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FUTURE INTERESTS - EFFECT OF EMINENT DOMAIN PROCEEDINGS

FUTURE INTERESTS — EFFECT OF EMINENT DOMAIN PROCEEDINGS — This study is concerned with the effect of condemnation proceedings upon future interests. The problems which arise are chiefly whether the owner of a future interest has such an interest in land as to be awarded a share of the fund given as compensation for the land, and if he does have such an interest as to be awarded a share, how it will be determined or apportioned to him and at what time. The first part of the study is a consideration of the question: what types of future interests are compensable? The second part involves an examination of the condemnation statutes of the various states to determine how the award is apportioned to owners of future interests; and, where the statutes are silent or employ very general terms, an examination of the cases for this purpose is also included. Landlord and tenant problems are excluded, since they require separate treatment, due in part to the contractual provisions involved.

I.

The taking of private property for public use without compensation is prohibited not only by the Constitution of the United States, but by the state constitutions as well. However, the difficulty arises in determining when there is an interest of sufficient substantiality to be regarded as "property" for purposes of constitutional law.[1] Though the subject is covered in every state by statutes, the problem whether there is a sufficient interest remains a question to be decided by the courts. In a few states, however, the problem of compensation for particular types of future interests is carefully worked out by legislation.[2]

That the several interests in one piece of land when they exist are compensable in condemnation proceedings is readily admitted both in statute [3] and by common law.[4] That those interests may be future interests as well as present interests is also recognized.[5] The difficulty arises in determining what types of future interests are compensable.

In the more common case of life tenant and remainderman both parties are considered to have separate and valuable estates, a taking of which must be compensated by the party exercising the power of eminent domain.[6] Even a conveyance of land by the life tenant to the condemning party will not affect the remainderman's right to sue the condemnor for the damages suffered by the taking of his interest.[7] This

[1] Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992 (1921); Bass v. Roanoke Nav. & Waterpower Co., 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247 (1892).

[2] Mass. Gen. Laws (1933), c. 79, §§ 24, 25, 27, 29, 30, 31; Conn. Gen. Stat. (1930), § 5078.

[3] Ala. Code (1928), § 7501; Cal. Code Civ. Proc. (1931), § 1248; Ind. Stat. Ann. (Burns, 1933), § 3-1706; Wis. Stat. (1931), § 32.10; Mont. Rev. Code (1921), §§ 9942 and 9944.

[4] Proprietors of Locks & Canals v. Nashua & Lowell R. R., 64 Mass. 385 at 387 (1852), where the court said: "When, therefore, there are equitable, collateral, derivative or contingent interests, though the legal estate in fee is in one, it is proper that all parties having such connected interests may unite in the application." In Colcough v. Nashville & N. W. R. R., 2 Head (39 Tenn.) 171 at 176 (1858), the court also said, "The word 'owner' as used in the charter, is not to be taken in any restricted sense. The ownership of the estate, so to speak, may be severed. A life interest, or a term of years, may be carved out of the fee. And in such case the tenant for life or lessee, as well as the remainderman or lessor, is within the meaning and spirit of the charter; and they are entitled to recover compensation for the damages or injury by them respectively sustained." But see State ex rel. Sayers v. School District No. 1, 79 Mo. App. 103 (1899).

[5] Ross v. Elizabethtown & Somerville R. R., 2 N. J. Eq. 422 (1841); Bentonville R. R. v. Baker, 45 Ark. 252 (1885); Cureton v. Southbound R. R., 59 S. C. 371, 37 S. E. 914 (1901); Charleston & W. C. R. R. v. Reynolds, 69 S. C. 481, 48 S. E. 476 (1904).

[6] Ross v. Elizabethtown & Somerville R. R., 2 N. J. Eq. 422 (1841).

[7] Seaboard Air Line Ry. v. Garrett, 85 S. C. 543, 67 S. E. 903 (1910); Bentonville R. R. v. Baker, 45 Ark. 252 (1885).

seems to be the rule even though the remainderman's interest is a contingent one.[8] In some instances where the life tenant was paid the award, the condemning parties claimed that the life tenant held the money in trust for the remainderman, but this the courts deny unless there is a clear showing that the money was paid for a greater interest than the life estate.[9] It should be observed that no case has been found of compensation awarded for a contingent remainder where the contingency related to a use of the land which would be prevented by the eminent domain proceedings. If such a contingency were involved, the problem would be similar to that arising in the possibility of reverter cases hereafter discussed; and it would be difficult to predict what solution a court would adopt.

