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Real Property--Use of "Descend" in Deed--Word of Limitation

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Court follow the New Hampshire decision? In the *Securo* case the West Virginia Court said:

> "But whether the rule should be carried to the extent, as some of the cases have done, of denying the infant a right to maintain an action for damages against his parent for injury inflicted with evil intention and from wicked motives is a question not now before us but remains for consideration if such unfortunate situation should arise."

—JEROME KATZ.

REAL PROPERTY—USE OF "DESCEND" IN DEED—WORD OF LIMITATION.—On February 19, 1868, Matthew L. Ward and wife conveyed a certain tract of land to "Lewis Woolwine (for the use and benefit of Columbia, his wife and upon her decease to descend to her heirs)." Columbia Woolwine thereafter conveyed parcels of the land in fee simple, and, through mesne conveyances, those lands come to A. S. Bosworth and Nellie A. Maxwell, among others. In November, 1928, Columbia Woolwine died and thereafter her heirs brought a bill for partition, claiming that they had a fee simple interest as remainder-men. *Held*: The deed from Matthew L. Ward and wife to Lewis Woolwine operated to vest in Columbia Woolwine an equitable fee simple estate, and the heirs took nothing as remaindermen. *Trahern v. Woolwine.*[1]

It would seem that the phrase "to Lewis Woolwine for the use and benefit of Columbia, his wife" gave Columbia Woolwine an equitable fee simple,[2] unless the words following were intended to limit or qualify such an interest: "and upon her decease to descend to her heirs." The Court said that the latter phrase did not limit or qualify the fee, but was merely descriptive of the fee, *i. e.*, an estate which would descend to the heirs of Columbia Woolwine at her decease. That construction rests upon the theory that the grantor used the word "descend" in its technical sense, as meaning "to pass by succession." It is doubtful, however, that the word was not used in its technical sense, for there are apparently other and better words to show an intent to pass a fee, and least of all would one expect a conveyancer to express such an intent in such an awkward way. Of course, if "descend" was used technically, Columbia Woolwine took a fee simple and her heirs took nothing.

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[1] 155 S. E. 909 (W. Va. 1930).

[2] W. VA. REV. CODE (1931) c. 36, art. 1, § 11; W. VA. CODE ANN. (Barnes, 1923) c. 71, § 8

In view of these considerations it would seem that "descend" was used in its popular sense, as "to go" or "to pass." Under such a construction of the deed, our statute abolishing the Rule in Shelley's Case[3] would apparently limit Columbia Woolwine's estate to an equitable life estate and give her heirs a contingent remainder in fee simple. Thus construed the case would seem to be governed by *Carter v. Reserve Gas Company*[4] yet a contrary result was reached.

The plaintiffs were trying to recover an estate which had increased in value from $1,400 in 1868, to near $5,000,000 in 1930, and the defendants were trying to sustain titles to 152 acres of land which had been divided into city lots, streets and alleys, and comprised about one-third of the real estate in the City of Elkins. The decision of the Court, sustaining the contentions of the defendants, saved that great catastrophe to the City of Elkins, but denied to the Woolwine heirs an estate which, it would seem, vested in them on the death of Columbia Woolwine. The decision permitted a life tenant to destroy what may have been intended as a contingent remainder. It may be better to deny the titles of the Woolwine heirs than to precipitate upon the City of Elkins the probable result of upsetting one-third of the land titles in that city.[5]

—WILLIAM J. MOORE.

TAXATION—TRUSTS—INTEREST OF ONE ENTITLED TO RECEIVE INCOME FOR LIFE FROM TRUST FUND.—A citizen of Virginia conveyed certain securities to a trustee in Maryland to pay the income to the settlor's children for life and after their death to divide the property among the settlor's descendants.[1] The taxing authorities of Virginia attempted to tax the interest of one of the children, a resident of Virginia, claiming she had an equitable life estate in the fund and taxable under the provision of the intangible property tax statute[2] imposing taxation on bonds, notes and all other de-

[3] W. VA. REV. CODE (1931) c. 36, art. 1, § 14; W. VA. CODE ANN. (Barnes, 1923, c. 71, § 11.

[4] Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738 (1919).

[5] See Pound, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605; Hardman, *Stare Decisis and the Modern Trend* (1926) 32 W. VA. L. Q. 163.

[1] Commonwealth v. Safe Deposit & Trust Co., 155 S. E. 895 (1930).

[2] TAX CODE OF VIRGINIA (1930) c. 7, § 69.