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Doe Vs. Considine

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Decided On : 1867

Appeal No. : 73 U.S. 458

Appellant : Doe

Respondent : Considine

Judgement :

Doe v. Considine - 73 U.S. 458 (1867)
U.S. Supreme Court Doe v. Considine, 73 U.S. 6 Wall. 458 458 (1867)

Doe v. Considine

73 U.S. (6 Wall.) 458

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF OHIO

SYLLABUS

1. Though a devise to trustees "and their heirs" passes, as a general thing, the fee, yet where the purposes of a trust and the power and duties of the trustees are limited to objects terminating with lives in being, where the duties of the trustees

are wholly passive, and the trust thus perfectly dry, the trust estate may be considered as terminating on the efflux of the lives. The language used in creating the estate will be limited to the purposes of its creation.

2. Estates in remainder vest at the earliest period possible unless there be a clear manifestation of the intention of the testator to the contrary. And in furtherance of this principle, the expression "upon the decease of A., I give and devise the remainder" construed to relate to the "time of the enjoyment of the estate, and not the tune of the vesting in interest." Where the language of a statute, read in the order of clauses as passed, presents no ambiguity, courts will not attempt by transposition of clauses, and from what it can be ingeniously argued was a general intent, to qualify, by construction, the meaning.

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The lessors of the plaintiff in error brought an action of ejectment in that court to recover certain real estate now here in controversy. The parties agreed upon the facts. Under the instructions given to the jury, they found for the defendants, and judgment was rendered accordingly.

The plaintiff excepted to the instructions, and this writ was prosecuted upon the ground that they were erroneous.

The facts, as agreed on, were as follows:

William Barr Senior, died on the 15th of May, 1816, leaving a will duly admitted to probate in Hamilton County, Ohio. It was out of the will that the controversy arose.

The testator left three daughters: Mary, the wife of William Barr; Susan, the wife of John B. Enness; and Mary B., the wife of James Keys. He left also one son, John M. Barr who, at the time of his father's death, had living, a wife, Maria Barr and an infant daughter, Mary Jane Barr.

John M. Barr the son of the testator, died on the 10th of August, 1820.

Mary Jane Barr the daughter of John M. Barr died on the 27th of November, 1821. Maria Barr her mother, died on the 3d of August, 1860.

The sons-in-law and daughters of the testator were all dead, each one leaving children born in lawful wedlock.

The testator also left living at the time of his death four brothers and two sisters. They are all dead. Two of them left no lineal heirs.

The will contained among others the following provisions:

"I give and devise unto my sons-in-law, William Barr James Keys, and John B. Enness, of Cincinnati aforesaid, *and to their heirs,* all and singular, that certain farm, tract or parcel of land, situate, lying, and being in the County of Hamilton, State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and *their heirs in trust* (first) for the use of my son, John M. Barr during his natural life, but nevertheless to permit and suffer my son, John M. Barr to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr,

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should die leaving a legitimate child or children, then also in trust for Maria Barr wife of the said John M. Barr in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children and educating the said children, but nevertheless to permit and suffer the said Maria Barr wife of the said John M. Barr to hold, use, occupy, possess, and enjoy the said farm and to receive and take the rents and profits thereof during her natural life. And *upon the decease of the said Maria Barr,* wife of the said John M. Barr in case she survive him; if not, *then upon the decease of the said John M. Barr,* I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr and their heirs forever. If my said son leave but one child as aforesaid, then I give and devise the said farm to him or her or his or her heirs forever. But if he leave two or more children, then I give and devise the said farm

unto such children and their heirs, to be equally divided between them. But should my said son, John, M. Barr, die without leaving any issue of his body, then and in that case I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr James Keys, and John B. Enness, and their heirs forever."

" * * * *"

"Also I do further give, devise, and bequeath the remainder of my estate, both real and personal, to my sons-in-law, William Barr James Keys, and John B. Enness."

John M. Barr having died, leaving no issue but Mary Jane Barr, and she having died in infancy, unmarried, and the life estate of her mother, Maria Barr having terminated by the death of that person, the question was presented in whom is vested the title to the premises in controversy.

The lessors of the plaintiffs claimed title under the three sons-in-law of the testator, or their wives, who were his daughters.