If a remainder is compensable, it is clear that the same may be said of a reversion;[10] and it is probable that the right to compensation would be recognized even though the reversion were subject to a contingent remainder which might, on the happening of the contingency, divest it.[11]

As to other kinds of future interests, the decisions indicate no clear answer to the problem under consideration. In the case of the mere right of entry for breach of condition or the possibility of reverter, a variety of solutions have been presented; and the problem is sometimes complicated by the fact that the condition or limitation upon which the prior estate may be determined involves a use of the land which will necessarily terminate upon condemnation. Thus if land had been conveyed to the trustees of a church "so long as it is used for church purposes," it is possible to argue that the owner of the possibility of reverter should receive the entire award because the determinable fee which was vested in the trustees has terminated. With the exception of the case of *Lancaster School District v. Lancaster County*,[12] which supports such a solution, it is believed that this viewpoint derives no support from the decisions. As the court said in *First Reformed Dutch Church v. Croswell*,[13] a case in which the church was given the entire award, "There was, therefore, no interval of time between the seizure of the plaintiff's estate and the seizure of the rights of the heirs at law during

[8] Cureton v. Southbound R. R., 59 S. C. 371, 37 S. E. 914 (1901); and see Callison v. Wabash R. R., 219 Mo. App. 271, 275 S. W. 965 (1925).

[9] Trimmier v. Darden, 61 S. C. 220, 39 S. E. 373 (1901). And see Bartlow v. Chicago B. & Q. R. R., 243 Ill. 332, 90 N. E. 721 (1909). In the latter case payment was made to the life tenant who was the mother of the reversioners, and the court held that there was not a discharge of the condemning company's obligation to compensate the reversioners.

[10] Bartlow v. Chicago B. & Q. R. R., 243 Ill. 332, 90 N. E. 721 (1909) (a reversion which was called by the court a remainder).

[11] See Bender v. Bender, 292 Ill. 358, 127 N. E. 22 (1920).

[12] 295 Pa. 112, 144 Atl. 901 (1929).

[13] 210 App. Div. 294 at 295, 206 N. Y. S. 132 (1924).

which there could have been a reverter of title to the heirs because of a church disuser of the premises necessarily consequent upon the seizure. At the moment of appropriation there had been no disuser." In some cases the courts have denied recovery to the owner of a possibility of reverter or right of entry for breach of condition on the ground that the interest is too slight and uncertain in character to permit a determination of any present value.[14] Sometimes the owner of such a future interest is said not to be entitled to anything because the taking of the land by eminent domain is regarded as an act of the law which makes impossible the performance of the condition and therefore cuts off the interest of those who claim under the grantor.[15] These cases appear to follow a dictum of Lord Denman, announced in 1844, to the effect that "even if the conditions were not performed, it appears to us that the non-performance would in this case be excused as being by act of the law, and involuntary on the part of the lessees." [16] In the Explanatory Notes to Tentative Draft Number 2 of the American Law Institute Restatement of Property,[17] situations involving condemnation of a possibility of reverter or right of entry for breach of condition are classified under four heads: (1) where the contingency is related to the use of the land and probable of occurrence; (2) where the contingency is unrelated to the use of the land and probable of occurrence; (3) where the contingency is related and improbable; and (4) where the contingency is

[14] In State ex rel. Sayers v. School District No. 1, 79 Mo. App. 103 at 110 (1899), the court denied any compensation, saying, ". . . for the relator at the time of such proceeding had no title whatever to the land sought to be condemned, but a bare possibility of a reverter dependent upon the future conduct of the beneficial owners of the land, over whose action he had no control whatever." But this reasoning as to control seems to have been ignored by the Supreme Judicial Court of Massachusetts in Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544 (1878), where though the reverter depended upon the act of the grantor removing the pipes from the land, the court held, "The grantee under the Ward deed took at least a base fee determinable by the removal by the grantor of the pipes from his land. Until it is determined, he has a fee, with generally all the incidents of an estate in fee simple. . . . The grantor has no subsisting title in the land, but only a possibility that it may revert to him by the happening of the event upon which it is determinable. He is not, within the meaning of the act under which these proceedings are instituted, a person or corporation whose land is taken by the respondent. His possibility of interest is too remote and contingent to be the subject of an estimate of damages by a jury."

