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Future Interests -- Contingent Remainders -- Intent of Testator

by C. 22079, No. 19, Acts of 1943 F.S.A. Section 194.53, that after the entry of the *decree of foreclosure, all right, title, interest in or liens on such property shall be cut off and extinguished and forever declared null and void and the title to such lands when conveyed by the county shall be construed in all respects as a new original title.*"

The court goes on to say that considering the act as a whole, it was not meant to "punish the man who makes an honest endeavor year after year to pay his taxes as appellants were alleged to have done in this case. Neither was it designed as a ruse to cut one loose from a title that he was offering year after year to preserve." In so construing the act, the court perhaps did do justice as concerned the present Plaintiff, but what the court failed to consider was the vast effect of such a ruling. What guarantee has the purchaser of property from the county, said county having acquired title through valid tax foreclosure proceedings, that the former owner will not come into court and claim that he was "unlettered in the niceties of real estate transactions"[11] thereby nullifying the tax deed? Will title insurance be written on any property where the chain of title has passed through a county in rem foreclosure proceeding? In effect, the court has here ruled that the title to such property acquired from the county is not a "new and independent title",[12] but one which is open to any equitable defenses which the court may consider valid.

The effect of this decision will be far reaching unless it is reversed or modified at some future date. It is shocking to think that after an equity cause is complete, absolute and final, its subject matter may be relitigated de novo in a proceeding for a writ of possession or writ of assistance. Attorneys should continue to litigate this question in all parts of the state and on every possible occasion in the hope that the court will ultimately realize what disastrous effects such decisions have upon real estate titles and will recede from its position.

11 Note 1, supra.

12 F.S.A. 194.53.

FUTURE INTERESTS—CONTINGENT REMAINDERS—INTENT OF TESTATOR

It makes little difference whether the ultimate enjoyment of an interest in remainder is dependent upon a condition precedent or a condition subsequent: if the right of enjoyment cannot be finally assured until determination of the particular[1] estate, a remainder is contingent

1 "Particular estate" is a term of art used to denote the precedent estate, consequent upon which a remainder vests in possession. "This precedent estate is called the *particular* estate, as being only a small part, or *particula,* of the inheritance. 2 Blackstone, "Commentaries on the Laws of England" (1765), *164.

and not vested. This novel statement of the law, contrary to the weight of American authority and the heretofore controlling authority in this state, is the result of a current decision of the Supreme Court of Florida.[2] It has heretofore been held,[3] that a remainder defeasible upon a condition subsequent is a vested remainder.

In the principal case, the court was called upon to construe a will in which the testator created a life estate in trust for his widow, and provided that upon her death, the principal should be divided among several named persons and a charity. The manner of division,[4] although complicated, is not material to the decision. Testator further provided, that if any of the named remaindermen should predecease *both himself and his wife,* the gift should lapse and be divided proportionately among the survivors. Several remaindermen survived testator but predeceased his wife. The personal representatives of these deceased beneficiaries claimed to share in the distribution of the estate after the widow's death, claiming that since their decedents had not predeceased *both* the testator and his widow, their legacies were not divested. The court disregarded this contention, holding that the remainders were contingent.

The court did not discuss the point, but evidently construed the words, "predecease both", as "fail to survive both", or "predecease either". Where there is a patent ambiguity, as here,[5] the court is at

2 Krissoff v. First National Bank of Tampa, 32 So. 2d 315 (Fla. 1947).

3 Redfearn, "Wills and Administration of Estates in Florida" (Second Edition, 1946), § 173. "A vested remainder may be absolutely or defeasibly vested," citing 33 Am. Jur., § 544. See Popp v. Bond, 158 Fla. 185, 28 So. 2d 259 (1947), noted in 21 Fla. Bar Jour. 302 (class gift). Simes, "Law of Future Interests" (1936), § 77. Gray, "Rule Against Perpetuities" (4th ed., 1942) §§ 103, 108: "If the conditional element is incorporated into the description of, or into the gift to, the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested." Compare the rule, that the word, "heirs", will be construed as relating to the death of the testator in order to vest remainder. Lowrimore v. First Savings and Trust Co. of Tampa, 102 Fla. 740, 140 So. 887 (1931). For an illustration of a condition subsequent, see Jenkins v. Merritt, 17 Fla. 304 (1879).