The defendants claimed through the heirs of the brothers and sisters of the testator, under the statute of descents of Ohio of the 30th of December, 1815, which was as follows:

" I. That when any person shall die intestate, having title to any real estate of inheritance lying and being in this state, which

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title shall have come to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred, in the following course:"

"1. To the children of such intestate or their legal representatives."

"2. If there be no children, or their legal representatives, the estate shall pass to the brothers and sisters of the intestate, who may be of the blood of the ancestor

from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or of the half blood of the intestate."

"3. If there be no brothers and sisters of the intestate of the blood of the ancestor from whom the estate came or their legal representatives, and if the estate came by deed of gift from an ancestor who may be living, the estate shall *ascend* to such ancestor."

"4. If there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives; and for want of such brothers and sisters, or their legal representatives, to the brothers and sisters of the intestate of the half blood, or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came."

"5. If there be no brothers or sisters of the intestate or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came."

The court instructed the jury:

"1. That at the death of the said Mary Jane Barr the granddaughter of the testator and daughter of said John M. Barr she was seized of a vested remainder."

"2. That at the death of the said Mary Jane Barr her said estate in said farm descended to the brothers and sisters of the said testator then alive, and the legal representatives of such of them as were then deceased."

"3. That the trust estate to the sons-in-law was only an estate *par autre vie* and terminated at the death of Maria Barr, but

whether that trust estate continued or not after her death the result is the same, for if the estate so vested in Mary Jane Barr were only an equitable estate, no recovery could be had against the parties in possession under her title in favor of the trustees or their heirs, and in no event except the death of John M. Barr without issue did the will give to the sons-in-law any interest in the property in controversy, other than the temporary trust estate."

The correctness of these instructions was the matter before the court.

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MR. JUSTICE SWAYNE delivered the opinion of the Court.

1. At the threshold of the subject before us, the inquiry arises as to the extent of the trust estate vested by the will in the three sons-in-law of the testator.

The determination of this point is not vital in the case, for whether they took the legal fee or not and whether the estate of Mary Jane Barr was legal or equitable in its character, the result must be the same. The same rules of law apply to descents and devises of both classes of estates, and

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if in this case an equitable fee in remainder was vested in Mary Jane Barr at the time of her death, while the legal fee as dry trust was held by the sons-in-law, those holding the latter title could not recover in this action against parties clothed with the equitable estate and entitled to the entire beneficial use of the property. [Footnote 1] But we entertain no doubt upon the subject.

The devise contains words of inheritance. It is to the trustees *"and to their heirs."* This language, if unqualified by anything else in the clause, would pass the fee. But when we look to the purposes of the trust and the power and duties of the trustees, we find them limited to two objects:

1. The trustees were to permit John M. Barr to enjoy the premises and receive the rents, issues and profits during his life.

2. If John M. Barr should die, leaving issue, and his wife Maria should survive him, then they were to permit her, during her life, to enjoy the possession and profits of the property.

A drier trust could not have been created. The duties of the trustees were wholly passive. They were authorized to do no act. They were simply to hold the estate committed to them until one or both the events defining the boundary of its existence had occurred. It was to subsist in any event during the life of John M. Barr and if he died, leaving issue, and his wife survived him, it was to subsist also during her life. The executors were directed, in any event, to make an expenditure upon the property, and to take the fund from the personal estate. This duty had no connection with the trust, and its bearing upon the case is in nowise affected by the fact that the executors and trustees happened to be the same persons. Whether John M. Barr died with or without issue, the entire object of the trust was fulfilled, and its functions were exhausted when the persons for whose benefit it

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was created ceased to live. "The remainder of the estate in said farm," in the language of the testator, thereupon passed according to the provisions of the will. It is neither expressed nor implied that the trust estate should exist any longer, and no imaginable purpose could be subserved by its longer continuance. When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says: [Footnote 2]

"Trustees take exactly the estate which the purposes of the trust require, and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what, less estate."

Chancellor Kent says:

"The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust, and notwithstanding the devise to the trustees and their heirs, they take only a chattel interest where the trust does not require an estate of higher quality. [Footnote 3]"

This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the statute of uses. The consequences in this case of the absence of such a statute in Ohio it is therefore not necessary to consider.

