] a remainder to a third person of any property not transferred by the owner of the life estate is valid. Consequently, if the courts had wished to do so they might have eliminated much tedious litigation by holding that whenever there is a gift over of the property which has not been conveyed at the first taker's death, then the first taker receives a life estate plus the power to convey the fee simple. The provisions of section 2131.07 of the Ohio Revised Code essentially attain the same objective. The pertinent portions of testator's will in the case of *In re Shira's Will* read as follows:

> Item Three: I hereby give and bequeathe to my wife, Bertha Breen-Shira, if she survive me, all of my property, real, personal and mixed, including my household goods, office equipment and instruments, all ready cash, on hand or on deposit in any bank, *which shall immediately be turned over to her, and with which she shall have absolutely to do with as she so desires,* all book accounts, notes, mortgages, stocks and bonds of which I shall be in possession of or be entitled to at the time of my death, automobile or automobiles, radios, etc. (Emphasis added.)
>
> Item Four: Upon the death of my wife, if she should survive me, the residue of my estate, real, personal and mixed, shall be converted into cash and the cash disposed of as follows: To Bernice McGuire, Centerburg, Ohio, if she be living, the sum of $5,000, and the balance to . . . .[18]

Since the gift by testator to his wife is not in "fee," "fee simple," or "fee simple absolute," it cannot be stated that there is a clear gift of a fee simple estate. The clause "which shall immediately be turned over to

12. 158 N.E.2d 919 (Ohio C.P. 1959); Cook, *Future Interests, Survey of Ohio Law — 1959*, 11 WEST. RES. L. REV. 385 (1960).

13. 4 KENT, COMMENTARIES ON AMERICAN LAW § 270 (13th ed. 1884).

14. 2 TIFFANY, REAL PROPERTY § 377 nn. 10 & 11 (3d ed. 1939); 3 SIMES & SMITH, LAW OF FUTURE INTERESTS § 1484 (2d ed. 1956); RESTATEMENT PROPERTY § 406, comment *g* (1944).

15. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY §§ 66-74g (2d ed. 1895); 2 TIFFANY, REAL PROPERTY § 377 (3d ed. 1959); 3 SIMES & SMITH, LAW OF FUTURE INTERESTS ch. 43 (2d ed. 1956).

16. 1 HAUSSER, OHIO PRACTICE § 1171 (1952).

17. 2 SIMES & SMITH, LAW OF FUTURE INTERESTS § 893 n.14 (2d ed. 1956).

18. 165 N.E.2d 60, 61 (Ohio P. Ct. 1959).

her, and with which she shall have absolutely to do with as she so desires" either refers to "all ready cash" or to "all of my property." In either case the language indicates that testator's wife was to have possession of the property referred to, free of any trust, and was to have the power to dispose of it during her life.

The reasoning of the court is summarized in the following quotations:

> There is no doubt as to the testator's intention in this case . . . . In case of a conflict between the testator's intention and the settled rules of law, the latter must prevail . . . . Item four of the will here under consideration does conflict with well-established rules of law. A fee, once given, cannot be cut down, by other provisions of the will. A remainder cannot be engrafted upon a fee.[19]

Of the latter two sentences of this quotation, which supposedly express relevant and well established rules of law, the last sentence is true but not relevant, and the other sentence is untrue and misleading. If testator's intention was clear, why not either construe the wife's estate as a life estate and uphold item four as a gift of remainders or construe the first estate as a fee simple, apply Ohio Revised Code section 2131.07, and uphold item four as a gift of executory interests.

Another oddity about the *Shira* case is that the property involved consisted of the balance of the proceeds of a life insurance policy which in accordance with its terms was payable in installments to testator's wife during her life and at her death any balance was payable to testator's estate.

A proper opinion in the *Shira* case might have simply read as follows:

"In accordance with the will of Donald D. Shira, the balance of the proceeds of the life insurance policy which have already been paid to his administrator d.b.n., c.t.a. and which do not exceed the sum of five thousand dollars are payable to the residuary beneficiary Bernice McGuire. Ohio Revised Code section 2131.07."

Unfortunately the long and rambling opinion of the probate court with its faulty analysis, irrelevant statements, and failure to apply section 2131.07 perhaps forebodes another century of frivolous litigation.

Adopted Child as Issue

The case of *Cook v. Crabill*[20] merits commendation for its construction of the word "issue" as including an adopted child. Thirteen years before testator executed his will his son adopted a child who lived happily in the son's home. Therefore, when the testator executed his will in

19. *Id.* at 63.

20. 164 N.E.2d 425 (Ohio Ct. App. 1959).

1925, under these circumstances, and left certain realty to his son and daughter with the executory limitation that if either child die "without living issue" his share should go to testator's "living children or their heirs," the court held that when the son died intestate his undivided half interest in the realty descended to his adopted child.

In the *Cook* case the court buttressed its opinion by stating that under Ohio statutory law in effect at the time of the son's death,[21] the adopted child is clearly "issue" of testator's son and testator presumably intended the word "issue" to be construed as of the son's death and not necessarily as of testator's death. Furthermore, said the court, testator knew when he executed his will that under Ohio law, as it then existed, the son's adopted child would inherit the son's property if he died intestate. Consequently, testator must have intended and expected the adopted child to inherit at the son's death the realty devised to the son.

RULE AGAINST PERPETUITIES

The common-law rule against perpetuities which is in effect in Ohio by statute[22] is rather easily complied with by draftsmen who understand its requirements. Unfortunately in *Large v. National City Bank*[23] testator's will did not comply with the restrictions of the rule against perpetuities. Testator might have used as measuring lives all his children and their issue *who were living at testator's death.* Unfortunately testator failed to restrict the word "issue" to those persons living at his death. By using as the measuring lives all of testator's children and "all of the issue of my children" the contingent future interests clearly violated the rule against perpetuities. Even if "issue" had been restricted to "grandchildren" the rule would have been violated because testator's children might possibly have children after testator's death. For this reason the statement in the opinion that the word "issue" could not be construed as "grandchildren" should not be taken to mean that without the qualifying phrase "living at testator's death" the measuring lives might be testator's children and grandchildren.

Presumably the court in *Large v. National City Bank* found the life estates and the contingent remainders so related that the entire trust failed and not merely the contingent remainders.[24] This point is not discussed in the opinion which simply states that the entire estate passed as intestate property at testator's death.

The case of *Finkbeiner v. Finkbeiner,*[25] involving the applicability of

21. OHIO REV. CODE § 3107.13.
22. OHIO REV. CODE § 2131.08.
23. 170 N.E.2d 309 (Ohio P. Ct. 1960).
24. 3 SIMES & SMITH, LAW OF FUTURE INTERESTS § 1262 (2d ed. 1956).
25. 111 Ohio App. 64, 165 N.E.2d 825 (1959).