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between the authority and the labor organization...."[53] in which the decision of the arbitration board is to be final and binding.[54]

It is submitted that the legislature would have explicitly stated that the employees of the Transit Authority had the right to strike against the government if such had been its intention, and so drastic a remedy, which greatly infringes on the rights of the government should logically come from the legislature or the people and not "by the unicameral act of a majority of court."[55]

LAURENCE M. SMAIL

EFFECT OF PROBATE DECREES OF DISTRIBUTION ON FUTURE INTERESTS

Decrees of distribution issued after the probating of wills have the same force and effect as judgments of courts of record,[1] so that persons who are adversely affected must appeal promptly to secure their rights or they will be precluded from asserting them. The case of *Riddle v. Jay*,[2] recently decided by the Supreme Court of Oklahoma, illustrates a situation wherein the failure to make a timely appeal of such a decree resulted in the plaintiffs' forfeiting a case which they probably could have won on its merits.

George W. Hughes died testate in 1913. In his will he left to his wife a life estate in all his property and upon her death the entire estate was to be divided into as many equal shares as there were children then living or deceased leaving issue.[3] In 1915 one of the testator's children (hereinafter referred to as the grantor) conveyed her apparent share by warranty deed to Jay, the defendant in the principal case. The will was not admitted to probate until 1925, when, pursuant to an Oklahoma statute,[4] a decree of distribution was issued by a county court. The decree assigned the widow a life estate in "all the rest, residue and remainder" of the decedent's estate and

[53]See note 47 supra at 920.

[54]Ibid.

[55]355 P.2d at 917.

[1]Chapin v. Chapin, 229 Mich. 515, 201 N.W. 530, 532 (1924); 57 Am. Jur. Wills § 1034 (1948); Annot., 136 A.L.R. 1180 (1942).

[2]356 P.2d 1071 (Okla. 1960).

[3]"I hereby give... to my beloved wife... a life estate in all... of my estate... and upon her death... direct that my entire estate shall be equally divided into as many portions or shares as there may be children of mine living, or deceased leaving issue...." Id. at 1075.

[4]Okla. Rev. Laws § 6463 (1910) (now Okla. Stat. tit. 58, § 631 (1951).

upon her death an undivided one-fourth interest to named children and "their heirs and assigns forever."[5] The grantor died in 1957; her mother, the widow of the testator, died the following year. The brothers, sisters, and children of the grantor then brought an action to quiet the title and to partition the realty involved. The plaintiffs contended that under the provisions of the decree, the interests of the living children or the issue of any deceased child were contingent upon their surviving the widow; and since the grantor predeceased the widow, her interest never accrued. Therefore, she could not convey any interest in the property. They further asserted that upon the death of the testator's widow they became owners of an undivided one-fourth interest of the testator's property, deriving their claim as beneficiaries under the will of the testator as interpreted by the final decree issued in 1925 and not as heirs of the grantor. Conversely, the defendant contended that his grantor held an indefeasibly vested remainder from the death of the testator until the time of the conveyance in 1915.

The majority of the appellate court held that it was bound by the final decree of distribution, and in determining the rights of the plaintiffs it would not look to the provisions of the will but only to the provisions of the distribution decree. In construing the final decree, the majority held that the widow had a life estate and the children had vested remainders. The dissenting members of the court, looking behind the distribution decree and construing the will, concluded that the will gave to the children remainders which were contingent upon their surviving the widow. In light of this construction the grantor had conveyed to the defendant a mere expectancy which, when the contingency failed, could never become possessory.

The court took the position that the plaintiffs must lose their case on the precedural point that the decree of distribution is not subject to collateral attack. It would seem that the plaintiffs were remiss in not making a timely and direct attack upon the decree of distribution because the county court, sitting in probate, apparently erred in construing the will. The will provision relating to the remainder interest is susceptible of three constructions:[6] (1) a remainder contingent upon

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[5]"All the rest, residue and remainder of said property ... to the said [wife] ... for ... the rest of her natural life, and upon her death to Rella Z. Riddle, Grace O. Jay, Owen R. Hughes and Emily M. Hughes, each an undivided one-fourth interest ... their heirs and assigns forever." 356 P.2d at 1075-76.

[6]See generally Annot., 47 A.L.R.2d 900 (1956); Annot., 131 A.L.R. 712 (1941); Annot., 109 A.L.R. 136 (1937).

the grantor surviving the life tenant;[7] (2) a vested remainder subject to being wholly divested by the grantor predeceasing the life tenant;[8] or (3) a vested remainder.[9]

A number of tests for contingent remainders may be applied with a reasonable degree of efficacy. It is generally stated that a contingent remainder is created when a condition precedent other than the termination of the preceding estate is necessary to vest the interest.[10] In an instance where the remainder interest is given to children who survive the life tenant, the remainder is said to be contingent because the remaindermen cannot be ascertained until the death of the life tenant.[11] A provision for a substitute gift, *i.e.*, one that takes the place of a prior devise, usually shows an intention that the primary gift is contingent upon the remaindermen surviving the life tenant.[12]

The probate court could have considered the remainder as one that was vested but subject to being divested. If the condition that the remaindermen outlive the life tenant is a condition subsequent to the vesting of the interest, the remainder is said to be vested subject to being wholly divested.[13] On the other hand, if the condition is precedent to the remainder estates coming into existence, the remainder is said to be contingent.[14] In *Riddle* the effect on the conveyance of a contingent remainder and a vested remainder subject to being divested would have been the same. If the remainder were contingent on the grantor surviving the widow, the grantee would have been defeated because the grantor's interest never matured; if the remainder were vested subject to being divested, the interest that the grantor had conveyed would have been divested when the grantor predeceased the widow.

