

1149.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF HELEN M. BISHOP
IN OXFORD TOWNSHIP, BUTLER COUNTY, OHIO, FOR MIAMI
UNIVERSITY.

COLUMBUS, OHIO, November 5, 1929.

HON. W. P. ROUDEBUSH, *Secretary, Board of Trustees, Miami University, Oxford, Ohio.*

DEAR SIR:—There has been submitted for my examination and approval an abstract of title, warranty deed and encumbrance estimate relating to a certain tract of land now held and possessed by one Helen M. Bishop which the president and trustees of Miami University propose to purchase for the use of said institution. Said tract of land is more particularly described as follows:

“Being parts of lots four (4) and five (5) on the Plat of Miami University lands in section 23, T. 5 R. 1 East, in Oxford Township, Butler County, Ohio, and bounded as follows: beginning at the southwest corner of said lot four (4), then by the true bearing on the south line of said lot four (4) south 89 degrees east 10 chains and 20 links to a stone, thence north $\frac{1}{2}$ degree west 13 chains and 60 links, thence north 70 degrees 45 minutes west 1 chain and 62 links, thence south 40 degrees west 13 chains and 25 links to a point in the west line of lot four (4), which is 4 chains from the southwest corner of said lot, thence south 37 degrees west 5 chains to a point in the south line of lot five (5), thence south 89 degrees east 3 chains to the place of beginning, containing 10.60 acres, of which 10 acres is in lot four (4) and 60/100 acres in lot five (5). Being the same premises conveyed by Moses W. Duvall to Eliza A. Bishop by Deed dated July 17th, 1869 and recorded in Deed Book 104, page 157, and being a triangular tract of land bounded on the south by the Botanical Gardens, and on the west and north by the road running northwardly from Oxford to the Water Works.”

The only question of any consequence presented by a consideration of the abstract of title is that arising from the last will and testament of Eliza A. Bishop, executed under date of August 21, 1890, and admitted to probate February 20, 1896.

On July 17, 1869, one Moses W. Duvall owned and held the above described property by a perpetual leasehold subject to the payment of an annual ground rent to the trustees of Miami University. On said date, said Moses W. Duvall, his wife joining with him in the deed, conveyed this property to said Eliza A. Bishop. The last will and testament of Eliza A. Bishop, above referred to, is as follows:

“I, Eliza A. Bishop of the Village of Oxford, County of Butler and State of Ohio, being in sound mind do make this my last will and testament in words following to-wit:

1. I will and direct that all my just debts and funeral expenses be fully paid.
2. I will and bequeath to my son Peter S. and to my daughters Anna J., Helen M., and Julia R. Bishop the sum of five hundred each—the same not to be paid as long as there is an unmarried daughter.
3. I will and bequath to my daughters Anna J., Helen M. and Julia R. Bishop all my property both real and personal they jointly to have full

possession and control as long as they remain unmarried subject to the following conditions.

4. The oldest of said daughters Anna J. shall be the head of the house and her decision as to use and control of said property shall be final and in case she shall marry or die then the next eldest shall assume said position and control.

5. Each of said daughters shall be entitled to the free and complete use and enjoyment of said property and shall share equally in all the income derived and all expenses incurred in keeping and maintaining the homestead.

6. In case of the marriage of either of said daughters Anna J., Helen M., or Julia R. their right to said property ceases and the remaining unmarried daughters shall own and possess it and in case of the marriage or death of all of said daughters Anna J., Helen M. and Julia R. the property is to be divided equally among all my children, George S., Emily J., Robert H., Sylvester L., Anna J., Helen M., Peter S., Mary B., Julia R.

7. I wish my daughters Anna J., Helen M. and Julia R. to have the same right and title while unmarried (except the right to will it at death) to said property, as I now possess and I give the right to dispose and sell said property—if in their judgment it seems best to do so.

Witness my hand this 21st day of August, 1890.

(signed) E. A. Bishop.

Witness

Lizzie C. Horner

Fannie L. Bishop"

Inasmuch as there are no joint tenancies in this state, the third item of said will had the effect of devising to each of the daughters of Eliza A. Bishop therein mentioned, an estate for life with her two sisters subject to termination by her marriage; and the estate and interest in said property so devised to the three daughters there mentioned in this item of the will was not enlarged to the absolute estate which said Eliza A. Bishop owned and held in said perpetual leasehold by the power given to said daughter to sell said property by the seventh and last item of said will.

In the case of *Fetter vs. Rettig*, 98 O. S. 428, the court had under consideration the following language in the will involved in said case, "I give, devise and bequeath to my beloved wife, Margaret Fetter, so long as she remains my widow, my entire property, both real and personal, wherever it may be situated. I do further devise to my said wife, in case she may desire so to do, the power to sell any of my real estate and deed or deeds to the purchaser thereof, execute and deliver and thereby convey any or all of my real estate in fee simple to the purchaser or purchasers thereof and to their heirs and assigns forever."

The Supreme Court in the case above cited, held, "That under this will the widow took only an estate for life, subject to be terminated on re-marriage, and, not having re-married, and being now deceased, the real estate so devised to her passes to the next of kin of the testator as an estate of remainder in fee simple."