4 The gifts in remainder were of two classes: specific sums to named persons, and a specific share of what was left to named persons. Most, but not all, of the persons named took gifts in both classes. A gift of the first class which lapsed, passed to the second: a gift of the second class which lapsed, was divided proportionately among the surviving legatees.

5 "It is a well-established rule that in construing a will, the court may, in order to give effect to the testator's intention, construe 'and' as 'or', and *vice-versa* . . . This latitude of construction is not to be exercised where the language of the will is explicit and the intent of the testator is not doubtful, but only when necessary in order to support the evident meaning of the testator." 57 Am. Jur. § 1154. See Redfearn,

liberty to disregard the language of the will and to adopt a construction consonant with intent.[6] Accepting, however, the propriety of the decision on this point, the clause appears to be one of divestiture, and the problem, more properly one of determining the scope and effect of a condition subsequent.

The law favors the vesting of remainders.[7] This rule implements a broad policy hostile to restraints on the alienation of land, which also finds expression in the rule that contingent remainders are destructible[8] and the rule against perpetuities,[9] which invalidates remainders that do not vest within a prescribed period. By construing remainders as vested wherever possible, the court avoids the operation of these rules, and at the same time assures the power of a remainderman to join with

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op. cit., § 130; Luxmore v. Wallace, 145 Fla. 325, 199 So. 492 (1941); Marshall v. Hewett, 156 Fla. 645, 24 So. 2d 1 (1945); Floyd v. Smith, 59 Fla. 485, 51 So. 537, 37 L. R. A. (N.S.) 651 (1910). See also, Simes, op. cit., § 363.

6 The ambiguity lies in this, that if the clause is designed to prevent intestacy (when a residuary gift lapses, it is not shared by surviving residuary legatees unless there is language of substitution, see F. S., 1941, § 731.20) with respect to any share, it is inapplicable unless the wife also predeceases testator, which may be said to be an exceptional case; and because the donee must always predecease the testator, it can never operate in a case like the present. Literal construction would therefore render the clause virtually inoperative, which may be sufficient to permit the application of rules of construction. By substituting "either-or" for "both-and", the clause becomes operative not only to prevent lapse, but also to avoid the necessity of reopening estates to make distribution where a beneficiary predeceases the life tenant.

7 See Story v. First National Bank and Trust Co. in Orlando, 115 Fla. 436, 156 So. 101 (1934); Redfearn, op. cit., § 130; Simes, op. cit., §348. "The law favors the vesting of estates, and therefore prefers to construe conditions as subsequent rather than precedent." Gray, op. cit., §103. See also Porter v. Baynard, 158 Fla. 294, 28 So. 2d 890 (1946); Sorrells v. McNally, 89 Fla. 457, 105 So. 106 (1936); Bross v. Bross, 123 Fla. 758, 167 So. 669 (1936); Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930).

8 Popp v. Bond, 158 Fla. 185, 28 So. 2d 259 (1947); Tankersley v. Davis, 128 Fla. 507, 175 So. 501 (1937); Lewis v. Orlando, 145 Fla. 285, 199 So. 49 (1940); Wallace v. Wallace, 118 Fla. 844, 160 So. 377 (1935); see Blackstone, op. cit. § 171; Redfearn, op. cit., § 173.

