Poythress et als. v. Harrison. January Term. 1855, Richmond

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197 *Poythress et als. v. Harrison. January Term. 1855, Richmond. Absent. CLOPTON. J. (He sat in the court below.) WIlls—Legacies—ContIngency*—Case at Bar.——A testator devises his whole estate to his wife for life, remainder to three nephews. with a "condition annexed" to the estates of the remaindermen "that they are to contribute equally to raise the sum of $1000 for Thomas P. Harrison. to be paid him at the death" of the widow. He also gives him a horse. bridle and saddle. to be received as soon as he completes his education: and a watch to be received at the death of the testator. The will then proceeds. “but should he die before he receives any or all of the legacies herein given him. then such as he may not have received." are to go to his sister.

Same—Same—Same.—Held: The legacy of $1000 is contingent upon Harrison's surviving the widow. on failure of which it belongs to his sister. It is not. therefore. payable. nor any part of it. until the widow's death though she renounces the will. and the remaindermen receive a. portion of their shares of the estate.

In 1847, Thomas E. Poythress died, leaving a will, by which he devised to his wife, Beersheba, all his property for life. The will then proceeded as follows:

“Second. At the death of my wife, I give, and bequeath, and devise all my estate, real, personal and mixed, to my brother Joshua Poythress, my nephew William P. Poythress, and my niece Nancy G. D. Harrison, to be equally divided among them, share and share alike, to them and their heirs forever, with this condition annexed —they are to contribute equally to raise the sum of one thousand dollars for Thos. P. Harrison, son of Braxton Harrison, deceased, to be paid him at the death of my wife, which I give to him and his heirs forever. I also give the said Thos. P. Harrison a horse of the value of sixty dollars, and my saddle and bridle, to him and his heirs forever. This last bequest of a horse, saddle and bridle, I wish him to *have as soon as he completes his education. I also give him my silver watch at my death; but

should he die be fore he receives any or all of the legacies herein given to him, then, and in that event, I give such as he may not have received to his sister Oceana Harrison, except the watch, which I give to my friend and neighbor, Thos. H. Wilcox."

The will was duly recorded in Charles City county, (of which the testator was a resident.) and shortly thereafter the said Beersheba appeared in court and renounced the provision made for her in the will. In consequence of this, one-third of the negroes and land of the testator were assigned to her, and the remaining two-thirds to the legatees in remainder above named. The rest of the personal estate remained in the hands of the executor, (George Walker.) to be thereafter distributed by him, (after paying the debts of the estate.) one-half to the widow, and the other half to the legatees.

In May, 1848, after these proceedings had been had, Thomas P. Harrison, above named, who was an infant, filed a bill by his next friend, setting forth the matters above stated, and insisting, that it was evident the testator intended he should receive his legacy at the same time that the legatees in remainder received theirs; that according to the will, they would not have received their interests until the death of the widow, but that inasmuch as they, by the renunciation of the widow, had become entitled to receive, and had actually received, the greater portion of their legacies, though the widow was yet alive, he also was entitled to receive a like proportion of his. The bill, therefore, prayed that such proportion might be decreed to him. and that provision should be made for the payment of the residue upon the death of the widow. The executor and the devisees in remainder were made parties to the bill, and the former was required to say in his answer whether he had suficient funds in his hands to pay the legacy of $1,000 to the plaintiff.

*The defendants answered—the executor stating that he had, as he believed, enough money in his hands to pay the legacy, but that he was unwilling to bind himself by an admission of assets, in the then state of his transactions as executor; and the other defendants, stating that they were willing to secure the payment of the legacy at the death of the widow, if Harrison were then living, denied his right to receive anything until that time, first, because the will directed it to be then paid, and secondly, because the devise to him was one contingent upon his surviving the widow, in failure of which the property was to go to his sister Oceana.

On the hearing of the case, the court decreed that the legatees in remainder should pay to Camilla A. M. Harrison, the legally qualified guardian of the infant plaintiff. the sum of $666 66 2/3%, that being two-thirds of his legacy, and should secure the payment of the remaining one-third at the death of the widow.

From this decree the legatees appealed to this court.

Gholson & Jones, for the appellants, submitted the case on the petition of appeal. Nance, for appellee.

FIELD, P., delivered the opinion of the court, in which all the judges concurred.

The court is of opinion that the appellee, at the time of instituting his suit in the Circuit Court, was not entitled to recover the legacy of $1,000 bequeathed to him by Thomas E. Poythress, for two reasons: first, because the said legacy was not payable to him until after the death of Mrs. Beersheba Poythress, the testator's widow, although she had renounced the provision made for her in her husband’s will; and secondly, because the said legacy, until after the death of Mrs. Poythress, was contingent, and if the appellee had died in her life-time it would have been payable to his sister, Oceana Harrison, as directed by the will. See Swope v. Tharnbers, 2 Grat. 319. Therefore, it is decreed and ordered, that *the decree of the court below be reversed with costs. And the court here, proceeding to enter such decree as the court below should have entered, doth order the said bill to be dismissed with costs. But this decree is to be without prejudice to the right of the appellee, in the event of his surviving Mrs. Beersheba Poythress, to institute a new suit for the recovery of the same legacy, &c.