Under the will of Eliza A. Bishop, here under consideration, it was quite clear that the life estate in common granted to the daughters named in the third item of her will is not enlarged to a full absolute estate in said property for the reason that the power granted to said daughters by the last item of said will to dispose of the same is limited by the exception which takes away their right to dispose of said property by will.

Touching this question it was held in the case of *Bohn vs. Irvington*, 303 Ill. 82, that:

"A devise to his widow of all the testator's real estate remaining after the payment of legacies and debts, with power 'to dispose of the same as she may choose, except by will,' does not create a fee with an unrestricted power of disposition, and a subsequent clause devising to the testator's blood relatives all property not disposed of by the widow in her lifetime is not void for repugnancy."

The daughters, Anna J. Bishop and Julia R. Bishop, specifically mentioned in the items of the will above referred to, both died unmarried and without issue. The daughter Helen M. Bishop therein mentioned, is still living, unmarried, and in possession and control of the property here in question under the terms of the will of said Eliza A. Bishop.

The specific question here presented is as to the power of Helen M. Bishop to sell and convey this property by deed under the power to sell the same granted to Anna J. Bishop, Helen M. Bishop and Julia R. Bishop, by the seventh and last item of the will of Eliza A. Bishop. Under the provisions of said item of the will, the three daughters named were to have the same right and title to said property which the testator possessed, other than the right to dispose of the same by will. Under this item of the will all three of said daughters could have sold said property and could have conveyed the same by joining in a deed for this purpose. The immediate question is whether Helen M. Bishop, the survivor of the donees of this power, can execute the power thus granted.

With respect to this question the rule is that where a mere naked power is conferred on two or more persons jointly, such power can not be executed by a survivor, but that where the power thus given is coupled with an interest in the donees of such power, the power granted may be executed by the survivor of the donees named. This rule is stated in 21 Ruling Case Law at page 788, as follows:

"Where a power is conferred to two or more individuals jointly, it can not be executed by the survivor, even though the title of an office is added merely for description purposes, unless the instrument creating the power provides that it may be executed by the donees, or the survivor. But where the power given to two or more donees jointly is one coupled with an interest, it may be executed by the survivor."

The principle above stated that where the power is given to two or more donees jointly is one coupled with an interest, it may be executed by a survivor is supported by a long array of authorities, of which the following are cited: *Taylor vs. Galloway*, 1 Ohio, 232; *Peter vs. Beverly*, 10 Pet. 532; *Wilson vs. Snow*, 228 U. S. 217; *Wallace vs. Foxwell*, 250 Ill. 616; *Robinson vs. Allison*, 74 Ala. 254; *Vonderhide vs. Easy Payment Property Co.*, 123 Ky. 352; *Gutman vs. Buckler*, 69 Md. 7.

Inasmuch as in the case here presented the three daughters of Eliza A. Bishop named as the donees of the power to sell this property granted to them by the last item of said will took a beneficial interest in said property and were charged with duties with respect to the upkeep and maintenance of the same, the power granted to them by said item of the will was one coupled with an interest; and pursuant to the rule of law applicable in such cases, Helen M. Bishop as the survivor of the donees of said power may, in the execution of said power, now sell and convey the same to the president and trustees of Miami University, and thereby vest in said body corporate all the right, title and interest which Eliza A. Bishop in her lifetime had and held in said property, subject only to the unde-

terminated taxes on said property for the year 1929, which the abstract shows are the only lien thereon.

An examination of the warranty deed tendered by said Helen M. Bishop shows that the same has been signed and otherwise properly executed and acknowledged by her, and that the same is in form sufficient to convey to the president and trustees of Miami University an indefeasible title in and to the land here under investigation, under the power granted to said Helen M. Bishop by the last will and testament of Eliza A. Bishop above noted; and said deed is accordingly hereby approved.

I have examined encumbrance estimate No. 6002, submitted as a part of the files in this matter and find that the same has been properly executed, and that there are sufficient balances in the proper appropriation account to pay the purchase price of this property. Inasmuch as this appropriation was out of land rents accruing to Miami University, no action of the controlling board with respect to the purchase price of this property was necessary.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1150.

APPROVAL, CONTRACT FOR THE ELIMINATION OF GRADE CROSSING
OVER HOCKING VALLEY RAILROAD, NEAR CARROLL, FAIRFIELD
COUNTY, OHIO.

COLUMBUS, OHIO, November 5, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of October 28, 1929, enclosing contract providing for the elimination of the grade crossing over the tracks of the Hocking Valley Railway Company just north of the village of Carroll in Fairfield County, Ohio, on state (intercounty) Highway No. 49, in which you propose to enter into a contract with the Hocking Valley Railway Company in reference to said grade crossing elimination.

I have carefully examined the agreement and find it correct in form, and hereby approve the same.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1151.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR SALE OF LAND OF
NORTH FORK FEEDER OF OHIO CANAL IN THE CITY OF NEWARK,
LICKING COUNTY, OHIO.

COLUMBUS, OHIO, November 5, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval a transcript in duplicate of your official pro-