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The case that would not close: How the case of Ethan Stone's estate has lasted more than 160 years in Ohio courts¹

On April 23, 1852, Alphonso Taft, the father of the only man in American history to serve as President of the United States and Chief Justice of the Supreme Court, walked into a former pork packaging plant on Court Street in Cincinnati, accompanied by his two law partners. Taft was at the plant, which was then serving as the Hamilton County Courthouse, to file initial paperwork in the estate of Ethan Stone, a man who had died three days earlier of "old age" at 84 years in his home at the corner of Vine and Fourth Streets. Joined by his partners Thomas M. Key and Patrick Mellon, Taft filed a lengthy will, covering the front and back of two 10½-inch by 17-inch pieces of onionskin paper, along with a codicil covering the front and back of another piece of similar paper with cursive handwritten script. Inside the makeshift-courthouse, Taft, Key and Mellon went to the office of Judge J.B. Warren, who just three months earlier had taken the oath as the first Hamilton County Probate Court judge under the modern court system in the State of Ohio. The judge's clerk accepted the case with entries for admitting the will and the codicil, and assigned the case number 179, based on the volume of cases already filed in the nascent court.² More than 160 years later, the file still sits on the shelves of the Hamilton County Probate Court among its active cases.

So far as can be determined, the Ethan Stone Trust is the oldest continuously active case in Ohio—and perhaps in the United States. It has been handled by all 24 Hamilton County Probate Court judges in six courthouses. In more than 16 decades, it has generated more than 500 filings, covering well over 3,000 pages. The trust contained one of the final plots of ministerial land within the state of Ohio when the Governor of Ohio deeded the lands to the Trust's sole

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ownership in 1974, 141 years after the U.S. Congress began the process of removing ministerial lands from the American landscape.

Ethan B. Stone was a leading citizen during the founding of Cincinnati, but a tragic figure who forfeited much of his local historical relevance through misfortune and poor investments. Stone's will, which set up a pair of trusts each strong enough to continue more than 160 years after Stone's death and launched decades of litigation, raised unusual questions involving probate, estate planning, real estate, and governmental legal issues.

The will

On June 17, 1850, all three attorneys of Taft, Key & Mallon entered the home at the corner of Fourth and Vine Streets owned by Ethan Stone, then an 82-year-old blind man who suffered from chronic rheumatic pains.³ Taft, the 39-year-old founding attorney of the firm, was to be the estate attorney for Stone, who had taken in Taft when Taft moved to Cincinnati from Vermont.⁴ Key and Mellon would be the witnesses to the instrument.

The will Taft had crafted contained 18 paragraphs, and all but six dealt with the disposition of \$10,500 of Stone's liquid worth, his real estate throughout Cincinnati, and the possessions inside his home. The bequests made Stone's will noteworthy in 1852, if for no other reason than the relatively large dollar amounts and real estate holdings involved. But it was the provisions set out in paragraph 11 and paragraph 16 of the will that has kept Stone's case active in court for more than 160 years following his death.

Paragraph 11 Trust

In 1794, John Cleves Symmes, a delegate to the Continental Congress from New Jersey and the father-in-law of William Henry Harrison, purchased a large tract of land in southwest Ohio. The area, known as the Symmes Purchase or the Miami Purchase,⁵ was divided into smaller plots of land, called townships. Those smaller plots were then divided again into 36 one-square-mile sections in checkerboard fashion. Section 29 of each of those plots of land was designated for ministerial use. Any money received by selling or leasing land in Section 29 of any of the plots of land in the Symmes Purchase territory—or any other ministerial land within Ohio—was to be distributed pro rata to the township's churches. Initially, the U.S. Congress was the Trustee of the Ministerial Lands. After Ohio became a state in 1803, the Ohio Legislature assumed that role.

There was no significant action in the trust during the first seven years of Ohio's statehood. By an act on Feb. 6, 1810, the legislature created a corporation of three trustees and a treasurer, to be elected by the citizens of any township containing a section 29 plot; those four individuals were charged with leasing the property perpetually and revaluing the rents every 15 years, dividing the rents among the religious societies of the township. By the same act, the legislature leased Section 29 of Storrs Township to Ethan Stone. Stone's lease lasted only eleven years, until the Trustees of the Township cancelled it with an act on Jan. 29, 1821. Stone had consented to the lease being canceled and entered into a new lease in May 1821, paying \$40 per year for a 99-year perpetual lease, renewable forever without revaluation on the square mile of land that constituted Section 29 of Storrs Township. The \$40 was to be divided among the churches of Storrs Township, at the discretion of the township trustees.⁶

