

says: "There is, in my judgment, no doubt that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person sub modo (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is prima facie to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case there is no reason to confine the meaning of the word "death" to death during the lifetime of the testator, or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death, which is certain, as a contingency, but when the testator has spoken of death sub modo, that being contingent, there is no need to render it contingent by introducing any limitation." See also Jarman, 5th ed., p. 1574; Theobald, p. 577.

Mary Jane Hards, therefore, took an estate in fee simple subject to be divested in favour of her children on her death, at any time, leaving children.

The estate consequently passed to the children of Mary Jane under the will, and it did not at her death form part of her estate.

Costs to all parties out of the estate.

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DECEMBER 6TH, 1907.

DIVISIONAL COURT.

FOSTER v. ANDERSON.

*Vendor and Purchaser—Contract for Sale of Land—Construction—Time of Essence—Delay of Purchaser in Tender of Purchase Money and Deeds—Delay of Vendor—Preparation of Conveyance and Mortgage—Misrepresentation by Purchaser's Agent — Statute of Frauds — Misdescription of Lot in Contract — Falsa Demonstratio — Identity of Premises—Deed Held in Escrow — Specific Performance.*

Appeal by plaintiff from judgment of RIDDELL, J., ante 531, dismissing an action for specific performance.