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Future Interests--Implied Condition of Survival

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or whether due care was exercised.¹⁹ But an exception to the general rule exists where safety of the structure or appliance or method is such a technical matter that the jury would be unable to make a determination itself, and in such a case expert opinion may be admitted.²⁰ Even where an objection by defense counsel, on grounds the testimony sought is an opinion, would be sustained, however, such an objection would be detrimental. It takes little imagination to feature the reaction of a juror to defense counsel's objection to plaintiff's questioning an employee of defendant whether the appliance was safe.

It is true that an instruction will be given if requested that the evidence is admissible only for impeachment purposes and for no other.²¹ But admitting the evidence and instructing the jury is not the same as keeping the evidence out altogether. If a juror has the information, it is difficult or impossible for him to restrict its use entirely to the admissible purpose.

Thus it would seem advisable to restrict a plaintiff's right to impeach by evidence of subsequent precautions to cases where the defense has itself introduced the evidence which is subject to impeachment or where the evidence was actually volunteered by the plaintiff's witnesses testifying under section 2055. Such a restriction would be in accord with the social policy that long justified the rule requiring the exclusion of such evidence. Has the *Daggett* case buried this policy without acknowledging the fact of its death? Future cases alone will tell.

Helen Barrett

FUTURE INTERESTS—IMPLIED CONDITION OF SURVIVAL

T dies, and in his will devises Blackacre "to *B* for life, remainder to *B*'s children." At *T*'s death *B* has one child, *C*. If *C* predeceases the life tenant, is his interest transmissible to his successors, or does it terminate by reason of his failure to survive? In other words, where the remainder is to go to the children of the life tenant is the interest of such a child subject to the condition that he survive the life tenant?

In California, as at common law, there is a presumption in favor of early vesting.¹ What evidence is necessary to raise an implied condition of survival which will rebut this presumption? The intent of the testator will control in the construction of any such clause.² But the difficulty lies in the fact that very often testators fail to foresee the possibility that children will not survive their parents. In such a case the courts are called upon to construe either a nonexistent or an ambiguously defined intent.

Such was the problem presented to the California Supreme Court in *Estate of Stanford*,³ where it was necessary to construe one phase of the will of Jennie Lathrop Stanford. It created a trust for the benefit of testatrix' niece, Amy L. Hansen, for life, and "upon her death (the) trust shall cease" and the corpus "shall belong and be delivered to the child or children of" Amy. Stanford University was named as the residuary legatee. At the time of the testatrix' death

¹⁹ CAL. JUR. 2d, *Evidence* § 361 (1954).

²⁰ *Bundy v. Sierra Lumber Co.*, 149 Cal. 772, 87 Pac. 622 (1906).

²¹ *Hatfield v. Levy Brothers*, 18 Cal. 2d 798, 117 P.2d 841 (1941).

¹ CAL. PROB. CODE §§ 28, 123.

² *Estate of Puett*, 1 Cal. 2d 131, 33 P.2d 825 (1934).

³ 49 Cal. 2d 315 P.2d 681 (1957).

Amy had one child, Walter. Amy and her son both survived the testatrix, but Walter predeceased his mother, dying without issue and bequeathing his estate to Ruth Barton. The court in a 4 to 3 decision reversing the Superior Court, Santa Clara County, held that no condition of survival would be implied, and that, therefore, Ruth Barton took as successor to Walter.

Both the majority and minority agreed that Walter's interest was subject to partial divestment in the event of other children coming into existence.⁴ But the dissent felt that it was also subject to complete divestment by Walter's predeceasing his mother. In holding that Walter's interest was not so subject, the majority expressly disapproved four earlier California cases, *Estate of Blake*,⁵ *Estate of Cavarly*,⁶ *Estate of Clark*,⁷ and *Estate of Hamon*,⁸ wherein conditions of survival had been implied in construing similar dispositions. The holding of the *Stanford* case would seem to be correct and in accord with section 296 of the Restatement of Property, which reads as follows:

"(2) From the fact that a class can increase in membership until a certain future date, no inference should be made that only such members of the class as survive to such future date become distributees."⁹

The *Clark* and *Cavarly* cases, and also the dissent in the *Stanford* case, did imply such a condition on the basis that the gift was to a class. In doing so the court in the *Cavarly* case relied on a statement made in Gray on Perpetuities that "it is a rule of construction of a gift to a class that only those are included who are in the class at the time of distribution."¹⁰ As pointed out by Professor Ferrier,¹¹ Gray made this statement in consideration of the problem as to when the class closed so that *after born* members would not be allowed to qualify. In its proper context the meaning of the quotation from Gray is merely that those *not yet born* at the time of distribution will never share in the interest.

