St. John's Law Review

Volume 14, April 1940, Number 2 Article 26

Wills--Future Interests--Vesting of Estates (In re Montgomery Estate, 258 App. Div. 64 (2d Dep't 1939))

St. John's Law Review

out the occurrence of a similar accident.[10] There was no evidence of negligence in the construction of the theatre in an action by a patron to recover for personal injuries suffered when, having slipped or stumbled, he fell from the gallery, the floor of which inclined about fifty-five degrees, over the parapet, which, with the balustrade, was over three feet high and that in the many years that the theatre was used no such accident had ever taken place.[11]

For the application of the rule, an analysis of the cases reveals, it is essential that the structure, machine or appliance had been (1) safely used in the past and that the use was (2) continuous (3) for a long period of time.[12] However, the latter prerequisite may vary in each case. In a proper one, it is satisfied even though the use is only for several days.[13]

A. G.

WILLS—FUTURE INTERESTS—VESTING OF ESTATES.—Testator died leaving a will providing for a trust fund of his residuary estate, the income of which was to be payable to his widow for life. Upon the death of his widow, the trust was to terminate and the trustees were to sell and dispose of the corpus. From the proceeds, two legacies of $1,000 each were to be paid to his grandchildren, and the remainder was to be divided equally among his three sons, Harry, Robert and John, or their survivors. In the event that either grandchild should die before him, the amount of his legacy was to go to his issue, if any, otherwise it was to lapse and was to be added to the portion to be received by the sons. One of the sons, Harry, survived the testator, but predeceased the widow. The surrogate excluded his estate from participation in the proceeds of the trust fund. On appeal, *held,* two judges dissenting, reversed. The requirements of survivorship of the remainderman imposed by the testator referred to the *death of the testator,* and not to the death of the life tenant. *In re Montgomery Estate,* 258 App. Div. 64, 15 N. Y. S. (2d) 729 (2nd Dept. 1939).

It is a cardinal rule of construction that the law favors the vest-

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[10] Loftus v. Union Ferry Co., 84 N. Y. 455 (1881).
In another action to recover for the fatal injuries sustained by the plaintiff's intestate, which could have been avoided if the elevator in which she was a passenger had been more adequately enclosed, it was held that the defendant was not negligent, for no evidence was offered that any similar accident had happened before and there was proof that elevators similarly constructed had been safely used for years. McGrell v. Office Building Co., 153 N. Y. 265, 47 N. E. 305 (1897).

[11] Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895).

[12] See note 9, *supra.*

[13] O'Connor v. Webber, 239 N. Y. 191, 146 N. E. 200 (1924).

ing of estates.[1] The rule has been stated that "a remainder is not to be considered as contingent in any case where consistently with the intention of the testator it may be construed as being vested." [2] The most frequent situation wherein this rule is applied is in those cases where the remainderman of an estate dies prior to the time prescribed by the testator for the actual possession and enjoyment of the estate.[3] In such case it must be determined whether the testator intended that survivorship of the remainderman up to the time of the enjoyment of his estate was a condition precedent to the vesting in him of the estate,[4] or, whether the estate vested immediately upon the remainderman surviving the testator, though the enjoyment of the estate was postponed.[5] In this connection it has been held that as a general rule, the requirement of survivorship of a remainderman imposed by the

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[1] *In re* Evans Estate, 165 Misc. 752, 1 N. Y. S. (2d) 99 (1937) ("No rule is more frequently referred to than that the law favors the vesting of estates"). This rule has been actuated by a desire "to avoid perpetuities, intestacy, illegal suspension of the power of alienation, and to effect an intent which might otherwise be defeated." Dougherty v. Thompson, 167 N. Y. 472, 483, 60 N. E. 760, 763 (1901). See also Miller v. Von Schwarzenstein, 51 App. Div. 18, 64 N. Y. Supp. 475 (4th Dept. 1900); Vanderpoel v. Burke, 63 Misc. 545, 118 N. Y. Supp. 548 (1909); Chandler v. Kron, 110 Misc. 397, 180 N. Y. Supp. 198 (1920); Matter of Leonard, 143 Misc. 172, 256 N. Y. Supp. 355 (1932); Matter of Soy, 143 Misc. 217, 256 N. Y. Supp. 545 (1932); *In re* Kelly's Estate, 167 Misc. 751, 4 N. Y. S. (2d) 675 (1938).

[2] Hersee v. Simpson, 154 N. Y. 496, 500, 48 N. E. 890, 891 (1897). Accord: Embury v. Sheldon, 68 N. Y. 227 (1877); Moore v. Lyons, 25 Wend. 119 (N. Y. 1840); Hopkins v. Hopkins, 1 Hun 352 (N. Y. 1874); Cogan v. McCabe, 23 Misc. 739, 52 N. Y. Supp. 48 (1898); *In re* Cipolla, 165 Misc. 498, 1 N. Y. S. (2d) 8 (1938).