9 There has been some dispute on this point, the destructibility of contingent remainders being thought by some to satisfy the policy of the law; but it is applicable to executory devises. Redfearn, op. cit., 169; Blackstone, op. cit., *174; Simes, op. cit., § 505; Gray, op. cit., § 99, *passim*. A construction is favored which avoids conflict with the rule against perpetuities. See Story v. First National Bank & Trust Co. in Orlando, 115 Fla. 436, 156 So. 101 (1934); Remier v. Smith, 105 Fla. 671, 142 So. 603 (1932); Maiben v. Bob, 6 Fla. 381 (1855).

the life tenant in a conveyance. These rules have been followed in Florida.[10]

It may be argued in the present case that it is immaterial whether the interest of the deceased remainderman be treated as defeasibly vested or contingent. Accepting the construction of the words "predecease both" which the court adopted, the interest would have been defeated even if regarded as vested. The rule that a divesting clause is to be strictly construed[11] might not have led to a different result in this case. However, the ruling of the court may cause trouble in a case where the widow elects to take against the will,[12] or where the divesting event might not take place within lives in being and twenty-one years.[13]

In declaring that the intent of the testator controls the determination whether a remainder is vested or contingent, which is undoubtedly correct[14] there is grave danger that the court will overlook the fact that the distinction between vesting in interest and vesting in possession is seldom apparent to the testator. Contingent remainders result by operation of law from the expression of intent that the ascertainment of the beneficiary's identity or his right to succeed the life tenant must depend on some future event other than the determination of the particular estate.[15] A remainder is vested if nothing but the determination

10 See cases cited, notes 2, 6, *supra*.

11 57 Am. Jur. § 1217.

12 See Wallace v. Wallace, 118 Fla. 844, 160 So. 377 (1935).

13 See note 8, *supra*.

14 "In this process (construction of will) three elements are always present. First, there is the idea in the mind of the testator, this 'intent' so often described as the 'pole star of construction' ".

Simes, op. cit., § 305. "These general rules all give way to the cardinal one, that a will must be construed so as to give effect to the intent of the testator." Terrell, J., in the principal case. Blackstone, op cit., *379; Redfearn, § 130. But see Gray, "The Nature and Sources of the Law" (2d ed., 1927) 174; "It undoubtedly sounds very prettily to say that the judge should carry out the intention of the testator. Doubtless he should; but some judges, I venture to think, have been unduly influenced by taking a fiction as if it were a fact. It would seem that the first question a judge ought to ask with regard to a disputed point under a will should be: 'Does this will show that the testator had considered this point and had any actual opinion upon it?' . . . If this question be answered in the affirmative, then there is no doubt that the solution of the testator's intention must be sought in the will. But in the vast majority of cases this is not what has happened." See also Gray, "Rule Against Perpetuities", § 103, note 1.

15 "It is true, the courts frequently say that the difference between a vested and contingent interest is a matter of intent. But, when that statement is made, it means, or should mean, that a remainder is vested or contingent depending on the existence or absence of an intent that there be no conditions precedent attached to the limitation." Simes, op. cit., § 305.

of the particular estate conditions the remainderman's right to possession. In either case, the estate is contingent, in testator's mind, upon termination of the particular estate, and it is therefore a mistake to regard language of postponement as showing an intent to make the remainder contingent.[16] While the court has recognized this canon of construction,[17] it appears to have been misapplied in the principal case.[18]

Very little weight and much less dignity are added to the opinion by a gratitous review[19] of some political questions, which we had considered settled extrajudicially, *vi et armis*, more than eighty years ago. Rules of the law of property are not explained by reason, but by history.

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16 "Words of postponement are usually construed to relate to the possession or enjoyment of the remainder rather than to its vesting in title interest, and the intent to postpone the vesting of the remainder must be clear and manifest." Redfearn, op. cit., § 173. "If futurity is annexed to the subject of the gift, the vesting is suspended; but if it appears to relate to the time of payment or enjoyment only, the gift vests at once." 57 Am. Jur. § 1220. "Nor will a remainder be contingent merely because a testator has said it is not to vest until a subsequent period." Simes, op. cit., § 70. Use of words such as "distribute" and "pay" do not show an intent to delay vesting. Williams v. Williams, 73 Cal. 99, 14 P. 394 (1887), Roberts v. Wehmeyer, 191 Cal 601, 218 P. 22 (1923); Chigizola v. Le Baron, 21 Ala. 406 (1853); Sheet's Estate, 52 Pa. 257 (1866). See annotation, 1915 C.L.R.A. 1012, 1064.

17 "If the element of futurity is annexed to the substance of the gift rather than the enjoyment of it, vesting is suspended and the gift is contingent." Terrell, J., in Travis v. Ashton, 456 Fla. 529, 23 So. 2d 725 (1945), cited and approved in the principal case.

18 The court found futurity "in substance" from the following factors: (1) payment to the life tenant from the trust estate; (2) the will shows on its face that the legacies of neither class vested until "after the death of my wife"; (3) the will shows that a condition of vestiture was that they survive "both" the testator and his wife; and (4) that the terms of the will nowhere show any obligation or desire on the part of the testator to pay anything to the heirs or personal representatives of any of the legatees. It is believed that the first three factors are as consistent with delay in enjoyment as with delay in vesting, and do not therefore compel the result that the remainder is contingent; and as to the fourth, this is an unwarranted assumption. Likewise in Travis v. Ashton, 456 Fla. 529, 23 So. 2d 725 (1945), the court mistook expressions relating to time of enjoyment for conditions precedent to vestiture.

19 "The Jeffersonian dictum that 'all men are created equal' likewise 'scotches' the point (i. e., the contention that this was a vested remainder) in that it was designed to raise an American citizen to the level of an Englishman, no one ever thought that it raised an American slave to the level of an American merchant or planter. So it follows that legal concepts vanish into thin air when supported by nothing more than assumptions which are contrary to fact." 32 So. 2d 315, at 317 (Fla.).

The rules in question were old when the Great Charter was still in its infancy; but the necessity of certainty and precision in determining the quality of interests in property, has preserved them intact to the present day.

CONSTITUTIONAL LAW—INTERSTATE AND FOREIGN COMMERCE—LIMITATION ON POWER OF STATES TO REGULATE

With the power of the federal government to regulate agriculture, labor, industry and business under the commerce clause[1] greatly expanded as the result of recent decisions,[2] attention has been focused upon the corresponding problem of the extent to which the grant of power to the federal government to regulate interstate and foreign commerce constitutes a limitation upon the power of the states.[3] A recent decision in the case of Bob-Lo Excursion Co. v. People of State of Michigan[4] may serve to redefine the extent of that limitation.

The excursion company operated an amusement park upon an island in Canadian waters fifteen miles from Detroit, and steamships by which persons were brought to and from Detroit. No passengers were accommodated overnight on the island or for passage to points beyond. Officers ejected a colored girl who came aboard with a party, otherwise composed of white girls. The excursion company was for this reason convicted of a misdemeanor under a state statute[5] which forbade denial of equal accommodations on public conveyance to any persons because of color. Appealing from a decision of the State Supreme Court affirming the conviction, the carrier contended that the state statute transgressed the limitations of the commerce clause, relying on two earlier decisions, one[6] of which held a state statute requiring equality of accommodation for colored passengers inapplicable to a packet plying in interstate commerce, and the other[7] of which held a state

1 U. S. Const., Art. 1, § 8, cl. 3.

2 See, e.g., Wickard Filburn, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1943); United States v. Darby Lumber Co., 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941); United States v. South-Eastern Underwriters' Association, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

3 See Dowling "Interstate Commerce and State Power Revised Version" 47 Columbia L. Rev. 546 (1947).

4 68 S. Ct. 358 (U.S. 1948).

5 Michigan Civil Rights Act, Penal Code §§ 146-8, as amended Public Act 117, 1937; Mich. Stats. Ann. (1946) Cum. Supp. §§ 28.343-6. The text of the Act is given in a marginal note to the principal case.

6 Hall v. de Cuir, 95 U. S. 485, 24 L. Ed. 547 (1878).

7 Morgan v. Commonwealth of Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 574 (1946).