Marquette Law Review

Volume 36
Issue 2 *Fall 1952*

Article 9

1952

Future Interests - Construction of Conveyance to "A and His Children" - Rule in Wild's Case

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member of a secret organization dedicated to the attainment of unlawful objectives.[13] The underlying theory for this rule is to allow the jury to draw the inference that since the defendant is a member of such an organization it is reasonably probable that he would have a motive or purpose for committing the crime charged, and therefore the conclusion to be drawn would be that the defendant, with reasonable probability, was guilty of the crime charged.[14]

In Wisconsin the general rule of law is followed disallowing evidence of a prior offense by the accused,[15] ostensively submitted to show guilt of the crime charged, but such evidence is admissible when the prior offense directly tends to prove some element of the crime charged.[16] The test to determine the competency of the evidence was given in the *Spick* case where the court said that the trial court must admit the evidence if (1) the evidence logically and reasonably tends to prove a fact in issue, and (2) there is a reasonable probability of the truthfulness of the evidence to be admitted;[17] and the fact that the evidence is circumstantial,[18] or may be prejudicial,[19] is no ground for its exclusion. If there is a connection between the two acts so as to show "plan, design and intent" the evidence is admissible.[20]

In this writer's opinion it would appear that the Wisconsin court, if confronted with an analogous situation, would follow the principle of the *Spick* case[21] and would concur with the majority in the instant case.

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Future Interests—Construction of Conveyance to "A and His Children"—Rule in Wild's Case—Certain land had been deeded by a grantor to his wife and their children. At the time the deed took effect the grantor and his wife had five living children, but another child was subsequently born. After the wife's death, condemnation proceedings

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[13] Jenkins v. Commonwealth, 157 Ky. 544, 180 S.W. 961 (1915); Carroll v. Commonwealth, 84 Pa. 107 (1877); Campbell v. Commonwealth, 84 Pa. 187 (1877); Hester v. Commonwealth, 85 Pa. 138 (1877); McManus v. Commonwealth, 91 Pa. 57 (1879).

[14] Commonwealth v. Fragassa, 278 Pa. 1, 122 A. 88 (1923).

[15] Ablricht v. State, 6 Wis. 74 (1857); Schaser v. State, 36 Wis. 429 (1874); State v. Miller, 47 Wis. 530, 3 N.W. 31 (1879); McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901); Malone v. State, 192 Wis. 379, 212 N.W. 879 (1927); State v. Henger, 220 Wis. 410, 264 N.W. 922 (1936).

[16] Zoldoske v. State, 82 Wis. 580, 52 N.W. 778 (1892); Fossdahl v. State, 89 Wis. 482, 62 N.W. 185 (1895); Paulson v. State, 118 Wis. 89, 94 N.W. 771 (1903); Dietz v. State, 149 Wis. 462, 136 N.W. 166 (1912); Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925); State v. Meating, 202 Wis. 47, 231 N.W. 263 (1930).

[17] Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909).

[18] *Ibid.*; Schwantes v. State, 127 Wis. 160, 106 N.W. 237 (1906).

[19] Herde v. State, 236 Wis. 408, 295 N.W. 684 (1941).

[20] *Ibid.*

by the U. S. government to acquire the land were held and a question arose concerning distribution of the condemnation award. *Held:* The conveyance to the grantor's wife and their children created a life estate in the wife with remainder in fee to all children of the grantor and his wife, both living and afterborn. *United States v. 654.8 Acres of Land in Roane County, Tenn. et al., 102 F. Supp. 937 (E.D. Tenn. 1952).*

When a grantor or testator gives property to "A and his children," a problem arises as to whether he intended a concurrent or a successive gift. The law regarding such dispositions grew out of *Wild's Case,* a famous English decision handed down in 1599.[1] There are two "resolutions" which stem from this case, one applying where the grantee or beneficiary has no children when the instrument takes effect, the other when the grantee or beneficiary has children at that time. Since the latter situation is that of the instant case we are concerned only with the second resolution, which, in its modern form, is as follows: A devise or conveyance to A and his children, A having children living at the time, vests the estate in A and his living children as cotenants, to the exclusion of any children afterward born.[2]

