INHERITANCE TAX: A bequest to A for life and remainder to heirs is a contingent remainder.

A contingent remainder is taxable although the original bequest be made before the Inheritance Tax Law of the State of Mo. was passed.

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November 16, 1933.

FILED

Mr. J.D. Moore,
Rich Hill, Missouri.

Dear Sir:

This department is in receipt of your letter of October 26, 1933 in which you request an opinion as to the following state of facts:

> "Mrs. Mitchell asked me to assist her in making an inheritance tax return.
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> Her father made a will in 1895, probated in 1896. After the formal part and sundry bequests and naming an executor, the will provided for a trustee, named by him in the will, to handle the property until such time as it could be apportioned by a commission appointed by the court to divide the land into three equal lots. This commission divided the land as provided in the will into three equal parts or lots and provided that the one part set aside to his son during his natural life and to his heirs.
>
> The son took charge and handled the part set aside to him from that time until his death this year. The provision of the will in setting aside this lot to the son states that he was to have use and control and benefit of the lot so apportioned to him during his life and then at his death to his heirs. It now developed that the heirs of the son was the same as set aside by the will to the other interests. That is to say, they were the heirs of both the maker of the will and the son. On the death of the son the heirs took control of the land and divided it by partition in the Circuit Court among themselves. The attorneys consulted by me disagree in regard to whether the land is subject to inheritance tax."

A bequest to A for life and remainder to A's heirs is a contingent remainder.

Section 3110, R.S. Mo. 1929 provides as follows:

> "Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited to them."

In the early case of Emmerson v. Hughes, 110 Mo. 627 (1892), Judge Black in construing a conveyance of land "to C for her natural life with remainder to the heirs of her body", held (l.c. 631):

> "'The deed here in question would, it is believed, create an estate tail at common law under the influence of the rule in Shelley's case. Section 8838, Revised Statutes, 1889, first enacted in 1835, abolishes the rule in Shelley's case (Riggins v. McClellan, 28 Mo. 23; Tesson v. Newman, 62 Mo. 198; Muldrow v. White, 67 Mo. 470), and at the same time declares what effect shall be given to a deed like the one now in question. It provides: 'Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited in them.' ***** The statute just quoted converted the estate tail, created by the deed at common law, into a life estate in the first taker with a contingent remainder in fee simple in favor of those persons who should answer the description of heirs of the body of the tenant for life.'"

In the case of Wiggins, et al. v. Perry, et al., (Sup. Ct. Mo. 1925), 271 S.W. 815, the Court had before it a will devising property in trust for the sole benefit of the testator's daughters during their natural lives with remainder over to the heirs of their body. The Court held:

"'In the light of the foregoing authorities, it seems to us perfectly clear that the daughters of the testator in this case take life estates only under his will. Assuming this to be so, it only remains to determine the nature of the interests which are given to the remaindermen. Is it contingent or vested? The learned trial court held that the remainders were contingent, and with this view the authorities both in this state and elsewhere appear to be in complete accord. The last two cases on this subject in the state are Hartnett v. Langan, 282 Mo. 471-492, 222 S.W. 403, and Schee v. Boone, 295 Mo. 212-224, 243 S.W. 882. In the Hartnett Case the gift was in this language, 'I give, bequeath and devise to my niece, Winifred Langan for life the other half of the residue of my estate, remainder in fee to the heirs of her body, or in default of such issue' then over, and it was held, at page 493 (222 S.W. 410) that the remainder was purely contingent, and Goodman v. Simmons, 113 Mo. 122-126, 20 S.W. 972, and Emmerson v. Hughes, 110 Mo. 627, 19 S.W. 979, were cited, where similar rulings were made. The authorities outside of this state are to the same effect: DuBois v.Judy, 291 Ill. 340-347, 126 N.E. 104; Walcott v. Robinson, 214 Mass. 172-178, 100 N.E. 1109; Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406-412, 94 N.E. 669; Aetna Life Ins. Co. v. Hoppin, 214 F. 928-933, 131 C.C.A. 224;Baxter v. Bickford, 201 Mass. 495-496, 88 N.E. 7; Coolidge v. Loring, 235 Mass. 220, 126 N.E. 276; McKinney's Estate, 260 Pa. 123-128, 103 A. 590; Gadsden v. Desportes, 59 S.C. 131, 17 S.E. 706.

We therefore respectfully submit that the will of John E. Liggett, construed according to its true intent and purpose, creates life estates only in his daughters, with contingent remainders over in the heirs of their respective bodies, and that the lineal descendants only of each daughter who answers the description of such heirs at the time of her death take such remainders, and that the trial court was clearly right in so ruling.'"

The decisions we have quoted above have reference to the rules of law applicable to life estates with remainder in fee tail. In the case here under consideration, however, we have a life estate with remainder to the heirs of the life tenant.

In the case of Green v. Irvin (Sup. Ct. Mo. 1925), 274 S.W. 684, the Court held that the rule of law laid down in the case of

Emmerson v. Hughes, supra, was applicable whether the remainder be limited to heirs or to heirs of the body. The Court said:

> "'Nor does the fact that in Emmerson v. Hughes and the other cases the remainder was limited to heirs of the body make the rule inapplicable to this case. Whether the remainder be limited to heirs, or to heirs of the body, in either event, it could not be told who will be such heirs until the death of the life tenant. Section 2269, R.S. 1919, is as follows:
>
> > 'Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers, in fee simple, by virtue of the remainder so limited in them.'
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> This section appears in that form in R.S. 1845, p. 220, sec. 7, and in all subsequent revisions. Its terms were applied in Hartnett v. Langan, 282 Mo. loc. cit. 492, 222 S.W. 403, a case wherein the remainder was limited to heirs of the body. Se, also, Schee v. Boone, 295 Mo. loc. cit. 224, 243 S.W. 882, and Cox v. Jones, 229 Mo. 53-64, 129 S.W. 495.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the bequest to the son for life and remainder to his heirs, created a contingent remainder in the heirs of the son.

II.

A contingent remainder is taxable although the original bequest be made before the inheritance tax law of the State of Missouri was passed.

It is well recognized that remainders that vested prior to the statute providing for an inheritance tax are not taxable at the death of the life tenant, and any such statute declaring them taxable is unconstitutional. Matter of Pell, 171 N.Y. 48; 63 N.E. 789.

However, a different rule prevails where the remainder is contingent. Section 597, R.S. Mo. 1929 provides in part as follows:

> "****Estates in expectancy which are contingent or defeasiable and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. ****"

> "A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event." 21 Corpus Juris, 981."

Page on "Wills", Section 1119, defines "contingent remainder" as follows:

> "'A future interest is contingent if the person to take is not in existence, as where the gift is to children, heirs of the body, and the like of one who, at that time, has no living descendants.
>
> It is also contingent where, by the terms of the gift, the beneficiaries can not be ascertained until the happening of some future event. Where a devise is made to a class in such terms that the class can not be ascertained at the death of the testator, but must be ascertained at some future time, the interest of the members of such class corresponding to such description is a mere contingency until such class is definitely ascertained. A gift to the 'heirs' of a certain person, to be ascertained at some time in the future, 'heirs' being used in its primary meaning, and not as equivalent to children; or a gift to the members of a class, such as children, who may be living at some future period of time, is contingent. A gift to A for life and at his death to his children and the heirs of such as might be deceased, or to the survivors of a class, as to A's children or the survivors of them, or to A and his children if he has any living, is a contingent remainder.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the contingent remainder interests passing by reason of the death of the life tenant are subject to the Inheritance Tax Laws of the State of Missouri.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH