North Dakota Law Review

Volume 27 | Number 4 Article 7

1951

Wills - No Contest Clause - Acceleration of Remainders

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its enactment prior to codification should have legal effect.[23] Particularly is this true where the statutes are incorporated into a statutory compilation which is more than a mere collection of statutes but is instead a revision of them, thus involving affirmative consideration of the merits of the legislation contained in the enactment. However, a majority of the courts have adopted a contrary view,[24] and in *Hines v. Harmon,*[25] a case heavily relied upon by the court in the instant decision, it was held that statutes brought into a revision do not have an equal status because of their simultaneous passage.

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WILLS—NO CONTEST CLAUSE—ACCELERATION OF REMAINDERS.—The will of testatrix left her estate in trust for the benefit of defendant for life with remainder to defendant's children and in default of issue of the defendant to the plaintiff if living, otherwise to plaintiff's children. The plaintiff and defendant were the sole heirs at law of the testatrix. Included in the will was a provision that any person contesting the will was to receive one dollar in lieu of all other provisions made by the will. Notwithstanding this provision the defendant brought suit to contest the will and lost. The executors, in filing their final account, petitioned the court to distribute the estate to plaintiff on the ground that the defendant had forfeited her life estate because of the contest, thus accelerating the plaintiff's contingent remainder. The provision in favor of defendant's children, it was argued, could never become operative because defendant was incapable of having children by reason of a surgical operation. The court *held* that by reason of the contest intestacy resulted as to the life estate, but that the contingent remainder of the plaintiff could not be accelerated so as to include in it the life estate; that the life estate must be distributed according to the laws of intestacy; and that defendant, as an heir at law, was entitled to one half of it. In re *LeFranc's Estate,* 232 P.2d 4 (Cal.App.1951).

According to the overwhelming majority of American courts, vested remainders, whether created by deed or by will, are acceler-

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[23] *Cf.* Barth v. Ely, 85 Mont. 310, 278 Pac. 1002 (1929).

[24] Hopkins v. Superior Court, 105 Cal.App. 133, 286 Pac. 1053 (1930); Pedro v. Hapai, 28 Haw. 744 (1926).

[25] 178 Okla. 1, 61 P.2d 641 (1936).

ated upon failure of the preceding life estate.[1] Although there is a substantial number of cases to the contrary,[2] the modern trend seems to extend this doctrine to contingent remainders, by ignoring the distinction between vested and contingent remainders after the failure of the testamentary life estate.[3] Although the theory of acceleration of contingent remainders is contrary to the established principle of seisin which requires that upon the premature termination of the supporting freehold estate the contingent remainder is automatically destroyed, courts favoring acceleration explain this deviation from the orthodox doctrine by basing their decision upon the necessity of following the testator's intention. "The doctrine (of acceleration of remainders) is founded upon the presumed intention of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the prior donee may still be alive, and is applied in promotion of the presumed intention of the testator and not to defeat his intention."[4]

Another way of avoiding the consequences of the destructibility doctrine commonly resorted to is to regard the contingent remainder as an executory interest by relating back the failure of the preceding life estate to the testator's death.[5] The Oklahoma court, in the comparatively recent case of *Thomsen v. Thomsen*,[6] dealing with the most common situation involving acceleration, i.e. the wife's renunciation of the life estate given to her by the will, charges the testator with knowledge of the right of the wife to elect whether to take under the will or under the statute and imputes to the testator the intention that the wife's election to take her statutory share in lieu of the estate "is, in legal contemplation, equivalent to her death." The reasoning of the case is characteristic of the modern majority rule accelerating contingent remainders.

Besides Indiana, where the courts give various reasons for denying acceleration,[7] California seems to be the only jurisdiction which consistently refuses to adopt the majority view. The main obstacle to such adoption seems to be § 780 of the California Civil Code (Deering 1937),[8] interpreted by the California courts so as to exclude acceleration entirely. So in the case of *In Re Arms' Estate*[9] heavily relied on by the principal case, involving the problem of acceleration

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[1] Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N.E. 980 (1911); Safe Deposit & Trust Co. v. Gunther, 142 Md. 644, 121 Atl. 479 (1923); *In re* McIlhattan's Will, 194 Wis. 113, 216 N.W. 130 (1927).