Although the two resolutions in Wild's Case were pure dicta, they have been the basis for countless decisions throughout the years in both England and America.[3] The second resolution is the majority rule in the United States today.[4] However, it is only a rule of construction and will yield to a contrary intent. Sometimes additional factors showing such intent indicate use of the world "children" as a word of limitation rather than a word of purchase, so an estate in fee simple goes to the named person.[5] Usually, however, additional factors justify the life estate and remainder construction.[6]

In the instant case the apparent result is that such additional factors call for the life estate and remainder construction. However, the Tennessee court, although paying lip service to the second resolution in Wild's Case, actually repudiates it. It states that the rule is followed, but that a slight indication of a variant intent takes a case out of the

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[1] Wild's Case, 6 Coke 16 b, 77 Eng. Reprint 277 (1599).
[2] Porter v. Henderson, 203 Ala. 312, 82 So. 668 (1919); Wills v. Foltz, 56 S.E. 473, 61 W. Va. 262, 12 L.R.A. (N.S.) 283 (1907). For collected cases, see Notes, 161 A.L.R. 612 (1946); L.R.A. 1917 B 49; and L.R.A. 1917 B 76. Also, see Casner, *Construction of Gifts "To A and His Children" (herein the Rule in Wild's Case),* 7 U. CHI. L. REV. 438 (1940) for an excellent discussion of the problems involved in the second resolution in Wild's Case.
[3] 3 Powell, THE LAW OF REAL PROPERTY 101 (1952); 2 SIMES, THE LAW OF FUTURE INTERESTS 201 (1936).
[4] 3 POWELL, *ibid.,* at 103; 2 SIMES, *ibid.,* at 209; Casner, *supra,* note 2, at 454; and cases cited.
[5] Payne v. Kennay, 151 Va. 472, 145 S.E. 300 (1928).
[6] Desmond v. MacNeill, 90 Conn. 142, 96 A. 924 (1916); Casner, *supra,* note 2, at 456, n.78.

rule.[7] The instant case is a good illustration of the weak excuses which are used under Tennessee law to controvert the rule. The court says that because the grantor in the consideration clause said, "for and in consideration of the love and affection I have for *Alice Brooks* . . . I, S. M. Brooks doth convey . . . ," he showed a purpose to favor his wife by thus singling her out. The court therefore concludes that a life estate in the wife was intended.[8] Similar excuses are used to get around the rule in other Tennessee cases.[9] The Tennessee court *does* say that the rule applies in one case, i.e. where a conveyance is to one and his children *without more*.[10] However, such a situation is hardly conceivable in view of the way the courts attach importance to seemingly insignificant phrases, as in the instant case.

The reason for Tennessee's repudiation of the second resolution in Wild's Case is a belief that it was the intention of the grantor or testator that afterborn children should share.[11] They are excluded if the gift is immediate, since the class of beneficiaries closes when the gift takes effect.[12] But under the life estate and remainder construction afterborn children are normally included, since the class can increase during the life estate in the parent.[13]

Two other states, Kentucky and Pennsylvania, also repudiate the second resolution in Wild's Case, but they do so more affirmatively. They declare the law to be that a devise or conveyance to A and his children creates a life estate in A with remainder to the children.[14] In both states one of the reasons for adopting the life estate and remainder construction is the reason advanced in Tennessee, i.e. to allow afterborn children to share.[15] Kentucky, however, has an additional reason in the case of a devise to one's wife and children. If the wife were to

[7] United States v. 654.8 Acres of Land in Roane County, Tenn. et al., 102 F. Supp. 937, 940 (E.D. Tenn. 1952); Blackburn v. Blackburn, 109 Tenn. 674, 679, 73 S.W. 109, 110 (1902); Beecher v. Hicks, 7 Lea 207 (Tenn. 1881).

[8] United States v. 654.8 Acres of Land in Roane County, Tenn. et al., *ibid.*, 940, 941.

[9] Blackburn v. Blackburn, *supra*, note 7; Beecher v. Hicks, *supra*, note 7; Moore v. Simmons, 2 Head 545 (Tenn. 1859).

[10] United States v. 654.8 Acres of Land in Roane County, Tenn. et al., *supra*, note 7; Beecher v. Hicks, *ibid.*

[11] See cases in note 7, *supra*.