[3] See Matter of Lockwood, 192 App. Div. 850, 183 N. Y. Supp. 103 (3d Dept. 1920); Clow v. Schlieman, 166 N. Y. Supp. 472 (1917); Matter of Clarke, 120 Misc. 191, 197 N. Y. Supp. 824 (1923); *In re* Werner's Estate, 167 Misc. 92, 3 N. Y. S. (2d) 965 (1938).

[4] Hall v. La France Fire Engine Co., 158 N. Y. 570, 53 N. E. 513 (1899), *aff'g*, 8 App. Div. 616, 40 N. Y. Supp. 1143 (4th Dept. 1896) (a conveyance to one to have and to hold for and during her natural life, and at her death to the heirs of her body her surviving, created a contingent remainder); Shangle v. Hallock, 6 App. Div. 55, 39 N. Y. Supp. 619 (2d Dept. 1896); May v. May, 209 App. Div. 19, 204 N. Y. Supp. 411 (2d Dept. 1924); Hunt v. Tuller, 244 App. Div. 363, 279 N. Y. Supp. 468 (1st Dept. 1935); Matter of Bristol, 147 Misc. 578, 264 N. Y. Supp. 349 (1933) (testator directed the division of the principal of a trust fund among his grandchildren or their issue, and two nieces and a nephew, or such of them as shall survive his daughter. *Held*, gift created a contingent estate, vesting being conditioned upon survivorship of the daughter); *In re* Barnes' Estate, 155 Misc. 320, 279 N. Y. Supp. 177 (1935).

[5] Mere postponement of the enjoyment of the portion of the residue of testator's estate devised to three sisters, by the creation of a life estate in such portion in testator's widow, did not prevent the vesting thereof in the three sisters upon testator's death. *In re* Weaver's Estate, 253 App. Div. 24, 1 N. Y. S. (2d) 167 (3d Dept. 1937), *aff'd*, 278 N. Y. 605, 16 N. E. (2d) 121 (1938). Postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift, or unless it be upon an event of such nature that testator presumably meant to make no gift unless that event happened. *In re* Greenslitt's Will, 165 Misc. 464, 300 N. Y. Supp. 1099 (1938). See note 1, *supra*.

testator refers to the death of the testator, and not to the death of the life tenant.[6] If the remainderman dies before the life tenant, the estate will nevertheless vest in him provided he survives the testator.[7] In many cases this result is confirmed by the application of other doctrines of construction, such as: the law favors testacy and not intestacy;[8] the designation of the remainderman by name is a strong indication of the intent of the testator that the remainder should vest on his death;[9] the use of words of present gift in reference to a remainder are strong evidence of an intention that the remainder is to vest on the death of the testator.[10] Thus, in the instant case, the court was not only aided by the general rule that the survivorship intended is that of the testator, but also by the fact that the gifts to the grandchildren were made expressly subject to the survival of the testator, so that in the absence of language referring to the gifts to the sons which clearly indicated that the period meant was the life ten-

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[6] Under a will directing an equal division of his estate—devised in trust for the testator's wife—among his children on her death or remarriage, the remainder vested in the children at the testator's death, there being no contingency as to persons entitled to the remainder, or event on which it was limited. *In re* Baumiller's Estate, 155 Misc. 815, 280 N. Y. Supp. 537 (1935). See also Matter of Accounts of Mahan, 98 N. Y. 372 (1885); Matter of Johnson, 212 App. Div. 768, 210 N. Y. Supp. 33 (3d Dept. 1925); Matter of White, 213 App. Div. 82, 209 N. Y. Supp. 433 (1st Dept. 1925); Matter of Walsh's Estate, 147 Misc. 103, 264 N. Y. Supp. 621 (1933).

[7] A bequest to one for life with remainder over to certain named legatees passes a vested interest to the remainderman in the absence of a contrary testamentary intention, and the interest of the remainderman who dies before the life tenant passes to his successors in interest. Matter of Lockwood, 192 App. Div. 850, 183 N. Y. Supp. 103 (3d Dept. 1920); Matter of Clarke, 120 Misc. 191, 197 N. Y. Supp. 824 (1923). See note 3, *supra.*

[8] The presumption against intestacy is very strong and is applied in all cases. West v. West, 215 App. Div. 285, 213 N. Y. Supp. 480 (2d Dept. 1926). See also *In re* Niles' Will, 164 Misc. 328, 298 N. Y. Supp. 727 (1937); *In re* Valentine's Estate, 165 Misc. 863, 1 N. Y. S. (2d) 695 (1937); *In re* Kearney's Estate, 169 Misc. 947, 9 N. Y. S. (2d) 290 (1939); *In re* Rathbone's Estate, 170 Misc. 1030, 11 N. Y. S. (2d) 506 (1939).