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[7]Restatement, Property § 157, comment u-x (1936).

[8]Caple v. Warburton, 125 Kan. 290, 264 Pac. 47 (1928); Restatement, Property § 157, comment o-t (1936).

[9]Annot., 47 A.L.R.2d 900, 920 (1956); Restatement, Property § 157, comment f-k (1936).

[10]Gray, Rule Against Perpetuities, § 101 (4th ed. 1942).

[11]"Where a devise by its terms is to a person for life with a remainder to such of the children of that person as survive at his death the remainder is contingent, for the reason that it cannot be ascertained until the death of the life tenant who takes the remainder." Smith v. Chester, 272 Ill. 428, 112 N.E. 325, 328 (1916).

[12]In re Constable's Estate, 176 Misc. 216, 26 N.Y.S.2d 967 (Surr. Ct. 1941). See generally 96 C.J.S. Wills § 947 (1957).

[13]A vested estate, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is said to be vested, subject to being divested on the happening of a contingency subsequent. L'Etourneau v. Henquenet, 89 Mich. 428, 50 N.W. 1077 (1891).

[14]Restatement, Property § 157, comment v (1936).

A remainder that is indefeasibly vested is a present interest certain of becoming possessory at some time in the future, and it is of no consequence that the intervening time cannot be precisely determined.[15] It is essential that the persons to whom the remainder is given are presently identifiable[16] and that the share which each is to receive is ascertained.[17] Because American courts favor the early vesting of estates[18] such phrases as "upon the death"[19] (which appeared in the will in the principal case), "after death," or "at the death" are generally dismissed as referring only to a postponement of possession. The use of such phrases alone does not usually postpone the vesting of the interest,[20] nor do courts imply from them a condition precedent of surviving the life tenant.[21]

Viewing the will as a whole,[22] instead of considering isolated phrases, it appears that the correct interpretation is that the remainder interests are contingent, being subject to the condition precedent that the remaindermen survive the life tenant. The will clearly states that only those children, or grandchildren, if their parents are dead, who are living at the death of the widow receive any interest in the estate.[23] Hence, it is impossible to ascertain to whom the interests inure until the widow dies.[24] Furthermore, there is a provision for a substitutionary gift, and there is an incorporation of a conditional phrase within the provision creating the remainder interest. Professor Gray states that when the conditional element is incorporated into the description of the gift to the remaindermen the remainder is contingent

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[15]Restatement, Property § 157, comment f (1936).

[16]Restatement, Property § 157, comment i (1936).

[17]See note 15 supra.

[18]Anderson v. Menefee, 174 S.W. 904 (Tex. Ct. App. 1915). See also 96 C.J.S. Wills § 947 (1957).

[19]Such phrases are termed "conditional in form which do not add a condition . . . ." Simes & Smith, Future Interests § 144 (2d ed. 1956).

[20]"[T]he will speaks from the death of the testator, and passes all property that he was capable of disposing of by will at the time of his death." Wilson v. Greer, 50 Okla. 387, 151 Pac. 629, 632 (1915).

[21]Simes & Smith, Future Interests § 144 (2d ed. 1956). But see Howard v. American Security & Trust Co., 84 App. D.C. 135, 171 F.2d 29 (D.C. Cir. 1948).

[22]"In construing a will or interpreting the meaning of particular words, parts, or provisions of a will, and in determining the intention of the testator in relation thereto, the courts must consider the will as a whole. . . ." 95 C.J.S. Wills § 620 (1957). See Atkinson, Wills § 146 (2d ed. 1953).

[23]"A gift to a child 'then living' at the determination of the life estate, vests when the life estate terminates." 3 Page, Wills § 1267 (1941). "Thus, it has frequently been held that a remainder interest is contingent where it is given to the life tenant's children who may survive him." Annot., 131 A.L.R. 712, 722 (1941).

[24]See note 11 supra.

upon that element.[25] Nevertheless, the county court in 1925 had construed the will as giving the children of the testator a vested remainder,[26] probably concluding that the phrase "upon her death" merely postponed the use and enjoyment of the remainder estate and had no effect on the time of vesting.[27] Any present construction of the will is of little consequence because the majority of the appellate court held that it was bound by the decree of the county court and not by the will of the testator. Therefore, the interpretation of the decree rather than that of the will becomes the determinative factor.

