WILLS - CONVEYANCES CONDITIONED ON GRANTOR'S DEATH - CONTRACTS FOR POSTHUMOUS PERFORMANCE

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WILLS — CONVEYANCES CONDITIONED ON GRANTOR'S DEATH — CONTRACTS FOR POSTHUMOUS PERFORMANCE — By an instrument entitled a lease, the owner of a country estate agreed with the Y.M.C.A. that the latter should have a lease of the land for his life in consideration of the payment of taxes
and the maintenance and improvement of a boys' camp on the premises. Further, if at his death the lease were in good standing (a right of entry for condition broken having been reserved), then the Y.M.C.A. was to receive full title to the land. Pursuant to the agreement the camp was operated, and at the lessor's death the Y.M.C.A. was in possession in good standing. In an action by the Y.M.C.A. for a decree directing the executor of the lessor's estate to execute full deeds to it, the heirs of the lessor denied the validity of the "lease" to give any rights surviving the lessor's death. Held, the Y.M.C.A. had no right to title in the land; the deceased had attempted a testamentary disposition of his property which failed under the statute of wills. In re Murphy's Estate, (Wash. 1938) 75 P. (2d) 916.1

The mechanics to which one may resort in providing for the posthumous disposition of his property are characteristically restricted by a broad public interest making invalid those devices susceptible of fraudulent misuse.2 This broad policy is effectuated by the formalism of wills, trusts and present deeds, and by the rigid requirements for adequate consideration in contracts for posthumous performance.3 Only if the policy is carefully observed and the mechanical requirements closely followed, may one continue the enjoyment of his property for life and yet be assured that the courts will enforce his provisions for later distribution.4 The validity of these devices is unquestioned, despite the definite testamentary savor of many contracts, deeds, and trusts.5 The difficulty

1 After a former hearing as reported in 71 P. (2d) 6, (1937), the court had upheld the instrument as a valid and enforceable contract for posthumous performance. The division of the court there was four to five. One justice retired and his successor, on the rehearing herein considered, changed the complexion of the court five to four against the validity of the instrument.

2 Posthumous dispositions of property were effective by a "testament in writing or otherwise by an act lawfully executed" under the Statute of Wills, 34 & 35 Hen. 8, c. 5 (1542). The difficulty of combatting the fraud which followed led to the enactment of the Statute of Frauds, 29°Car. 2, c. 3 (1676), "for prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury." Similar difficulties of proof require a certain restriction in other methods of disposition. Cf. Hamlin v. Stevens, 177 N. Y. 39 at 47, 69 N. E. 118 (1903).


4 The courts are not at all uniform in the strictness with which they require that wills conform to the formality set by statute, or that instruments of testamentary force be drawn as wills. See 16 Bost. Univ. L. Rev. 269 (1936) for the suggestion that courts strict in one respect will be strict in both. This accounts for the decision in American University v. Conover, 115 N. J. 468, 180 A. 830 (1936).

5 The postponement of the actual transfer of property till death, plus a certain power of revocation reserved to the transferor, are the qualities generally referred to as testamentary. The first may be found equally in contracts, deeds and trusts. The second quality may be realized to a degree in contracts [see 20 Col. L. Rev. 468 (1920)], to a considerable extent as to deeds [see Ballantine, "When Are Deeds Testamentary?" 18 Mich. L. Rev. 470 (1920)], and practically completely as to trusts [see 28 Mich. L. Rev. 603 (1930)].
attending the enforcement of these inter vivos devices arises when the actual transfer of property is conditioned or contingent upon circumstances at the death of the transferor. If the instrument is a conveyance, the problem is to determine the nature of the interest created at its execution, a matter of interpreting the intention of the grantor. The interest may be contingent or vested, present or future; but if positively conveyed, the fact that it ripens to full title on the grantor’s death is a fact of no more significance than the setting of any other date. If the instrument in the instant case were to be considered a conveyance, it is submitted that whether the grantor created a contingent estate on a condition precedent (the good standing of the lease at death), or a fee simple with a power of termination reserved for life, either interest was placed by the grantor beyond his control without need for further act on his part to give the Y.M.C.A. full right to the premises. The contrary ruling of the court that the condition made the conveyance ineffective till death and so testamentary would seem logically to make deeds invalid whenever the grantor so much as reserves a life estate. But the court, in part at least, considered the instrument as a contract. So regarded, the same rules of construction would indicate that the promisee held an equitable interest surviving the death of the promisor, which interest became absolute upon the performance of the consideration stipulated. This would follow whether the property was promised as a bequest, as against the estate, or as a direction to the promisor’s executors to convey subsequently. Either way, the contract would be enforceable at law

7 11 A. L. R. 23 (1921); Hall v. Hall, 206 Iowa 1, 218 N. W. 35 (1928).
8 The problem is that of construing a condition as precedent or subsequent. See Rannel v. Rowe, 74 C. C. A. (8th) 376, 145 F. 296 (1906). If possible, courts will construe a remainder as vested, Warne v. Sorge, 258 Mo. 162 at 171, 167 S. W. 967 (1914), but not, of course, against the intent of the parties as drawn from the instrument. Note that if the estate did not vest till the contingency, it was the terms and not the nature of the instrument that produced this result.
9 The court may have been correct in considering the remainder to the Y.M.C.A. as contingent, vesting only on Murphy’s death. But it is not clear whether the court, in demanding that “the present interest required to be transferred . . . within the meaning of the rule, is an interest which will survive the death of the grantor”—75 P. (2d) 916 at 919—would require possession to antidate the grantor’s death, or only that the estate vest prior to his death. See Young v. O’Donnell, 129 Wash. 219, 224 P. 682 (1924), as indicating the probable attitude of the court to recognize such conveyances.
10 20 Col. L. Rev. 468 (1920). For a list of the types of consideration given for the promise of the property, see 68 C. J. 571, note 56 (1934).
13 In re Fuhrmann’s Estate, 209 Wis. 218, 244 N. W. 628 (1932).
14 Damages might be given on an anticipatory breach theory even before the death of the promisor. See Synge v. Synge, [1894] 1 Q. B. 466 (1894). As to
or in equity.\textsuperscript{15} The court held, nevertheless, that the consideration was given solely for the life interest, making the remainder a mere gratuity which failed as an attempted testamentation.\textsuperscript{16} It is submitted that in this construction the court did grave violence to the expressed intention of the parties. The scheme of the promisor was entire, not separated into a contract and a gratuity; the consideration itself contemplated an enduring estate in the Y.M.C.A.; the mechanics of the plan were surrounded with an abundance of formality and a certainty in detail that negatived any possibility of the misuse of the arrangements for fraudulent purposes. It is submitted that the court groped unnecessarily to find a vested remainder in the Y.M.C.A. before consenting to effectuate the instrument as a conveyance, and that, as a contract, the instrument stipulated an adequate consideration for a posthumous transfer.

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damage awards given against the estate of the promisor, see Brooks v. Yarbrough, (C. C. A. 10th, 1930) 37 F. (2d) 527 at 531.


\textsuperscript{16} In 75 P. (2d) at 919, the court said, "The leasehold interest which passed to the respondent passed by virtue of the leasing contract and not under the provisions of paragraph 24 of the contract. ... [That] paragraph provides that the property is to become, on the death of the lessor, the property of respondent. This is the same direction that would have been given in an instrument expressly named as, and intended by the maker to be, a will." Paragraph 24 provided that "said transfer and passing shall not be regarded as a gift or devise, but for a good and sufficient consideration" (the services under the lease). Cf. the treatment of the provision by the (ultimate) minority on the first hearing, 71 P. (2d) at 12.