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Future Interests

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regarding the judgment excessive, went on to say that if plaintiff would accept a remittitur of $48,000.00, it would affirm the judgment; otherwise, it would be reversed and remanded for further proceedings. Weygandt, C. J., concurred in the judgment of reversal, but felt that any attempt to cure the serious error by means of the process of remittitur was improper under the circumstances. His view seems commendably sound.

In *Holt v. Hartschuk*, following the rule of *Bush v. Harvey Transfer Co.* the court of appeals held that within the two-issue rule, contributory negligence exists only where there is actionable negligence; therefore, a judgment in a negligence action should be affirmed under the two-issue rule where the issue of actionable negligence is erroneously submitted to the jury although the issue of contributory negligence is submitted without error intervening. On the issue of actionable negligence, the trial court erred, in permitting plaintiff’s witness, a physician, to give his opinion as to the nature and extent of plaintiff’s injuries since it was based on records and x-ray photographs made by others, none of which were offered in evidence or properly identified and authenticated for admission.

**Clinton DeWitt**

**FUTURE INTERESTS**

Litigation involving future interests is generally the result of defective draftsmanship. This defective draftsmanship is usually caused by one or more of the following deficiencies in the draftsman: (a) inadequate knowledge of the law of future interests; (b) carelessness in the use of words; or (c) incomplete knowledge of the future interests which the conveyer intended to create. These deficiencies may be partially the result of inadequate judicial opinions in cases involving future interests.

A case that may mislead and confuse lawyers and judges is *Cleveland Trust Co. v. Andrus*. Although the holding of the Lorain County Court of Appeals in this case is proper, the opinion of the court is inadequate and misleading. Here the testator gave the residue of his estate upon the death of his wife, the life beneficiary, as follows: a one-fifth undivided interest to each of four named children and a one-fifth undivided interest to the children of testator’s deceased child; if any of testator’s children died in the meantime, leaving heirs of their body, then the portion going to such deceased child or children shall go to their children in equal shares and said trustee

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8 122 N.E.2d 653 (Ohio App. 1953)
9 146 Ohio St. 657, 67 N.E.2d 851 (1946)
is to convey such remainder of my estate to my children and grandchildren aforesaid in the proportions hereinafter set forth.

One of testator's sons survived the testator but predeceased the life beneficiary leaving only the son's widow and no heirs of his body. The court of appeals held that the son's undivided one-fifth of the remainder vested at testator's death and therefore when the son predeceased the life beneficiary his interest as remainderman passed as part of his estate.

The question before the court consisted of two parts. First, was survival by the son to the time of his mother's death a condition precedent to the vesting of the remainder in the son? Second, if the remainder vested in the son at testator's death subject to divestment if the son predeceased his mother leaving heirs of his body, was this vested remainder also subject to divestment if the son predeceased his mother leaving no heirs of his body? The court overlooked the second and more difficult part of the question when it stated that the "sole question presented is the time of vesting whether at the death of the testator, or at the termination of the life interest."

If the draftsmen of future interest provisions and the courts do not have a common understanding as to the test to be applied in distinguishing a vested remainder from a contingent remainder, litigation and confusion will probably result. For this reason, the Ohio courts should use a better test than the one set forth in In re Hutchinson and relied upon by the court of appeals in the Andrus case. This inadequate test is as follows: "When there is a person in being who would have the right to possession immediately upon the determination of the particular intervening estate, the remainder is vested."

This inadequate and misleading test has been traced to Fearne's Treatise on Contingent Remainders, Preston's Abstracts, and Butler and Hargrave's Notes to Coke on Littleton. The test as set forth by Fearne has been called fallacious by Austin. It caused the Court of Appeals of New York in Moore v. Little to hold that a remainder to the heirs of a living