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We are of opinion that the trust estate of the sons-in-law of the testator was only an estate *par autre vie,* and that it terminated at the death of Maria Barr.

II. This brings us to the consideration of the question what was the estate, in quantity and quality, of Mary Jane Barr at the time of her decease?

The hinge upon which turns this part of the controversy is the following language of the will:

" *And upon the decease of the said Maria Barr wife of the said John M. Barr in case she survive him; if not, then upon the decease of the said John M. Barr I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr and their heirs forever.* If my said son leave but one child as aforesaid, then I give the said farm to him or her, *or his or her heirs forever. But* if he leave two or more children, then I give and devise the

said farm unto such children *and their heirs,* to be equally divided between them. But should my said son, John M. Barr die without leaving any issue of his body, then, and in that case, I do give and devise *the remainder of my estate in the said farm* unto my said sons-in-law, William Barr James Keys, and John B. Enness, *and their heirs forever.* "

The plaintiff in error claims that this clause is an executory devise, and that it gave to Mary Jane Barr a contingent estate, to take effect upon the event of her outliving both her parents, *and not otherwise,* and that as she died before her mother, no title or interest ever vested in her.

The defendants claim that upon the death of the testator, Mary Jane Barr took under the will a vested remainder, subject to open and let in after-born children, if any there were, and deferred as to the period of enjoyment until the death of the one parent who should survive the other, but liable to no other contingency, and limited by no other qualification.

This point of the will must be examined by its own light, and also in the light of the adjudications in like cases.

Considering it without the aid of authority, we have no

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difficulty in coming to a conclusion as to its proper construction.

We think that it gives:

1. A legal estate par autre vie, to three sons-in-law in trust.

2. An equitable life estate, with the usufruct of the property to John M. Barr.

3. In case he should die leaving issue and his wife Maria should survive him, then an equitable estate for life to her with the usufruct of the property for the benefit of herself and the surviving child or children of John M. Barr.

4. A vested remainder in fee simple to the child of John M. Barr living at the time of the death of the testator, subject to open and let in the participation of after-born children, and liable to be divested by their dying before their father, but *not* liable to be defeated by any other event.

5. The devise over to the three sons-in-law was an alternate or collateral contingent remainder, and if John M. Barr had died leaving no children surviving him, that remainder would thereupon at once have vested and been converted into an absolute fee simple estate. [Footnote 4]

In no event except the death of John M. Barr without issue did the will give them any interest in the property other than the temporary trust estate.

By the vesting of the remainder in Mary Jane Barr at the death of the testator and the death of her father, this provision in behalf of the sons-in-law became as if it were not. It was utterly annulled, and could not thereafter take effect either as a contingent remainder or as an executory devise. We are satisfied the testator did not extend his vision or seek to control this property beyond the period of the death of his son, John M. Barr. With a view to that event, he made two provisions equally absolute, emphatic, and final in their terms. In that respect, there is no difference. The result, whether the one or the other should take

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effect, was to depend upon the single fact whether John M. Barr died with or without surviving children.

The language used carried the entire estate of the testator in the premises alike in both cases, and we can no more hold the word "heirs" to be the synonym of "issue," or otherwise qualify the estate intended to be given in the one case than in the other.

The theory of the counsel for the plaintiff derives no support from the principle of human nature which not unfrequently impels a testator to transmit his property, as far as possible, in the line of his descendants. Here Barr Keys and Enness were

not of the blood of the testator. He could not but be aware that if they took the property, it might pass from them, by descent or purchase, to those who were strangers to his blood and in nowise connected with his family.

Having disposed of the property absolutely at the death of his son, he left the future, beyond that boundary, with its undeveloped phases, whatever they might be, to take care of itself.

III. We will now examine the case in the light of principle and authority.

A vested remainder is where a *present* interest passes to *a certain and definite* person, but to be enjoyed *in futuro.* There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate or *eo instanti* that it determines.

A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person or upon the happening of a dubious and uncertain event.

A contingent remainder, if it amount to a freehold, cannot be limited on an estate for years, nor any estate less than freehold. A contingent remainder may be defeated by the determination or destruction of the particular estate before the contingency happens. Hence, trustees are appointed to preserve such remainders.