In the *Stanford* case the dissent falls prone to the same error of quoting out of context. Quoting from Simes and Smith,¹² the minority says:

"Where a gift to a class is postponed, so far as distribution is concerned, until the termination of a prior life estate, it is clear that the general rule of construction would permit the class to increase until the end of the life estate, *but would exclude all members of the class who were not in being at the termination of the life estate.*"¹³ (Emphasis added)

⁴ After Walter's death, Amy Hansen adopted as her children, an adult and her two children. The majority of the court held that they, also, became members of the class "child or children." To reach this decision extrinsic evidence was admitted from which it appeared that Jennie believed an adopted child would have the same rights as a natural child. The court felt that this showed intent which would rebut the usual rule that such adoptees do not fall within the class. The dissent felt that such evidence is an insufficient showing of intent to abrogate the established rule. Annot., 144 A.L.R. 670, 676 (1943), 70 A.L.R. 621, 626 (1931).

⁵ 157 Cal. 448, 108 Pac. 287 (1910).

⁶ 119 Cal. 406, 51 Pac. 629 (1897).

⁷ 64 Cal. App. 2d 636, 149 P.2d 465 (1944).

⁸ 136 Cal. App. 517, 29 P.2d 326 (1934).

⁹ RESTATEMENT, PROPERTY § 296 (1940).

¹⁰ 119 Cal. at 410, 51 Pac. at 630.

¹¹ Ferrier, *Implied Condition of Survivorship in Gifts of Future Interests in California*, 40 CALIF. L. REV. 49, 58 (1952).

¹² SIMES & SMITH, FUTURE INTERESTS § 640 (1956).

¹³ *Id.* at 78.

Simes and Smith in the section from which this passage was quoted, were discussing the advisability of closing the class at the end of the life estate, and the reference, as was Gray's, was to those members not *yet* in being rather than to those who did exist but died.

In addition, in the *Clark* and *Cavarly* cases the court failed to apply section 123 of the Probate Code, which reads as follows:

"A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes all persons coming within the description before the time to which possession is postponed."¹⁴

While not conclusive on the problem, the first clause is a recognition of the rule in favor of early vesting, and by implication would seem to negate any requirement of survival to the time to which distribution is postponed.¹⁵

Other early California cases appear to make a distinction between words of gift which are said to pass a present interest and those which are deemed to be in futuro. In the former instance the gift is said to be immediate, with postponement only as to the time of possession. In the latter, a condition of survival is said to be annexed to the substance of the gift.¹⁶ *Estate of Blake* is an illustration of the application of this distinction. In this case there was no intermediate life estate. The gift was in trust to pay the income to two daughters and a granddaughter until each arrived at the age of thirty. Then "as each . . . arrives at the age of thirty, she shall have the right to demand and receive one-third of the rest and residue of my estate as her distributive share thereof." (Emphasis added.) One basis for requiring survival to age thirty was that the right "to demand and receive" was future, and therefore the gift was contingent on survival.

In *Estate of Hamon* the words were "*shall deliver*" the property at the expiration of twenty years, and survival to that time was held to be a condition precedent. However, in three other California cases no condition of survival was found from similar words. In *Keating v. Smith*¹⁷ the trust corpus was "*to go to*" the testator's widow at the expiration of a period measured by the minority of the children; in *Estate of Wallace*¹⁸ the trustee "*shall distribute*" the trust property upon the death of the life tenant; and in *Estate of Norris*¹⁹ the trustee "*shall grant and deliver*" at the death of named persons. In these last three cases it was felt that the words quoted referred merely to delivery of possession rather than passage of title. Finding any apparent distinction between these phrases would appear to be an arbitrary approach to discerning the testator's intent.

In the *Stanford* case the terms of the trust were couched in words similar to those in the cases abovementioned. Here the will provided that upon the termination of the life estate the trust corpus "shall belong and be delivered to" the children of Jennie. The court properly found that this clause is no different from "go to," the words in the *Keating* case. It concluded that such phrases have no technical meaning but are terms common in everyday usage which may refer to delivery of possession only, and are, therefore, not controlling in the determination as to

¹⁴ CAL. PROB. CODE § 123.

¹⁵ See Ferrier, *supra* note 11, at 59.

¹⁶ Clobberie's Case, 2 Vent. 342 (1677).

¹⁷ 154 Cal. 186, 97 Pac. 300 (1908).

¹⁸ 11 Cal. 2d 338, 79 P.2d 1094 (1938).

¹⁹ 28 Cal. App. 2d 152, 177 P.2d 299 (1947).