[9] Where testator bequeathed residuary estate to trustees for the use of his wife during her life, and upon her death the residuary estate was to be equally distributed among *named* legatees, the gift vested on the death of the testator, since a gift of remainder to named persons in existence at the death of the testator imports an immediate vesting. *In re* Chaim's Estate, 168 Misc. 923, 6 N. Y. S. (2d) 713 (1938). See also Matter of Brundrett, 135 Misc. 574, 240 N. Y. Supp. 220 (1929); *In re* Murphy's Estate, 157 Misc. 5, 283 N. Y. Supp. 545 (1935); *In re* Dudley's Will, 168 Misc. 695, 6 N. Y. S. (2d) 489 (1938); *In re* Merriam's Estate, 168 Misc. 932, 6 N. Y. S. (2d) 692 (1938).

[10] Where a remainder is created by words of present gift and the only contingency is a death certain to occur and the remaindermen are known and fixed, the postponing clause is to be regarded as relating only to the period of actual enjoyment and not to the period of vesting of the interest. Matter of Gurnee, 84 Misc. 324, 147 N. Y. Supp. 396 (1914). See also *In re* Robinson's Will, 155 Misc. 412, 281 N. Y. Supp. 625 (1935) (Primary rules to be followed by the court in determining the question of future estates are testator's intention, reasonable interpretation to avoid intestacy, early vesting of title and preference to heirs of blood to strangers); *In re* Evans' Estate, 165 Misc. 752, 1 N. Y. S. (2d) 99 (1937).

ant's life, it was reasonable to presume that the period of survival was to be the same, namely, the testator's life.[11]

However, "the general rule, that the death referred to in the will is death in the lifetime of the testator, yields to facts or circumstances or language in the will indicating a different intention." [12] This is in accordance with the established rule that all canons of testamentary construction give way to an expressed testamentary intent to the contrary.[13] Thus, where there is a direction in a will to convert realty into personalty upon the death of the life tenant and divide the proceeds, with the remainder of the personalty, among the then living heirs of testator and his deceased wife, there is an intention to postpone the date of vesting until the time of payment.[14] Similarly, in a will where there are no words of a present gift, and the gift is to be found only in the direction to divide or pay over at a future time —so that futurity is annexed to the substance of the gift—it is said to be a contingent gift which will not vest in the remainderman until the time for payment arrives.[15] In the absence, however, of an unequivocal expression by the testator clearly indicating the time at which the estate is to vest, it will be deemed to vest as of the death of the testator.

R. J. M.

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[11] Concurring opinion of Lazansky, J., instant case at 731. The court also found that "if the pertinent language here were construed as requiring the remaindermen to survive the life tenant, intestacy would result if the life tenant survived the other two sons of an earlier marriage, who are well advanced in years. * * * The designation of the three sons by name is an effective element in the determination of the intent of the testator that the remainder should vest in the sons on their survival of the testator.

[12] *In re* Evans' Estate, 165 Misc. 752, 763, 1 N. Y. S. (2d) 99, 109 (1937).

[13] Whitwell v. Whitwell, 146 App. Div. 270, 130 N. Y. Supp. 906 (4th Dept. 1911); *In re* Atkinson's Will, 120 Misc. 186, 197 N. Y. Supp. 831 (1923); *In re* Matthew's Estate, 154 Misc. 779, 278 N. Y. Supp. 904 (1935); *In re* Wilkins' Will, 155 Misc. 152, 278 N. Y. Supp. 891 (1935).

[14] *In re* Potter's Estate, 167 Misc. 848, 4 N. Y. S. (2d) 828 (1938), *aff'd*, 255 App. Div. 823, 7 N. Y. S. (2d) 32 (4th Dept. 1938).

[15] *In re* Bennett's Estate, 156 Misc. 694, 282 N. Y. Supp. 645 (1935). As to the application of the "Divide and Pay Over Rule", wherein there is a gift found *only* in a testamentary direction to divide or pay over at a future time, and in which the gift is said not to vest in the remainderman until the time for payment arrives, see *In re* Cipolla, 165 Misc. 498, 1 N. Y. S. (2d) 8 (1938); *In re* Watson's Will, 164 Misc. 940, 300 N. Y. Supp. 1126 (1938); *In re* Grube's Will, 169 Misc. 170, 7 N. Y. S. (2d) 794 (1938).