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FUTURE INTERESTS - ACCELERATION OF CONTINGENT REMAINDERS AFTER WIDOW'S ELECTION TO TAKE AGAINST WILL

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FUTURE INTERESTS — ACCELERATION OF CONTINGENT REMAINDERS AFTER WIDOW'S ELECTION TO TAKE AGAINST WILL — Testator made specific bequests in the first five items of his will, one bequest being directed to his wife. In the sixth item he gave his wife a life interest in all the property remaining after satisfying items one to five. Item seven provided for a remainder in some specific realty to a niece, and item eight provided that upon the death of the wife and after satisfying item seven, the residue of the estate was to go to five named beneficiaries and to all of his nephews and nieces "then living." The widow renounced her share under the will and took her statutory share of one third of all the property. *Held*, the remainders were accelerated into possessory estates; "then living" referred to the termination of the previous life estate and not to the death of the life tenant; the termination of the life estate closed the class; and the disapointed legatees under items one to four would be compensated first out of the proceeds of the specific bequest renounced by the widow, and the balance be secured by a lien imposed on the accelerated remainders. *Tomb v. Bardo*, 153 Kan. 766, 144 P. (2d) 320 (1941).

The situation presented in the instant case, while common enough in view of the prevalence of statutes permitting widows to elect to take distributive shares, has given rise to many closely related problems which have taxed judicial ingenuity in the construction of wills in the light of events unforeseen by the testator.[1] To achieve coherency of exposition it is advisable to treat some of these problems separately although in reality they are all closely related. The remainders described in item eight are expressly limited on the contingency that the takers be living at the death of the life tenant. There is excellent authority to sustain the Kansas court's holding that the purpose of this limitation was to benefit the persons living when the preceeding life estate terminated, and that the death of the widow was not a necessary condition precedent.[2] The fact that a remainder is in terms contingent should not prevent its vesting in possession upon a premature termination of the previous estate.[3] Acceleration

[1] The first collection of American cases on this subject appeared in 1932. Simes, "The Acceleration of Future Interests," 41 YALE L. J. 659 (1932).

[2] PROPERTY RESTATEMENT, § 233, comment c. (1936); 5 A. L. R. 473 at 474 (1920); 17 A. L. R. 314 (1922); 3 SIMES, FUTURE INTERESTS, § 756 (1936); American National Bank v. Chapin, 130 Va. 1, 107 S. E. 636 (1921).

[3] It is assumed here that the destructibility rule is no longer in force. If it were,

may be denied, however, if the testator has clearly indicated a contrary intent,[4] or if it is impossible to ascertain the remaindermen at the time,[5] or if necessary to do so to prevent a substantial distortion of the testamentary scheme. An ancillary problem was presented in the instant case due to the fact that the remainders were limited to a class which was subject to increase or decrease during the life of the renouncing life tenant. However, having decided to accelerate the remainders, the court was inevitably forced by the same reasoning to close the class.[6] In addition there was the practical argument that an awkward problem of administration might arise if, after the property was vested in possession among some forty-two beneficiaries, the distributive shares were still liable to change in size during the life of the renouncing widow. Perhaps the most vexing issue that confronted the court in the instant case was whether to deny acceleration of the remainders for the sole purpose of avoiding a distortion in the testamentary scheme. The distortion would arise because the specific legatees would take less than the testator intended to give them due to the necessity of satisfying the renouncing widow's claim out of their shares, while the remaindermen would take more than the testator intended because their estates would become possessory sooner than was contemplated. To prevent this deviation from the testamentary plan, courts have often been led to deny acceleration and apply the doctrine of sequestration, whereby the interests renounced are administered by a trustee under judicial supervision for the duration of the life of the renouncing claimant, and the income is used to compensate the disappointed legatees.[7] In the principal case, the court apparently

then the prior determination of the life estate would necessarily destroy the contingent remainders supported by that estate.

[4] Blatchford v. Newberry, 99 Ill. 11 (1880); Stevens v. Stevens, 121 Ohio St. 490, 169 N. E. 570 (1929).

[5] Schaffenacker v. Beil, 320 Ill. 31, 150 N. E. 333 (1926). It was held In Matter of Byrnes' Estate, 149 Misc. 449, 267 N. Y. S. 627 (1933), that a limitation to the children of a deceased brother and their issue living at the time of the widow's death or remarriage, could not be accelerated upon the widow's renunciation of her life estate, because membership in the class could not be determined at that time. Many cases which have expressly stated that contingent remainders will never be accelerated can be explained under one of the three grounds stated above, namely, the testator had expressed a contrary intent, the remaindermen could not be presently ascertained, or it was necessary to deny acceleration to prevent distortion of the testamentary scheme. It seems clear, therefore, that quite often the court's statement was broader than required by the facts in the case before it.

[6] 2 PROPERTY RESTATEMENT, § 231, comment i (1936); Allen v. Hannum, 15 Kan. 470 (1875); Davis v. Hilliard, 129 Md. 348, 99 A. 420 (1916). Cf. 3 SIMES, FUTURE INTERESTS, § 759 (1936); Yeaton v. Roberts, 28 N. H. 459 (1854).

[7] 3 SIMES, FUTURE INTERESTS, § 761 (1936); 5 A. L. R. 1628 (1920); 99 A. L. R. 230 (1935); 125 A. L. R. 1013 (1940); 2 PROPERTY RESTATEMENT, § 234 (1936) and Appendix, p. 71 et seq.

It has variously been suggested that the basis for this principle is a phase of the equitable doctrine of election, or that the courts have construed the future interests involved as executory devises to vest on the widow's death, or that it is a rule for marshalling the assets of the estate. See 3 SIMES, FUTURE INTERESTS, § 761 (1936).

recognizes and approves the rationale of sequestration, but it seeks to achieve essentially the same ultimate results by a different process which, unlike sequestration, is consistent with acceleration. The remainders were accelerated subject to a lien for the balance of the amount necessary to repair the disappointment suffered by the specific and favored legatees. This procedure, while not common, is not entirely new.[8] The device used by the court does not perhaps succeed in preserving the more delicate nuances of the testamentary plan to the same degree that sequestration does. What it loses in this respect is compensated for by the fact that it is much less cumbersome, relatively inexpensive and much speedier in closing the estate. For these reasons such a device is especially useful in situations where the estate involved is too small to invoke the use of the more elaborate machinery of sequestration.[9]

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[8] Apparently a similar device was employed in Sarles v. Sarles, 19 Abb. N. C. (N. Y. Sup. Ct.) 322 (1887). Essentially such a procedure was allowed as an alternative to sequestration, if all the parties agreed, in Jones v. Knappen, 63 Vt. 391, 22 A. 630 (1891). This procedure may have been used in Allen v. Hannum, 15 Kan. 625 (1875); and in Mercantile Trust Co. v. Schloss, 165 Md. 18, 166 A. 599 (1933).

[9] There has been a great deal of disagreement over the issue of who should ultimately bear the loss occasioned by the satisfaction of the renouncing claimant's share. Some decisions have indicated that absent any direction by the testator, the loss should fall entirely on the residuum. Others have said that all classes of legatees should share the loss alike. On this problem in general, see 5 A. L. R. 1628 at 1634 (1920); 99 A. L. R. 1187 (1935); 2 PROPERTY RESTATEMENT, § 234, comment m (1936). In the instant case, this difficulty was obviated because of the clear manner in which the testator stated the order in which his bequests were to be fulfilled.