The Ministerial Fund lands of Ohio, all 43,525 acres of them, were held by the legislature until Feb. 20, 1833, when the U.S. Congress authorized Ohio to sell the Ministerial sections,

provided the legislature and the purchaser attained consent from the lessee and the current inhabitants of the township in which the Section 29 plot stood. The proceeds of the sales were to be deposited in the State Ministerial Fund. The majority of the Section 29 lands were sold to the current leaseholders shortly after Congress authorized Ohio to sell the lands. Yet, Section 29 of Storrs Township was not sold to Ethan Stone. Stone held the lease on Section 29 of Storrs Township until his death in 1852, when, according to the terms in his will, his trust continued to collect the rent of the subleases on the properties occupying the land and gave the money for charitable and religious purposes. At that time, the subleases on the land were generating \$1,200 in revenue per year.⁷ The will directed the trustee to pay the \$40 yearly lease to the trustees of Storrs Township and make disbursements to the Cincinnati Orphan Asylum in the amount of \$100 per annum; the Society for the Relief of Aged and Indigent Females in the amount of \$60 per annum; half of the residue to the Protestant Religion of Storrs Township and the other half of the residue to the support of protestant schools on the grounds of Section 29 of Storrs Township.

The will did not designate exactly which church and which schools would receive the funds generated by the residue following disbursements to the Cincinnati Orphan Asylum and the Society for the Relief of Aged and Indigent Females. Instead, to avoid disputes, the will directed that there be a vote every 10 years to decide which church should be awarded the money, while the educational money was to be split equally among the eligible institutions. The Hamilton County Probate Court assumed oversight of the Church Fund elections, as it was overseeing the trust. The court directed the trustee to set up three polling places and three judges within Storrs Township for the decennial elections. Residents of Storrs Township over the age of 15 years old who had a right to partake in Communion in a Protestant Church—not necessarily one in Storrs Township—were allowed to vote.

On March 30, 1875, by an act of the Ohio Legislature (72 O.L. 242), the sublessees occupying “section twenty-nine, township four, fractional range one, in the Miami Purchase, in the county of Hamilton” gained the ability to obtain a conveyance by deed and fee simple to the land on which they resided. To get a conveyance, the sublessee had to “pay to the treasurer of the city of Cincinnati, upon the warrant of the city auditor of said city, the price per acre for said section at which the same is valued in the lease given to the original lessee by the trustees of said township four, fractional range one.”⁸ If the fee was paid and the certificate prepared by the treasurer of Cincinnati was presented to the Governor of Ohio, the sublessee became the owner of the land by deed in fee simple.

While the act was being discussed and passed in the statehouse in Columbus, the square mile of land on the western portion of what was then a city of more than 216,000 residents⁹ was still held largely by the Ethan Stone trust, although fleetingly after a change in trusteeship in 1870 led to the sale of some of the land. The trust’s oversight had been complicated in 1869, when Storrs Township, whose trustees had been receiving the \$40 per year lease payments from the Stone trust, was incorporated into the City of Cincinnati; the Probate Court had neglected to appoint a new recipient. Following the 1875 Act, most of the land of the section was sold. However, in 1881, Henry Beedorf, a sublessee, petitioned the Probate Court to appoint a trustee to collect ground rents and administer the terms of the will. Frederick Tischbein, an attorney for Gray & Tischbein who happened to live on the Section 29 grounds came forward to assume oversight of a trust that, according to probate court records, had had no activity in three years.¹⁰ Tischbein, a German immigrant who was then 32 years old, applied to be named trustee shortly after Beedorf’s petition, and was approved by Judge Isaac P. Matson on March 9, 1881.¹¹

The most contentious and high-reaching litigation involving the Ethan Stone Trust came as a result of Tischbein's efforts in 1881 to begin collecting ground rent from each of the trust's sublessees. As he did so, Tischbein found that many of the sublessees did not believe that they were sublessees.

Shortly after the sublessees gained the right to purchase a conveyance to their land by the Legislative Act of 1875, many of those residents came forward to take advantage of the offer. Chief among them was Daniel F. Goodhue, who on July 3, 1875, paid the Treasurer of the City of Cincinnati \$666.66 to receive a conveyance from the Governor to the land he was occupying.¹² That acreage, comprising 17.34 percent of the 106 acres of the fractional Section 29, was part of a sublease Stone had made on Feb. 2, 1846, to Justus Wright for \$30 per year.¹³ Similar to how Wright subleased the portion of Section 29 that he had subleased from Stone, Goodhue soon began looking to sublease or sell part of the land he believed he had purchased in July 1875. Later that year, Goodhue accepted an offer of \$600 to sell lots three, four, six and seven of his land to Davies and Mehitable C. Wilson. Both the Wilsons and Goodhue believed they owned their respective plots of land "free from any claim of rent" from the Stone Trust. Therefore, when Tischbein came in 1881 and asked the Wilsons to pay \$15.10 for their portion of the \$30 annual fee under the perpetual lease of Ethan Stone to Justus Wright, the Wilsons refused to pay. Mehitable C. Wilson brought suit against Tischbein in Hamilton County Superior Court, asking that she "might be declared to hold the title to her lots free and discharged from all claims for rents under (Stone's) lease."¹⁴