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1 95 Ohio App. 503, 121 N.E.2d 68 (1953).
2 120 Ohio St. 542, 549, 166 N.E. 687, 690 (1929). The dictum in the Hutchinson case that where two persons own property in common during their joint lives with the survivor to take the entire property in fee simple, each owns a vested remainder in the one-half interest of the other is the result of an improper test for determining when a remainder is vested. See Note, 3 WEST. RES. L. REV. 60 (1951).
3 SIMES, FUTURE INTERESTS § 84 (1936).
4 FEARNE, CONTINGENT REMAINDERS 216 (10th ed. 1844).
5 2 PRESTON, ABSTRACTS 113 (3d ed. 1819).
6 CO. LITT. 265 a n. 2.
7 AUSTIN, JURISPRUDENCE 895 (3d ed. 1869)
8 41 N.Y. 66 (1869) It has been said the old Court of Appeals of New York was
person is vested. Some jurisdictions somewhat blindly followed this New York decision, thereby introducing conflict and confusion into the law of future interests of these jurisdictions. Professor Simes and other outstanding authorities on the law of future interests have pointed out the fallacies in the test. All courts of Ohio should reject this test as unsound and misleading.

The holding in the Andrus case happens to be proper because under accepted rules of construction, as well as under the defective tests used by the court, the remainders to testator's named children are vested and because under accepted rules of construction the death of the son prior to the death of his mother and leaving no heirs of his body would not divest his remainder, a point which the court simply assumed was true if the remainder vested at testator's death.

In Manley v. Crawford the provision of testator's will before the court for construction reads as follows:

> It is my will that after the death of my said wife, Martha E. Crawford, that my estate both real and personal shall pass to and vest in equal parts in my son Carl J. Crawford and my daughter Gladys Crawford Manley. Should either of said children die before my deceased leaving children the part of my estate that would have gone to such child if living shall pass to and vest in the children of such deceased child. Should either of my said children die prior to my decease without children it is my will that such share as would have gone to such child had he or she been living shall vest in the child that may be living or to the heirs of such child.

At testator's death he was survived by his widow, a daughter and a son. The son predeceased his mother survived only by the son's widow. The son's widow claimed the interest of her husband on the ground that it was not divested at his death.

The Darke County Court of Appeals recognized the rule that "the law favors the vesting of estates at the earliest possible moment in the absence of a clearly expressed intention to postpone the vesting to some future time." The court also recognized that the question whether testator's son had to survive to the death of his mother, the life tenant, "is not wholly free from doubt," but it reversed the judgment of the court of common
pleas and construed the will as requiring survivorship by the son to the
death of the life tenant as a condition precedent to his taking because
testator stated that after the death of his wife, his estate should *vest* in his
son and daughter.

The language which the court cites in support of its holding that the
son had to survive the life tenant to take is weak though the court states it
"can scarcely conceive of stronger language." The language is as follows:
"After the death of my said wife...my estate...shall pass to and
vest." The phrase "after the death of my said wife" does not indicate
that the remainderman must survive to take. Neither does the phrase
"shall pass to" reveal such an intent. "Vest" is the only word that might
have been used to indicate a requirement of survivorship, but this use of the
word is doubtful because (a) it is used in connection with "pass to,"
(b) the words which follow it relate to distribution — "vest in equal parts,"
and (c) the word "vest" may mean vest in possession.

It is significant that the same phrase "shall pass to and vest in" was
used with respect to the children of the son or daughter if the son or
daughter predeceased the testator. With respect to these grandchildren the
testator provided: "Should either of said children die before my decease
leaving children the part of my estate that would have gone to such child if
living shall pass to and vest in the children of such deceased child." Would
a father want a remainder to vest at his death in the children of a deceased
child, but not to vest in his child if living at the father's death? Shouldn't
the court attach great significance to the fact that the references to death
of a child either leaving children or not leaving children specifically refer
to death before the testator's decease?

Another point in *Manley v. Crawford* which merits comment is that
the court stated that since the remainder to the son was contingent upon
his surviving the life tenant there was a reversion which passed as intestate
property. Then the court proceeded to hold that upon the death of the
life tenant leaving the daughter surviving "the entire estate vested in
the daughter." The son survived the father and therefore he must have in-
herited this reversion with his mother and sister. The failure of the court to explain its holding that the entire reversion vested in the daughter at the son's death is unfortunate.

The Ohio Supreme Court affirmed the decision of the Franklin County Probate Court in In re Miller's Estate although the probate court ignored testator's express direction in his will that his executors deliver personal property to his daughter, the life beneficiary, without requiring bond. The probate court under its plenary powers properly and justifiably ordered the executor to transfer the personal property to a trustee to manage it for the life beneficiary and at her death to distribute it as the will provided among the issue of the life tenant. This action was taken by the probate court because the life beneficiary was substantially insolvent after receiving and spending about $450,000 in six years. There was no evidence that the testator knew of the life beneficiary's spendthrift habits. The Ohio Court of Appeals and the Ohio Supreme Court both approved of this action by the probate court.