An executory devise is such a disposition of real property

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by will that no estate vests thereby at the death of the devisor, but only on a future contingency. It differs from a remainder in three material points:

1. It needs no particular estate to support it.

2. A fee simple or other less estate may be limited by it -- after a fee simple.

3. A remainder may be limited, of a chattel interest, after a particular estate for life in the same property. [Footnote 5]

The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.

It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary. [Footnote 6]

Adverbs of time -- as *where, there, after, from,* &c.; -- in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest. [Footnote 7]

Where there is a devise to a class of persons to take effect in enjoyment at a future period, the estate vests in the persons as they come *in esse,* subject to open and let in others as they are born afterward. [Footnote 8]

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An estate once vested will not be divested unless the intent to divest clearly appears. [Footnote 9]

The law does not favor the abeyance of estates, and never allows it to arise by construction or implication. [Footnote 10]

"When a remainder is limited to a person *in esse and ascertained* to take effect by *express limitation,* on the termination of the preceding particular estate, *the remainder is unquestionably vested.* [Footnote 11]"

This rule is thus stated with more fullness by the Supreme Court of Massachusetts.

"Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an

event *that must unavoidably happen by the efflux of time,* the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder. [Footnote 12]"

In 4th Kent's Commentaries 282, it is said: "This has now become the settled technical construction of the language and the established English rule of construction." [Footnote 13] It is added:

"It is the uncertainty of *the right* of enjoyment, and not the uncertainty of *its actual enjoyment,* which renders a remainder *contingent.* The present capacity of taking effect in possession -- if the possession were to become vacant -- distinguishes a vested from a contingent remainder, and not the

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certainty that the possession will ever become vacant while the remainder continues. [Footnote 14]"

It is further said in the same volume: [Footnote 15]

"A. devises to B. for life, remainder to his children, but if he dies without leaving children remainder over, both the remainders are *contingent,* but if B. afterward marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over *are gone forever.* The remainder becomes a *vested* remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs. [Footnote 16]"

We have quoted this language because of its appositeness to the case under consideration. The propositions stated are fully sustained by the authorities referred to. Other authorities, too numerous to be named, to the same effect, might be cited. We content ourselves with referring to a part of those to which our attention has been called in the briefs in this case. [Footnote 17]

This doctrine received the sanction of the Supreme Court of Ohio in *Jeefers v. Lampson,* [Footnote 18] where it was adopted and applied. The leading authorities relied upon by the counsel for defendants in error in this case were cited by the court and control the result. We are bound by this decision as a local rule of property.

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The same doctrine has been sanctioned by this Court. [Footnote 19]

According to the theory of the plaintiff's counsel, if Mary Jane Barr had married and had died before her mother, leaving children, they would have been cut off from the estate. Surely the testator could not have intended such a result.

In three of the cases, substantially like this as to the point under consideration, brought to our attention by the counsel for the defendants in error, this consequence of such a construction was adverted to by the court.

In *Carver v. Jackson,* [Footnote 20] the Court said:

"It is also the manifest intention of the settlement, that if there is any issue, *or the issue of any issue,* such issue shall take the estate, which can only be by construing the prior limitation in the manner in which it is construed by this Court."

In *Goodtitle v. Whitby,* [Footnote 21] Lord Mansfield said:

"Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now, suppose that the object of the testator's bounty marries and dies before his age of twenty-

one, *leaving children,* could the testator *intend in such an event to disinherit them?* Certainly he could not."

In *Doe v. Perryn,* [Footnote 22] Buller, Justice, said:

"But if this were held not to vest till the death of the parents, this inconvenience would follow that it would not go to grandchildren, for if a child were born who died in the lifetime of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor."

Mary Jane Barr was, at the death of the testator, within every particular of the category, which, according to the authorities referred to, creates a vested remainder.

1. The person to take was *in esse.*

2. She was ascertained and certain.

3. The estate was limited, to take effect in her absolutely, upon the death of her father.

4. That was an event which must unavoidably happen by the efflux of time.

5. Nothing but her death, before the death of her father, would defeat the remainder limited to her.

6. She had a fixed right of property on the death of the devisor. The period of enjoyment *only* was deferred and uncertain.

7. The time of enjoyment *in possession* depended upon the death of her mother. The right was in nowise dependent on that event.