[2] Compton v. Rixey's Ex'rs., 124 Va. 548, 98 S.E. 651 (1919); Brandenburg v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885); *In re* Lawrence, 37 Misc. 702, 76 N.Y.Supp. 653 (1902); see Rocker v. Metzger, 171 Ind. 364, 86 N.E. 403 (1908) which illustrates the rule in that state.

[3] Roe v. Doe, 5 Boyce 545, 93 Atl. 373 (1914); O'Rear v. Bogie, 157 Ky. 666, 163 S.W. 1107 (1914); *In re* Disston's Estate, 257 Pa. 537, 101 Atl. 804 (1917).

[4] Sherman v. Flack, 283 Ill. 457, 119 N.E. 293, 294 (1918); See Notes, 5 A.L.R. 473 (1920); 17 A.L.R. 314 (1922); 62 A.L.R. 206 (1929) 164 A.L.R. 1433 (1946).

[5] Wakefield v. Wakefield, 256 Ill. 296, 100 N.E. 275 (1912); Crossan v. Crossan, 303 Mo. 572, 262 S.W. 701 (1924); 3 Simes, Law of Future Interests § 755 (1936).

[6] 196 Okl. 539, 166 P.2d 417 (1946).

[7] Cool v. Cool, 54 Ind. 225 (1876).

[8] "When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years."

[9] 186 Cal. 554, 199 Pac. 1053 (1921).

upon the widow's renunciation of the testamentary life estate, the Supreme Court of California reversed the decree of the probate court accelerating the remainder and held that, as to the renounced life estate, intestacy resulted and the widow was entitled to share in it in her capacity as heir at law. Proceeding on this analogy, the court in the principal case reaches an identical result. It also follows the same line of argument as In re *Arms' Estate, supra,* and In re *Mathie's Estate,*[10] namely that despite the clause limiting distribution to a contesting legatee to one dollar no disinheritance resulted. On this point the California court is in complete agreement with other jurisdictions.

In considering In re *Arms' Estate, supra,* Simes expressed doubt as to whether § 780 of the California Civil Code[12] was intended to have the prohibitive effect given it by the court in that case.[13] He calls attention to the fact that § 55 of the New York Property Law is substantially the same as the California law,[14] yet since the landmark case of *Kalish v. Kalish*[15] the New York courts have been deciding in favor of acceleration and against intestacy.[16]

An additional ground for refusing to accelerate the contingent remainder of the plaintiff was assigned by the court to the fact that her remainder was contingent upon defendant's death without leaving issue. In doing so, the court proceeds upon the antique theory that in relation to the distribution of property, the termination of trusts, and the rule against perpetuities, the law conclusively presumes that a woman is capable of bearing children regardless of her age or physical condition. The doctrine, although repudiated by the Restatement [17] and by the United States Supreme Court in deciding tax matters,[18] is still the majority rule in America,[19] and in circumstances like those found in the instant case (hysterectomies performed) represents the unwarranted preservation of an unrealistic anomaly in Anglo-Saxon jurisprudence.

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[10] 64 Cal. App.2d 767, 149 P.2d 485 (1944) (since there was no residuary legacy or devise, the testatrix died intestate as to that portion of the estate which her husband would have received under the will if he had not contested it).

[11] In order to cut off intestate rights there must be found in the will an intent to make a valid gift to other persons of the property which otherwise would pass in intestacy. *In re* Martin's Will, 95 N.Y.S. 2d 260 (N.Y. Surr. 1949); Strohm v. McMullen, 404 Ill. 453, 89 N.E.2d 383 (1949); *In re* Martz' Estate, 318 Mich. 293, 28 N.W.2d 108 (1947).

[12] See note 8 *supra.*

[13] Simes, *The Acceleration of Future Interests,* 41 Yale L.J. 659 (1932).

[14] *Id.* at 673, n. 34.

[15] 166 N.Y. 368, 59 N.E. 917 (1901).

[16] *In re* Durand's Will, 250 N.Y. 45, 164 N.E. 737 (1928); *In re* Cashman's Estate, 153 Misc. 374, 275 N.Y.Supp. 831 (1934); Bank of New York v. Palmer, 269 App. Div. 229, 54 N.Y.S.2d 902 (1945).

[17] 2 Restatement, Trusts § 340, comment e; 3 Restatement, Property § 274.

[18] United States v. Provident Trust Co., 291 U.S. 272 (1934).

[19] Adamson v. Wolfe, 200 Ark. 360, 139 S.W.2d 674 (1940); *In re* Sterrett's's Estate, 300 Pa. 116, 150 Atl. 159 (1930).