In Morgan v. Reese the testator devised real property to a named person for life, then, at death of the life beneficiary, to those persons who at the death of the life beneficiary "are my legal heirs." Testator died in 1943. Testator's brother, who was an heir of testator, died in 1945 survived by a widow. The life beneficiary died in 1949. The persons who would have been testator's heirs if he had died at the death of the life beneficiary believed that the widow of testator's brother was entitled to one-fifth of the proceeds from the proceeds of the sale of the real property. They therefore promised her one-fifth of the proceeds if she would join in a contract to sell the real property and agree to sign a warranty deed to the purchaser. The widow signed the contract and joined in the warranty deed. When the parties to this arrangement with the widow were advised by counsel that the widow had no interest in the real property because testator's brother predeceased the life beneficiary, they refused to pay the widow anything. The widow then sued to recover the amount promised her. The Putnam Common Pleas Court held that there was no contract between the widow and the persons who took as remaindermen. No cases were cited in support of this holding because the court believed that "the law is so plain that it does not require any citations."

The case of matter of Edward A. Coyle illustrates well the importance of a knowledge of the general principles of future interests by the lawyers who draft wills and by the judges and lawyers who must construe wills. In the will which was before the Portage County Court of Appeals in the Coyle

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20 160 Ohio St. 529, 117 N.E.2d 598 (1954)
21 116 N.E.2d 68 (Putnam Com. Pl. 1953)
case the testator gave the residue of his estate to a trustee to pay the income for the support of testator's son subject to the power of the trustee to use any or all of the principal of the trust for this purpose if the income was insufficient and also subject to the power in the trustee to give the son any or all of the principal if the trustee determined that the son would not waste it. After this gift to the son, the testator continued his residuary gift as follows:

Whatever may be left, if any, in said trust fund at the time of the death of my said son, I give, devise and bequeath to the heirs of his body. If he shall not leave surviving him any heirs of his body, then whatever may be left in said trust fund, if any to my blood nieces and nephews, share and share alike. If any of my said nephews or nieces should die prior to the death of my said son, leaving surviving them heirs of his or her body, their said heirs shall receive the portion of said trust fund which said niece or nephew would have received, if living.

The question presented to the Probate Court of Portage County, in an action to determine the highest amount of inheritance tax payable, was whether the heirs of the body of the nieces or nephews received any future interest. The probate court improperly held that the nieces and nephews received a vested remainder subject to its being divested only upon the death of the son leaving heirs of his body and that the heirs of the body of the nieces and nephews received nothing. The probate court stated that the heirs of the body of the nieces and nephews received nothing because the gift to the nieces and nephews is in the language of an absolute gift! The court of appeals properly reversed the decision of the probate court. But the opinion of the court is authority only as to the specific issue that the heirs of the body of the nieces and nephews received a future interest.

This gift of various future interests is deceptive in that ambiguities and omissions may not be readily apparent. The trustee's power to use part or all of the principal for the support of testator's son or to transfer it to the son does not in itself make the remainders contingent. But the remainder in fee simple to the heirs of the body of the son is necessarily contingent upon the death of the son survived by descendants, and for this reason alone is a contingent remainder. The share of each heir of the body of the son should be determined in accordance with the statute of intestate succession in effect at the death of the son. Since the first and primary remainder is contingent, the second and secondary remainder should also be considered contingent. This construction avoids the troublesome

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23 Restatement, Property § 276 (1940); 1 Simes, Future Interests 134 (1936).
24 Restatement, Property § 249 (1940).
25 Id. at § 310.
26 Id. at § 278.
question whether a contingent remainder can divest a vested remainder and also is in accordance with the form of the gift which is in the language of a condition precedent—"if he shall not leave surviving him any heirs of his body, then I give." Yet, the court appeals, contrary to accepted principles of construction, stated that "clearly the nieces and nephews have a remainder which vested at" testator's death.