The Superior Court ruled in favor of Tischbein. It reasoned that Tischbein was a duly appointed trustee of the Ethan Stone Trust and therefore had exclusive right to collect ground rents. As such, Wilson was ordered to pay \$80.63 in unpaid rent from 1877 to 1881, and to

continue paying the \$15.10 per year to honor her portion of the lease to the Ethan Stone Trust. Wilson appealed, and the case was taken to the Hamilton County District Court, where Judge Robert A. Johnson wrote an opinion. Johnson's opinion was based primarily on the precedent the court had set earlier that year in a suit brought by Maria Jackson, Stone's niece and a devisee of his will, against Goodhue. In that case, Jackson claimed the conveyance to Goodhue was not valid and that Goodhue still owed his portion of the ground rent to her uncle's trust. The Jackson case was brought in the Court of Common Pleas in Hamilton County, where the judge sided with Jackson's claim. On appeal to the district court, Judge James M. Smith wrote an opinion holding that the 1875 Ohio Legislative Act "did not follow the provisions of the act of congress of 1833." Specifically, the Goodhue conveyance did not attain the consent of the lessee or the residents of the township, which the Court of Common Pleas took as a precedential condition for all future transfers on that ministerial land. The court held that since the transaction contravened the 1833 Congressional Act, the conveyance was void.¹⁵

In *Wilson v. Tischbein*, Judge Johnson noted that beyond the straightforward reason of a lessee being entitled to notice of land he would lose a right to, the residents of the township should have been entitled to notice of the conveyance because of the possibility of forfeiting some aspect of the religious benefits of the trust's continuance, which would be lost if the land was conveyed to a party outside of ministerial interest. As neither condition was met, the conveyance of the land free of a yearly lease payment to the Stone Trust was invalid. Further, Johnson noted, even if the notices were not considered to be precedential conditions of such a conveyance, a merger between Goodhue and the State could not have arisen, as Goodhue was merely perceived to be purchasing the perpetual sublease of Justus Wright from Ethan Stone—which had not been invalidated and still stood. The only merger that could occur, Johnson

believed, was between Ethan Stone, if living, and the State of Ohio; Goodhue had no privity with the State, as he was not the first lessee.¹⁶

Wilson's attorneys also attempted to argue that the \$40 per year lease, which the attorneys understood to be paid to Storrs Township for the benefit of the residents of the Township, "became extinguished" because Stone devised certain portions of the profits on the land back to the Township, which no longer existed. Johnson denied the argument, saying that the lease was in full force. He noted that that \$40 per year went to all of the religions of the township and that the devisee was not necessarily the Township, but the winner of the decennial elections.¹⁷ Therefore, there was no reason for the leasehold to have lapsed by any argument relating to improprieties with the township.

Johnson's decision to uphold the right of the Ethan Stone Trust to hold the lease as long as it paid the \$40 per year to the treasurer of the City of Cincinnati to be transmitted for the benefit of all of the religious organizations standing on the grounds of Storrs Township kept the trust alive. It also reprimanded the City of Cincinnati, saying the city had "no right to take (the \$40 yearly lease payment) and devote it to other purposes."¹⁸ As a result, it kept the Wilsons as sublessees under the lease from Ethan Stone to Justus Wright in 1846, and therefore the couple had to pay \$15.10 per year as their portion of the yearly lease. Most importantly, it allowed the trust to continue to hold the lands, as it would for more than 129 additional years.

The Paragraph 11 trust remains active. Its holdings, as of this writing, consist of 16 parcels of land, the remnants of the square mile that the Ohio Legislature first leased to Ethan Stone in 1821. Without cash assets, the Trust currently has no way of honoring its commitment to its beneficiaries. Beyond the two modern iterations of the named beneficiaries, the Trust has

no other known beneficiaries. Meanwhile, the trust is involved in a foreclosure suit in the Hamilton County Common Pleas Court, in which the trust is asserting its interest in five of its parcels which underlie lands involved in an action against a real estate development company.¹⁹ As the 16 parcels that comprise the breadth of the trust's current assets sit in an underdeveloped portion of Cincinnati, just west of Downtown, and the valuation of the parcels remains unknown, the current trustee, Fifth Third Bank, continues to search for ways to obtain value for the remaining pieces of Ethan Stone's legacy.

