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Future Interests--Limitations to Heirs Postponed--Determination of Takers

G. H. A.
West Virginia University College of Law

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analyze that their statements in courts should be carefully considered beforehand so as to avoid the result reached in the principal case. Attorneys, as agents for their clients, should make out the best case possible for the client and force the adversary to prove every part of his case rather than allow the verdict to be based on an improvident admission.

J. L. R.

**Future Interests—Limitations to Heirs Postponed—Determination of Takers.**—In 1909 T died devising certain real estate to his son A and A's wife, B, for and during the life of the survivor of them, remainder to their children. The will further provided that if A and B died without having had any children, then the real estate was to be divided among T's heirs. In 1910 A died childless. The property was subsequently sold by agreement between the life tenant, B, and T's heirs. A disagreement arose among the heirs as to the proper distribution of the proceeds. P contended that the heirs of T, who were to share the proceeds of the sale, were to be determined upon the death of the life tenant, B, and since that class is still contingent as to membership it would be impossible to distribute the proceeds. D contended that the heirs of T should be determined at the death of T or no later than the death of A when it became conclusive that he would have no children. The lower court accepted D's latter contention. Held, that as a general rule when a testator directs that upon the happening of a certain event a particular interest or estate is to go to his heirs, the class is to be determined as of the date of testator's death unless a contrary intent is plainly manifested in his will. While the court intimated that the case fell within the general rule, they further stated that when it conclusively appeared, by the death of A, that the contingent remainder in his unborn children would never vest, the heirs must be determined no later than that date. *Dean v. Lancaster*, 105 S.E.2d 675 (S.C. 1958).

In order to properly analyze the principal case it becomes necessary to determine the particular estates in land created so one may apply the particular rules of law applicable. Upon the death of the testator the son and his wife had a vested life estate in possession. This is evidenced by the fact that the estate was created in favor of known, ascertained persons with no condition precedent to their taking the life estate.
The limitation in remainder to the children of the life tenants was a contingent remainder. *Rinks v. Gordon*, 160 Tenn. 345, 24 S.W. 2d 896 (1930). A remainder is contingent when it is limited to a person not in being when such limitation is made. *Kohl v. Montgomery*, 373 Ill. 200, 25 N.E.2d 826 (1940). It is interesting to note that in the principal case the language creating the remainder does not establish its status as a contingent remainder, in that the language neither discloses a condition precedent to the vesting of the estate in the form of an uncertain event, nor does it indicate that the class to take is unborn or unascertained. The facts of the case create the contingency, in that the life tenants had no children at the creation of the estate. Had there been a child born to the life tenants the remainder would have become vested in that child, subject, however, to being partially divested (or subject to open) to allow for after born children. *Stearns v. Curry*, 306 Ill. 94, 137 N.E. 491 (1922).

The limitation over to the heirs of the testator was likewise a contingent remainder, thus making the limitations following the life estate a contingent remainder in double aspect. A contingent remainder in double aspect is the creation of two or more alternative contingencies or substitutional remainders, whereby two or more remainders in fee simple are created as substitutes or alternatives, on such contingencies that only one of the remainders can possibly vest. *Willis v. Lapsley*, 240 Ky. 829, 43 S.W.2d 47 (1931). The contingent remainder in double aspect is to be distinguished from the vested remainder subject to a condition subsequent with a limitation over in the form of an executory devise which is a devise to a person in derogation of, or substitution for, a preceding vested estate in fee simple (defeasible), either in possession, remainder, or reversion. *Humphreys v. Welling*, 341 Mo. 1198, 111 S.W.2d 123 (1937).

The remainder to T’s heirs, as will later be pointed out, was not contingent as to class according to the better view, but rather because the vesting of the estate was conditional on the happening of an uncertain event, *i.e.*, the death of the life tenant without issue.