[12] Moore v. Ennis, 10 Del. Ch. 170, 87 A. 1009 (1913); Biggs v. McCarty, 86 Ind. 352, 44 Am. Rep. 320 (1882); Cullens v. Cullens, 161 N.C. 344, 77 S.E. 228, L.R.A. 1917 B 74 (1913); 2 SIMES, *op. cit. supra*, note 3, at 214.

[13] Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922); Elliot v. Diamond Coal & Coke Co., 230 Pa. 423, 79 A. 708 (1911); Hague v. Hague, 161 Pa. 643, 29 A. 261 (1894); 3 POWELL, *op. cit. supra*, note 3, at 105; Casner, *supra*, note 2, at 459; RESTATEMENT, PROPERTY sec. 295 (1940).

[14] Virginia Iron, Coal & Coke Co. v. Dye, 146 Ky. 519, 142 S.W. 1057 (1912); Elliot v. Diamond Coal & Coke Co., *ibid.*

[15] Forest Oil Co. v. Crawford, 77 Fed. 106 (3d Cir. 1896); Hall v. Wright, 121 Ky. 16, 87 S.W. 1129 (1905); Fletcher v. Tyler, 92 Ky. 145, 17 S.W. 282, 36 Am. St. Rep. 584 (1891); Webb v. Holmes, 3 B. Mon. 404 (Ky. 1843); Elliot v. Diamond Coal & Coke Co., *supra*, note 13; Vaughn's Estate, 230 Pa. 554, 79 A. 750 (1911); Casner, *supra*, note 2, at 458.

take a fee simple in part of the land devised, there would be a possibility that this part would pass to some stranger to the blood of the testator. The Kentucky court believes that such a result would be contrary to the testator's intention.[16]

In contrast to the above reasons for repudiating the second resolution in Wild's Case, there are three main reasons advanced for adherence to the rule. They are: (1) such a construction is in conformity with the plain import of the words;[17] (2) if a life estate and remainder were intended, it would have been natural and easy to expressly say so;[18] (3) public policy, favoring the free alienation of land, is against the life estate and remainder construction.[19]

However, because of the importance of effectuating the intent of the grantor or testator, the life estate and remainder construction appears to be more reasonable than the concurrent ownership construction. One ordinarily thinks of parent and children enjoying property successively and not concurrently. Since the average grantor or testator probably has this in mind and since he also probably wants to benefit all of A's children, whenever born, his probable intention is more likely to be carried out by the life estate and remainder construction.[20]

The problem of construction involved in a conveyance or devise to A and his children has never been before the Wisconsin Supreme Court. Careful drafting of deeds and wills eliminates the problem, but if it ever does arise, it is suggested that the life estate and remainder construction be adopted for the reasons given above.

WILLIAM A. GIGURE

Bailments — Effect of Statute Imputing Negligence of Conditional Vendee, Bailee, or Negligence of Agents, Servants or Employees of said Vendee or Bailee to Conditional Vendor or Bailor—Plaintiff brought an action against defendant for damages to plaintiff's automobile which damages resulted from a collision between defendant's automobile and plaintiff's automobile, the latter being driven by an employee of plaintiff's bailee. The bailor-bailee relationship arose out of the commonly known "rent-a-car" contract, but it

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[16] Shelman & Co. v. Livers' Exec'r, 229 Ky. 90, 16 S.W. 2d 800 (1929); Lacey's Exec'r v. Lacey, 170 Ky. 160, 185 S.W. 495 (1916); Davis v. Hardin, 80 Ky. 672 (1880).

[17] Moore v. Ennis, *supra*, note 12. Also, see Note, L.R.A. 1917 B 49, 50, 51.

[18] Graham v. Fowler, 13 Serg. & R. 439 (Pa. 1826). Also, see Note, L.R.A. 1917 B 49, 51.

[19] Ewing v. Ewing, 198 Miss. 304, 22 So. 2d 225, 227, 228, 161 A.L.R. 606, 610, 611 (1945).

[20] Casner, *supra*, note 2, at 459. The life estate and remainder construction is embodied in PROPOSED UNIFORM PROPERTY ACT SEC. 13. However, the RESTATEMENT, PROPERTY sec. 283 (a) (1940) follows the second resolution in Wild's Case.