Paragraph 16 Trust

At the time of his death, Stone's largest asset was his home at the corner of Fourth and Vine Streets. The Downtown Cincinnati area was rapidly growing, and nineteen years later Fountain Square would open a block from Stone's property. Stone's will took advantage of the escalating value of the real estate by not immediately disposing of it. Instead, Stone left the home and the lots to his niece, Louisa Pease, and Mary Farrar, a widow living in the home, until the decease of one of them. After one of the two died—or sooner, if either Pease or Farrar should see fit—the home and property were to be sold. The proceeds from that sale were to be initially divided four ways to benefit Stone's relatives. After their passing, however, their portions ceded to the Trustees of Cincinnati College, to be used for the education of indigent scholars preparing for the ministry of the Episcopal Church.²⁰

Cincinnati College did not remain the beneficiary for long. Twenty-five years after Stone's death, in April 1877, the Episcopal Bishop of Southern Ohio effectively assumed control of the trust and dispersed the funds within his ministry, according to filings found in the Episcopal Church archives. The informal arrangement, allowing the Bishop to access the funds while Cincinnati College remained the trustee, was in place for the next twenty years. The trust was

formally shifted to the Bishop's trusteeship, though, on Saturday, April 24, 1897, when the Hamilton County Probate Court under Judge Howard Ferris issued an entry in the Court's book noting a permanent change in the paragraph 16 trust.²¹

The Bishop of Southern Ohio continued as the officially acknowledged trustee of the paragraph 16 trust until its conclusion on November 7, 2012, a period of 115 years that included all nine Bishops of Southern Ohio in the diocese's history, along with eight Coadjutor Bishops. As the trust was sustained by investments—including holdings in the Central Trust Company, the Little Miami Railroad, Buckeye Loan & Building Co., and Series G and K U.S. Treasury bonds—and had merely one charity as a beneficiary, the litigation in the case was miniscule compared to its sister trust created five paragraphs earlier in the will of Ethan Stone.

¹ In digitizing documents in the Hamilton County Probate Court going back to 1791, it was brought to Judge James Cissell's attention that this case was ongoing. Judge Cissell assigned Magistrate Gordon Strauss the task of retrieving and organizing boxes of documents relating to this estate. Upon Magistrate Strauss' retirement, Judge Cissell assigned law clerk Doug Tift to continue the research, and he was principally responsible for the drafting of this article for publication in an Ohio State Bar Association publication.

² The case is now No. 1900000179. The number was changed to comply with modern Court numbering systems.

³ James Wickes Taylor, "A Choice Nook of Memory," 10, James Taylor Dunn, 1st ed., 1950

⁴ Ishbel Ross, "An American Family: The Tafts, 1678 to 1964," 10, 1st ed, 1964. Also "A choice Nook of Memory," by James Wickes Taylor, p. 11.

⁵ Taken from Booth Shepard's 1954 summary of the first 100 years of the case. Shepard represented Fifth Third Bank, which had become trustee in 1954.

⁶ Robert D. Handy and William Disney. "Reports of Cases Argued and Determined in Ohio Courts of Record: Western Law Monthly" 612, 1st ed., 1896. (recorded in book F 3, p. 206 of Section 29). The new lease can be found at the Hamilton County Recorder in book W 2, p. 205 of Section 29 of Storrs Township. The actual terms of the lease stated that the revaluation process required under the previous lease was now omitted.

⁷ Robert D. Handy and William Disney. "Reports of Cases Argued and Determined in Ohio Courts of Record: Western Law Monthly" 613, 1st ed., 1896.

⁸ The Act can be found in "The Statutes of the State of Ohio in continuation of Curwen's Statutes at Large," edited by J.R. Saylor in the Library of Congress, Vol. IV, chapters No. 3128-3136. (book does not have page numbers, but is arranged by chapter number).

⁹ 1870 census data.

¹⁰ "University of Cincinnati Bulletin" September 25, 1905. P. 55.

¹¹ Vol. 84, page 13 of the Hamilton County Probate Court Journal Entries. According to Hamilton County Probate Court records, Tischbein would serve as trustee of the Paragraph 11 trust until April 28, 1913, when his son, A.L. Tischbein, assumed the trusteeship.

¹² Recorded in book 445, page 240 in the Hamilton County Recorder's office.

¹³ Book 128, page 614 in the Hamilton County Recorder's Office.

¹⁴ Robert D. Handy and William Disney. "Reports of Cases Argued and Determined in Ohio Courts of Record: Western Law Monthly" 613, 1st ed., 1896.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Robert D. Handy and William Disney. "Reports of Cases Argued and Determined in Ohio Courts of Record: Western Law Monthly" 614, 1st ed., 1896.

¹⁹ *The Huntington National Bank v. Collins Riverside Development*, Case No. A 1208332 in Hamilton County Common Pleas Court.

²⁰ Reginald C. McGrane. "The University of Cincinnati: A Success Story in Urban Higher Education." 38, 1st ed, 1963.

²¹ Volume 169, page 39 of Hamilton County Probate Court Entry Book.