8. Upon the death of her father, she surviving him, her estate, before *defeasible,* became indefeasible and absolute.

We are thus brought to the conclusion, upon technical as well as untechnical grounds, that Mary Jane Barr had, at the time of her death, an indefeasible estate of remainder in fee in the premises in controversy.

In the view we have taken of this case, the doctrine of shifting uses can have no application; we therefore forbear to advert to the rules of law relating to that subject.

IV. Mary Jane Barr having died unmarried and intestate, it remains to inquire to whom her estate passed.

The descent cast was governed by the statute of December 30, 1815.

The first section only applies to the subject.

The first part of the fourth clause of that section is as follows:

"4. If there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives."

This gave the property "to the brothers and sisters" of the testator, "or their legal representatives."

The language of this clause is plain and unambiguous.

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There is nothing in the context, rightly considered, which qualifies or affects it. There is, we think, no room for construction. [Footnote 23] We concur entirely in the views of the eminent counsel, whose professional opinions, long since written, have been submitted to us. We think the point hardly admits of discussion. If there could be any doubt on the subject, it is removed by the act of 1835, which substitutes for the rule of descent here under consideration, the one which we are asked to apply. Were we to adopt the construction claimed by the plaintiff's

counsel, instead of adjudicating we should legislate. That we have no power to do. Our function is to execute the law, not to make it.

The instructions given by the court to the jury were in accordance with the views we have expressed. We find no error in the record, and the judgment is

Affirmed.

[Footnote 1]

4 Kent's Com. 334, 335; *Brydges v. Brydges,* 3 Vesey Jr., 127; *Cholmondeley v. Clinton,* 2 Jacob & Walker 148; *Brydges v. Duchess of Chandos,* 2 Vesey Jr. 417, 426; *Walton v. Walton,* 7 Johnson's Chancery 270; *City of Cincinnati v. Lessee of White,* 6 Pet. 441.

[Footnote 2]

2 Jarman on Wills 156.

[Footnote 3]

4 Kent's Commentaries 233; *See also* *Webster v. Cooper,* 14 How. 499; *Neilson v. Lagow,* 12 How. 110; *Doe ex dem. Compere v. Hicks,* 7 Term 437; *Curtis v. Price,* 12 Vesey Jr. 9; *Morrant v. Gough,* 7 Barnewall & Cresswell 206; 1 Greenleaf's Cruise 359, note.

[Footnote 4]

Luddington v. Kime, 1 Ld.Raymond 203; *Dunwoodie v. Reed,* 3 Sergeant & Rawle 452, C.J. Gibson's opinion.

[Footnote 5]

2 Blackstone's Commentaries chap. 12.

[Footnote 6]

Johnson v. Valentine, 4 Sandford 43; *Wrightson v. Macaulay,* 14 Meeson & Welsby 214; *Chew's Appeal,* 37 Penn. 28; *Moore v. Lyons,* 25 Wend. 126; *Phipps v. Williams,* 5 Simons 44; *Gold v. Judson,* 21 Conn. 622; Redfield on Wills 379; *Finlay v. King,* 3 Pet. 374, 5 Barr 28; *Carver v. Jackson,* 4 Pet. 92; *Purefoy v. Rogers,* 2 Saunders 388; *Doe v. Morgan,* 3 Term 765, 766; *Nightingale v. Burrell,* 15 Pick. 110.

[Footnote 7]

Johnson v. Valentine, 4 Sandford 43; *Moore v. Lyons,* 25 Wendell 119; *Boraston's Case,* 3 Coke, 20; *Minning v. Batdorff,* 5 Barr 506; *Rives v. Frizzle,* 8 Iredell's Equity, 239.

[Footnote 8]

Johnson v. Valentine, 4 Sandford 45; *Doe v. Provoost,* 4 Johnson 61; *Chew's Appeal,* 37 Penn. 28; *Doe v. Ward,* 9 Adolphus & Ellis 582, 607, 4 Dow 203; *Doe v. Nowell,* 1 Maule & Selwyn 334; *Bromfield v. Crowder,* 1 New Reports 326; *Phipps v. Ackers,* 9 Clark & Finelly, 583; *Doe v. Prigg,* 8 Barnewall & Cresswell 235; *Minnig v. Batdorff,* 5 Barr 505; *Gold v. Judson,* 21 Conn. 623.