Seventeen states require a decree of distribution in order to transfer either real or personal property.[28] The effects of such a decree are threefold: (1) the will is construed by the court which is exercising probate jurisdiction;[29] (2) the decree relates back to the time of the testator's death and supports the title of anyone who has taken under or through one who has derived his title from the will;[30] and (3) the decree is conclusive as to the rights of the devisees and their privies.[31]

A decree issued by a probate court or a court having probate jurisdiction is as final and of the same force and effect as a judgment in a court of record because such proceedings are in rem[32] and are res judicata as to the matters decided.[33] The general rule is that a county or probate court which has issued a decree of distribution has impli-

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[25]Gray, Rule Against Perpetuities, § 108 (4th ed. 1942).

[26]"There is little room for doubt that the remainder described in the decree is vested since the specific language as to who are the remaindermen, the extent of their interests and the portions which they are to receive clearly eliminates any uncertainty. See note 5 supra.

[27]See note 22 supra.

[28]Arizona, California, Connecticut, Idaho, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, Wyoming. See generally 3 American Law of Property § 14.43 (Casner ed. 1952).

[29]"The county court construes every will when it decrees a distribution thereunder. . . ." In re Sjurson's Estate, 29 S.D. 566, 137 N.W. 341, 342 (1912). "In fact the court could not assign the estate by the final judgment 'without construing the will'." In re Brandstedter's Estate, 198 Wis. 457, 224 N.W. 735, 736 (1929). See generally Annot., 136 A.L.R. 1180, 1185 (1942).

[30]Okla. Rev. Laws § 1160 (1910) (now Okla. Stat. tit. 16 § 17 (1951)). "[T]he probate would relate back so as to make valid whatever she has done previously, and which, under the will after probate, she would have had right to do." Sutphen v. Ellis, 35 Mich. 446, 448 (1877).

[31]Okla. Rev. Laws § 6464 (1910) (now Okla. Stat. tit. 58 § 632 (1951)); Model Probate Code § 183 (Simes 1946).

[32]Krohn v. Hirsch, 81 Wash. 222, 142 Pac. 647, 648 (1914); Ladd v. Weiskopf, 62 Minn. 29, 64 N.W. 99, 101 (1895).

[33]See note 1 supra.

edly, if not expressly, construed the will.[34] Some appellate courts, however, while recognizing that the county or probate court has the power to construe a will, hold that the will has not been construed if the language of the will is merely incorporated into the final decree.[35]

The grantor in the principal case did not acquire her title from the decree,[36] but it came to her from the testator's will which was operative at the instant of his death.[37] Therefore, when the grantee purchased the remainder interest before any distribution decree had been entered, he did so at his own risk and was subject to the provisions of the distribution decree when it is subsequently entered.[38] The decree merely interpreted the provisions of the will, but the force of the interpretation related back to the time of the testator's death,[39] and acted to affirm the validity of the conveyance[40] since the decree decided that the grantor's remainder was vested. The fact that the supreme court is now called upon to interpret the decree cannot affect its conclusiveness.[41] The plaintiffs recognized that they were bound by the decree but sought to apply an interpretation to it which would be beneficial to them, *i.e.*, that the decree gave them a vested remainder. In holding the remainder described in the decree to be

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[34]Cook v. Cook, 17 Cal. 2d 639, 111 P.2d 322, 324 (1941). See note 32 supra. "There is no general and inherent power vested in probate courts to construe wills as a distinct and independent branch of jurisdiction.... Nevertheless, in many jurisdictions... courts of probate are vested with power... to construe wills as an incident of their general jurisdiction over the settlement and distribution of decedents estates.... The construction and effect of the will... are necessarily involved, otherwise there could be no distribution of an estate...." 96 C.J.S. Wills § 1076 (1957). But see Annable v. Ricedorff, 140 Neb. 93, 299 N.W. 373 (1941); Andersen v. Andersen, 69 Neb. 565, 96 N.W. 276 (1903); Youngson v. Bond, 69 Neb. 356, 95 N.W. 700 (1903). These cases hold that the Nebraska rule is that a decree of a probate court is not a conclusive construction as between adverse claimants but is for the information and benefit of the administrator or executor. See generally 136 A.L.R. 1180, 1185 (1942).

[35]In re Hill's Estate, 214 Wis. 677, 253 N.W. 787, 788 (1934).

[36]"The title of the devisees does not originate either in the probate of the will or the decree of distribution that may be or has been entered, but title comes from the deceased through the will the instant of his death." In re Deschamps' Estate, 65 Mont. 207, 212 Pac. 512 (1922). See also 3 American Law of Property § 14.44 (Casner ed. 1952).

[37]"The rule . . . is that a will generally speaks as of the time of the testator's death...." 95 C.J.S. Wills § 629 (1957). See note 20 supra.

[38]Phelps v. Grady, 168 Cal. 73, 141 Pac. 926 (1914). See generally Annot., 86 A.L.R. 400 (1933).

[39]Peter v. Peter, 343 Ill. 493, 175 N.E. 846 (1931).

[40]See note 1 supra. See generally Annot., 86 A.L.R. 400 (1933); Annot., 48 A.L.R. 1035 (1927).

[41]Davis v. First Nat'l Bank, 139 Tex. 36, 161 S.W.2d 467 (Comm'n App. 1942).