Michigan Law Review

Volume 34 | Issue 8

1936

FUTURE INTERESTS-REMAINDER TO A CLASS AS A VESTED REMAINDER

FUTURE INTERESTS—REMAINDER TO A CLASS AS A VESTED REMAINDER —Testator left to his daughter certain real estate "as her sole and separate property during her natural life and at her death to her children absolutely." One of the children mortgaged his interest in the remainder to plaintiff and died, the life tenant surviving him; and thereafter the plaintiff brought suit for foreclosure. *Held*, this was a remainder to uncertain persons which did not vest in anyone during the life of the life tenant; and therefore the mortgage was a nullity. *Deener v. Watkins*, 191 Ark. 776, 87 S. W. (2d) 994 (1935).

The decision must have come as a surprise to counsel for the plaintiff; for to reach the conclusion here found, it is believed that the court not only impliedly overrules two earlier Arkansas decisions[1] but runs contrary to the very weight of modern American authority.[2] A gift to "children" is a gift to a class, and the general rule is well established that a remainder to a class, where no words of condition appear,[3] creates a vested remainder in those of the class then in

[1] Jenkins v. Packington Realty Co., 167 Ark. 602, 268 S. W. 620 (1925); McKinney v. Dillard & Coffin Co., 170 Ark. 1181, 283 S. W. 16 (1926).

[2] See 1 SIMES, FUTURE INTERESTS, § 76 (1936), for discussion and collection of cases, and 3 THOMPSON, REAL PROPERTY, § 2151 (1924); 21 C. J. 986 (1920); 23 R. C. L. 533 (1919).

[3] The court in the instant case does not base its conclusions upon the presence of any words which might indicate the testator intended only survivors of the life tenant to take; and several of the cases which it cites are seemingly distinguishable on the ground that the gift was only to specified members of the class, that is the survivors, and not to the class as a whole. See Birdsall v. Birdsall, 157 Iowa 363, 132 N. W. 809 (1911); McLean v. Stanley, 134 Kan. 234, 5 P. (2d) 839 (1931). And cf. Hurst v. Hilderbrandt, 178 Ark. 337, 10 S. W. (2d) 491 (1928); and National Bank v. Ritter, 181 Ark. 439, 26 S. W. (2d) 113 (1930). The lower court did rule that under the provisions of the will the remainder was bequeathed contingently to the life tenant's children at her death. It is believed, however, that there is little to show the testator intended to create any contingency. The words "at her death" are usually interpreted as applying merely to the time when the estate is to vest in possession, and not in interest. National Bank of America v. Barritt, 136 Kan. 870, 18 P. (2d) 552 (1933); Dowd v. Scally, (Iowa 1921) 184 N. W. 340.

existence,[4] subject only to be opened up to let in future members,[5] which remainder, if it is in fee, will pass to the heirs or next of kin of any member dying before the life tenant.[6] The theory of the court in the instant case apparently is that a gift to "children" is uncertain in its description of the parties to whom the remainder is to go[7] and therefore creates a contingent remainder.[8] On the other hand, the court seems to admit that a remainder is vested if those children of the life tenant, alive at the time of the making of the gift or devise, are specifically named in the deed or will, and to agree further that in such case after-born children take a vested interest upon their birth.[9] It is submitted that the court has here found and created a distinction without any substantial difference; for the fact remains that the word "children" is just as certain in its connotation whether it is used to describe the whole class, or only those who may be born in the future. Moreover, if an interest may vest in after-born "children," it is a little difficult to understand why it may not vest in those "children" already in existence. It seems questionable whether any other jurisdictions will attempt to follow the distinctions here announced.

J. B. B.

[4] Smith v. Neill, 104 N. J. Eq. 339, 145 A. 537 (1929); McLean v. Stanley, 134 Kan. 234, 5 P. (2d) 839 (1931); and see the authorities cited in footnote 2, supra. The reason for saying the interest vests at this time is believed to be substantially that no good reason can be given for the contrary view since no condition precedent to the vesting has been expressed. Further, it is an oft-repeated canon of interpretation that the law favors the vesting of interests at the earliest possible moment. McKinney v. Dillar & Coffin Co., 170 Ark. 1181, 283 S. W. 16 (1926).

[5] Hatfield v. Sohier, 114 Mass. 48 (1873); Kepler v. Larson, 131 Iowa 438, 108 N. W. 1033 (1906).

[6] Crawley v. Kendrick, 122 Ga. 183, 50 S. E. 41 (1905); McLean v. Stanley, 134 Kan. 234, 5 P. (2d) 839 (1931).

[7] It is believed the court reached this conclusion on the theory that since the word "children," in legal connotation, includes both issue of the life tenant and adopted children, it was uncertain as to whom the remainder was to go. But surely this theory will not hold for this uncertainty goes not to the person but to the number who will take. An uncertainty as to the number is present in every case of class gift, but in order to determine who will take, it is only necessary to decide whether a certain individual falls within the given class.

[8] Tennessee, for a long time, held a similar view, that a remainder to a class was not vested until all the members of the class had been ascertained. Satterfield v. Mayes, 11 Hump. (30 Tenn.) 58 (1849). But this holding was changed by statute. Tenn. Code (1932), § 7598. See 1 SIMES, FUTURE INTERESTS, § 76 (1936), for a discussion of the Tennessee view.

[9] It is believed to be on this basis that the court distinguishes an earlier Arkansas decision which counsel for the plaintiff claimed to be in point. Landers v. People's Building & Loan Assn., 190 Ark. 1072, 81 S. W. (2d) 917 (1935).