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WILLS-FUTURE ESTATES-DESCENDIBILITY OF CONTINGENT REMAINDERS

WILLS—FUTURE ESTATES—DESCENDIBILITY OF CONTINGENT REMAINDERS.—A testator left property in trust for his wife and son, or the survivor of them, for life. There followed a remainder over the lineal heirs of the son, but should the son die without issue the property was to be divided among specifically named devisees. The son died unmarried and without issue. Representatives of three deceased remaindermen who had predeceased the son claimed shares in the estate. *Held,* that the shares of the contingent remaindermen had lapsed. *In re Coots's Estate* (Mich. 1931) 234 N.W. 141.

It seems unfortunate that the court felt compelled to hold survival of the life tenants by the contingent remaindermen to have been a condition precedent to the taking of the latter. The testator may always require such a survival by the terms of the will. *Eckle v. Ryland*, 256 Mo. 424, 165 S.W. 1035; *Fitzhugh v. Townsend*, 59 Mich. 427. The instant case seems to write survivorship into all such provisions for contingent remainders. In the absence of express requirement, survivorship of the remaindermen should not be necessary. Where a remainder is contingent because of the uncertainty of the person to take, a remainderman does not have a descendible interest. 9 COL. L. REV. 546; 1 FEARNE, CONTINGENT REMAINDERS, 3d ed., 363-8; 15 MICH. L. REV. 175. (In this article three cases are cited as holding that the remainder may be descendible even though the person to take be uncertain. Only the Virginia case cited seems to bear out the contention, and the result is there secured by a peculiar statute.) But where there is no uncertainty as to the person, the remainderman has a vested interest in the remainder contingent on the happening of the event which is to vest possession, and the interest is descendible, devisable, and alienable. *Culley v. Elford*, 187 Ala. 165, 65 So. 381; *Perry v. Bulkley*, 82 Conn. 158, 72 Atl. 1014; *Fisher v. Wagner*, 109 Md. 243, 71 Atl. 999; *Rosenzwog v. Gould*, 131 Md. 209, 101 Atl. 665; *Cummings v. Stearns*, 161 Mass. 506, 37 N.E. 758; *Hennessy v. Patterson*, 85 N. Y. 91; *Roosa v. Harrington*, 171 N. Y. 341, 64 N.E. 1; *Matter of Turner*, 210 App. Div. 221, 205 N. Y. S. 712; *Weeks v. Guerin*, 121 Mis. 131, 200 N. Y. S. 387; *Guaranty Trust Co. v. Curry*, 134 Mis. 99, 234 N. Y. S. 329. The older cases are collected in 15 MICH. L. REV. 175. Where there is but a single remainderman, the requirement of survival would often result in a total intestacy as to the gift over. Cases holding that there is descendibility under such circumstances are here collected separately though they do not seem to differ on principle. See *Braley v. Spragins* (Ala. 1930) 128 So. 149; *DuBose v. Kell*, 105 S. C. 89, 89 S.E. 555; *Boston Safe Deposit and Trust Co. v. Stratton*, 259 Mass. 465, 156 N.E. 885; *Nickerson v. Harding*, 267 Mass. 203, 166 N.E. 703; *Fulton v. Teager*, 183 Ky. 381, 209 S.W. 535; *Griffin v. Shepard*, 124 N. Y. 70, 26 N.E. 339; *Matter of Smith*, 205 App. Div. 449, 200 N. Y. S. 538; *In re Woodruff's Will*, 237 N. Y. S. 417. See also *Matter of U. S. Trust Co. of New York*, 223 N. Y. 617, 119 N.E. 1082, affirming 179 App. Div. 923, in which the dissenting opinion in the lower court seems to have been argued much as the opinion in the principal case. The language of the lower New York courts has often been inexact, and in dealing with a situation similar to that of the principal case the courts have talked of "vested remainders." An analysis of the facts will show that the court really dealt with a "vested interest in a contingent remainder" as stated by the court of appeals in *Hennessy v. Patterson*, 85 N. Y. 91, and *Roosa v. Harrington*, 171 N. Y. 341, 64 N.E. 1. The New York cases are of especial interest since Michigan has borrowed from New York a statutory codification of the common law rule, and has provided that "Expectant estates are descendible, devisable, or alienable in the same manner as estates in possession." COMP. LAWS, 1915, sec. 11553; FOWLER, NEW YORK REAL PROPERTY LAW 210 (1899). If the instant case be sound it is difficult to see how any expectant estate be descendible or devisable unless the testator shall expressly so state, and the purpose of the statute is thus defeated. The court was evidently embarrassed by the

case of *Hadley v. Henderson,* 214 Mich. 157, 183 N.W. 75. The *Hadley* case can not be distinguished on the ground that it involved an executory devise rather than a remainder after a life estate, since both are treated by the statute as "expectant estates." Moreover, regardless of statute, an executory devise has the same incidents of descendibility as a contingent remainder. 18 C. J. 821; *Hennessy v. Patterson,* 85 N. Y. 91. Counsel in the *Coots's* case argued for a distinction on the ground that the *Hadley* case concerned personal property only. If the *Hadley* case be taken to have laid down a rule of property which governs the disposition of real estate, it certainly introduced into Michigan law a new and unsettling factor. The present trend of the law is marked by the effort to escape the common law infirmities of the contingent remainder, and the *Hadley* case would seem rather to establish a new infirmity in Michigan law. At least one earlier case appears to have been decided under a contrary doctrine. *Mulreed v. Clark,* 110 Mich. 229, 68 N.W. 138, 989. The *Hadley* case is contrary to the general current of the authorities. 11 R. C. L. 484; *Blackstone v. Althouse,* 278 Ill. 481, 116 N.E. 154; *Fitzgerald v. Daly,* 284 Ill. 42, 119 N.E. 911; *Medley v. Medley,* 81 Va. 265; *Prince v. Barham,* 127 Va. 462, 103 S.E. 626; *Kidwell v. Rogers,* 103 W. Va. 272, 137 S.E. 5. (It is admitted that the last three cases cited are of doubtful authority inasmuch as they rely on the peculiar Virginia and West Virginia statutes.) In view of the general policy of the law which seeks to escape the infirmities in expectant estates, it is to be hoped that the decision of the *Coots's* case may be reversed on rehearing, and that the *Hadley* case, if indistinguishable, will be overruled. (Since the above has been written, the rehearing has been denied.)