[Footnote 9]

Chew's Appeal, 45 Penn. 232; *Harrison v. Foreman,* 5 Vesey 208; *Doe v. Perryn,* 3 Term 493; *Smither v. Willock,* 9 Vesey 234.

[Footnote 10]

Comyn's Dig., Abeyance, A. E.; *Catlin v. Jackson,* 8 Johnson 549; *Ekins v. Dormer,* 3 Atkyns 534.

[Footnote 11]

Preston on Estates 70.

[Footnote 12]

Blanchard v. Blanchard, 1 Allen 227.

[Footnote 13]

Doe v. Prigg, 8 Barnewall & Cresswell 231.

[Footnote 14]

Williamson v. Field, 2 Sandford's Chancery 533.

[Footnote 15]

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[Footnote 16]

Doe v. Perryn, 3 Term 484 (Buller's opinion); *Right v. Creber,* 5 Barnewall & Cresswell 866; Story J., in *Sisson v. Seabury,* 1 Sumner 243; *Hannan v. Osborn,* 4 Paige 336; *Marsellis v. Thalhimer,* 2 *id.* 35.

[Footnote 17]

Harrison v. Foreman, 5 Vesey 208; *Belk v. Slack,* 1 Keen 238; *Bromfield v. Crowder,* 1 New Reports 325; *Danforth v. Talbot,* 7 B.Monroe 624; *Goodtitle v. Whitby,* 1 Burrow 234; *Moore v. Lyons,* 25 Wendell 119; *Randoll v. Doe,* 5 Dow 202; *Edwards v. Symons,* 6 Taunton 214; *Phipps v. Ackers,* 9 Clark & Finelly 583; *Stanley v. Stanley,* 16 Vesey 506; *Doe v. Nowell,* 1 Maule & Selwyn 334; *Boraston's Case,* 3 Coke 52; *Doe v. Ewart,* 7 Adolphus & Ellis' 636; *Minnig v. Batdorff,* 5 Barr Pa.St. 503.

[Footnote 18]

10 Ohio State Rep. 101.

[Footnote 19]

Finlay v. King's Lessee, 3 Pet. 376; *Carver v. Jackson,* 4 Pet. 1; *Williamson v. Berry,* 8 How. 495; *Croxall v. Shererd,* 5 Wall. 280; *see also* Washburn on Real

Property 229, and 1 Greenleaf's Cruise, tit. Remainder.

[Footnote 20]

29 U. S. 4 Pet. 1.

[Footnote 21]

1 Burrow 233.

[Footnote 22]

3 Term 495.

[Footnote 23]

Armstrong v. Miller, 6 Ohio 124.

MR. JUSTICE GRIER (with whom concurred CLIFFORD, J), dissenting.

I cannot let this case pass without expressing my entire dissent from the conclusions of the majority of my brethren, both on the construction of the will of William Barr and the statute of descents of Ohio.

In the construction of a will the first great rule -- one that should control and govern all others -- is, that the court should seek the intention of the testator from the four corners of his will. All technical rules, from Shelley's case down, were established by courts only for the purpose of effectuating such intention. But it is easy to pervert the testator's intention by an astute application of cases and precedents, of which the present case is the last example of many which have preceded it, and where the testator's intention is entirely defeated by the application of rules intended to effectuate it. The remainder in fee to the children of John M. Barr was not to vest *till the decease of Maria Barr.*

"And upon the decease of said Maria, I devise the remainder of

my estate to the legitimate child or children of John M. Barr and his heirs forever, remainder over to the testator's sons-in-law in case of failure of such issue of the son."

Such is the language. By construing the remainder to vest before "the decease of Maria Barr" the executory devise to the sons-in-law is entirely defeated, and the clear intention of the testator frustrated by factitious rules intended to facilitate its discovery.

It often happens that legislative acts require the same liberal rules of construction as wills, where the testator is presumed to be *inops concilii.* It only requires the reading of the fifth section of the statute before the fourth in order to effectuate the intention of the legislature, and to clear it from the absurdity of giving an intestate's estate, not to his next of kin, but to his brothers and sisters, instead of his own children.

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