The need to construe the remainder to the heirs of the body of the son and the remainder to the nieces and nephews as contingent is not so obvious in the Coyle case as it would be if the first remainder were to those heirs of the body of the son who attain the age of thirty years and if the second remainder were to the testator's nieces and nephews if no heirs of the body of the son attain the age of thirty years. In such a gift the first remainder would be void because it violates the rule against perpetuities and therefore the nieces and nephews might take if their remainder is called vested even though the son was survived by heirs of his body.

The gift in the Coyle case to the nieces and nephews and to the heirs of their bodies is certainly not a model which other draftsmen should follow. It fails to provide specifically for situations which are likely to arise in gifts to nieces and nephews and to the heirs of their bodies. For example, suppose one of testator's nieces or nephews died before testator executed his will and this niece or nephew was survived by a child. If the life beneficiary dies leaving no heirs of the body is this child of a deceased nephew entitled under the will to take his parent's share?

If one of testator's nieces or nephews was alive at the execution of the will but predeceased the testator and this nephew or niece was survived by a child, is this child entitled to take his parent's share under the will if the life beneficiary dies leaving no heirs of the body?

If one of testator's nephews or nieces survives the testator but predeceases the life beneficiary and this nephew or niece was survived by a child who also predeceases the life beneficiary, did this child have an interest under testator's will which would pass by testate or intestate succession at the child's death?

If one of testator's nieces or nephews survives the testator but predeceases the life beneficiary leaving only a surviving spouse, did this deceased nephew or niece have an interest under testator's will which would pass by testate or intestate succession to the surviving spouse?

27 1 Simes, Future Interests 115, 132 (1936)
28 Restatement, Property § 278, comment a (1940)
29 5 Am. Law of Property 398 (1952); 3 Page, Wills 257 (1941); 2 Simes, Future Interests 197 (1936); Ohio Rev. Code § 2107.52.
30 5 Am. Law of Property 394 (1952); Ohio Rev. Code § 2107.52.
31 Restatement, Property § 254, comment d, § 261 (1940); 5 Am. Law of Property 151 (1952); 2 Simes, Future Interests 179 (1936)
32 See note 13, supra.
In cases involving future interests there is often in addition to the usual problem of determining the persons who take, the problem of determining the share that each of these persons takes. The gift of a future interest to the heirs of the body of a named person as in the Coyle case and the gift to the testator’s children who are living at a stated time or their legal representatives as in Boblett v. Barbee raise this problem of distribution.

There are three general ways to divide property among the owners of future interests. These three general ways are (a) per stirpes, (b) per capita, or (c) according to the statute of descent and distribution which as to lineal descendants usually provides for per capita distribution when all persons who take are related in the same degree to the testator or the intestate and for a combination of per capita and per stirpes distribution when all persons who take are not so related.

In Boblett v. Barbee, the Franklin County Court of Common Pleas states that the issue is whether “the beneficiaries shall take per stirpes or per capita.” The beneficiaries are testator’s eight grandchildren and four great-grandchildren, the children of a deceased ninth grandchild. These grandchildren and the children of a deceased grandchild are the descendants of testator’s four children. All four of testator’s children survived the testator but predeceased the life beneficiary. The gift in testator’s will was to his children living at the death of the life beneficiary or their legal representatives. The phrase “their legal representatives” was apparently used in the sense of heirs of the body.

Under a per stirpes distribution the testator’s children would have been the stock. The court rejected this construction. Under a per capita distribution each grandchild and each great-grandchild would receive a one-twelfth share. The court apparently thought it directed a per capita distribution when it directed distribution of a one-ninth share to each grandchild and a one-thirty-sixth share to each great-grandchild. But, this distribution is in accordance with the statute of intestate succession in effect at the time for distribution and is a combination of per capita and per stirpes distribution. For the draftsman the important point to remember is that the phrase per capita may be used by draftsmen or by courts to mean equality of distribution among all beneficiaries or equality among all members of a class with the descendants of a deceased member taking his or her share. Also the phrase per stirpes may be ambiguous when it is not clear as to which class is the stock or stirpes.

ROBERT N. COOK

33 See White, Per Stirpes or Per Capita, 13 U. OF CIN. L. REV. 298 (1939); Page, Descent Per Stirpes and Per Capita. [1946] WIS. L. REV. 3.
34 119 N.E.2d 319 (Franklin Com. Pl. 1954).