It is interesting to note that at common law a remainder could not be created in the heirs of the testator or grantor. This was the rule known as the doctrine of worthier title which contains two aspects: (1) the inter vivos phase and (2) the testamentary phase. The inter vivos phase made the remainder in the heirs of the grantor
void giving the grantor a reversion after the termination of the preceding estate. This phase of the rule is recognized in a few jurisdictions in the United States but the majority of the courts that recognize it deem it only a rule of construction and not a rule of law. National Shawmut Bank v. Joy, 315 Mass. 457, 59 N.E.2d 113 (1944); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929); Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919).

In the testamentary phase, the title to the remainder in the testator’s heirs passed to the heirs by descent, rather than devise, as title acquired by descent was deemed to be the “worthier title.” This phase of the rule is almost gone today and would normally have no practical effect. 3 Restatement, Property, § 314 (2) (1940). Quaere, if such a rule was applied in the principal case, would the court not be compelled to hold that heirs meant heirs at T’s death as that is when title descends?

The primary problem to be resolved is whether the limitation to T’s heirs includes the class as determined at T’s death or at the time of the death of the life tenant when it was finally positively determined that the remainder in the life tenant’s unborn children would never vest; thereby conclusively establishing the fact that the heirs of T would take. The court in the principal case avoided this issue by stating that while they believed the heirs living at T’s death were the proper class to take, in no case would the class be determined any later than the death of the life tenant. In the principal case it would have made no difference since in either event the class to take was the same. But suppose, between the time of the death of T and the death of the life tenant, one or more of T’s heirs had died. This would have materially affected the distribution of the estate. Professor Simes states: “In the absence of language or circumstances indicating a contrary intent, the word ‘heirs’, in a gift to the heirs of a named person, means those persons who would take the kind of property which is the subject matter of the gift, on the death of the named ancestor intestate, according to the local statutes of descent and distribution then in force.” Simes, Future Interests 321 (1951). This rule is true even though the gift to the heirs is postponed, unless a contrary intent is manifested. Loring v. Sargent, 319 Mass. 127, 64 N.E.2d 446 (1946). Where the gift to heirs is postponed, there is no condition precedent that the persons to take must survive the period of distribution in the absence of language and circumstances indicating a contrary intent. Tyler v. City Bank Farmers Trust Co., 314 Ill. 528, 50 N.E.2d 778 (1943).
Another view in respect to the determination of the heirs or next of kin when there is a postponed gift, in remainder or as a substitute gift, is that the class is to be determined as of the death of the life tenant though this can not be truly said to be a gift to the heirs of one who died other than at the death of the life tenant. *New York Life Ins. & Trust Co. v. Winthrop*, 237 N.Y. 93, 142 N.E. 431, 31 A.L.R. 791 (1923). This view was apparently followed in *National Bank v. Kenney*, 113 W. Va. 890, 170 S.E. 177 (1933). However, in the *Kenney* case, there was an express condition of survivorship as to the primary class gift and the court stated that this condition of survivorship applied equally as well to the substitutional class gift in favor of the testatrix's heirs, thus holding that only the heirs who survive the life tenant should take.

The principal case has suggested by inference at least a third possible view, i.e., the heirs who will take are determined when it conclusively appears that the heirs will take regardless of the fact that this happened neither at the testator's death nor at the termination of the final life estate (the time of distribution) but in the interim.

It is submitted that while the decision in the principal case was satisfactory from a practical point of view, yet the court should have taken a more positive position in order to establish a precedent for situations in the nature of the one above suggested, so that one may more clearly and with preciseness predict what the law will be.

G. H. A.

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**Public Utilities—Discontinuance of Service.**—*P* filed a petition with the Public Service Commission praying authority to discontinue the furnishing of passenger service over its branch line between Elkins and Durbin, West Virginia. The commission entered an order granting in part the relief prayed for, but ordered that *P* continue furnishing passenger service three days per week. *Held*, that, where no public need for such service exists and a substantial loss is suffered by the carrier in the furnishing of such service, authority to discontinue the service should be granted. *Western Maryland Ry. v. Public Serv. Comm’n*, 106 S.E.2d 923 (W. Va. 1959).