Other cases going upon this theory are Lyford v. Laconia, 75 N. H. 220, 72 A. 1085 (1909); Titus v. City of Boston, 161 Mass. 209, 36 N. E. 793 (1894); First Reformed Dutch Church v. Croswell, 210 App. Div. 294, 206 N. Y. S. 132 (1924).

[15] Scovill v. McMahon, 62 Conn. 378, 26 A. 479, 21 L. R. A. 58 (1892); Cincinnati v. Babb, 4 Ohio Dec. 464 (1893). See, also, New Haven County v. Trinity Church Parish, 82 Conn. 378, 73 A. 789 (1909).

[16] Doe v. Churchwardens of Rugeley, 6 Q. B. 107, 115 Eng. Rep. 41 at 44 (1844).

[17] Pp. 18-25. The subsequent quotations in the text are taken from the explanatory notes.

unrelated and improbable. In the latter two cases the conclusion is reached that the holder of the future interest will not be entitled to any portion of the award [18] because the "dictates of practical convenience urge that the whole award be given to the holder of the possessory estate." In the two "probable" types of cases the result reached is that some share of the award will go to the holder of a possibility of reverter or right of entry for breach of condition "when he can show that the significant event will probably occur within a reasonably short period of time." The difficulty of making an evaluation of such an interest as well as the lack of any case law for such a proposition is readily admitted, but the situation does give occasion for some remedy to the holder of such an interest and leads to the conclusion that "a compromise between abstract justice and practical convenience is attained which is believed to be the most desirable position to embody in the Restatement."

The fact that there are possible objections to the conclusion that the interest and rights of the grantor cease because of the eminent domain proceedings, when the grant or devise clearly contemplated otherwise, seems to have led to the solution presented in the recent case of *In re Westchester County*.[19] In that case land had been devised to the Presbyterian Hospital in the City of New York, subject to a condition subsequent to the effect that the devisee's interest would be defeated if any portion of the land should be voluntarily conveyed or mortgaged, or if the Hospital should fail to use it. A portion of the land was taken under eminent domain proceedings. The court ruled that the award should be held by the Hospital to invest and re-invest in securities prescribed by law for the investment of trust funds and to retain the income for its own purposes so long as it should hold the principal. Though it is stated that "the condition subsequent was rendered impossible of performance" as to the land taken, it seems that the court assumed that the award might revert if the condition were broken as to the remaining land.

2.

Few of the statutes on condemnation explicitly deal with future interests. But an analysis shows that the question has been treated by various legislatures, though many have adopted a policy which seems to place all the burden on the courts. Most states leave the problem

[18] PROPERTY RESTATEMENT (Tentative Draft No. 2), §§ 61 and 73 and comments thereon.

[19] 243 App. Div. 706, 277 N. Y. S. 26 (1935). Even a more singular result was reached in Lutes v. Louisville & N. R. R., 158 Ky. 259, 164 S. W. 792 (1914), where to avoid condemnation the grantor conveyed to a railroad company and received other land plus some cash. The court there held that the same possibility of reverter would apply to the new land, admitting, however, if condemnation had gone through that the grantor's claims would have been erased.

with no special mention of future interests in their statutes. There is usually some clause stating, "Any person . . . who shall have or claim to have any interest in the property sought to be condemned may voluntarily intervene," [20] or some such similar clause in sections which deal with the distribution of the award. A few of the states such as Georgia [21] and Tennessee [22] make some mention of future interests by stating that unborn remaindermen are bound by the proceeding, but in other respects ignore them. The Georgia [23] law refers to contingent interests. The statutes of Vermont, Virginia, New Mexico, Missouri, Connecticut, and Massachusetts do speak of future interests, though to varying extent.

Virginia merely provides that the court should make distribution "as to it may seem right, having due regard to the interest of all persons therein, whether such interests be vested, contingent or otherwise...." [24]

The Vermont law states, "When a railroad corporation takes land subject to an estate for life or years, the commissioners shall appraise the damages to such estate, and also the damages to the reversionary interest." [25] Missouri and New Mexico have identical provisions which state that when owners have less than a fee, "the person having the next vested estate in remainder may at the option of the petitioner be made party defendant" and "if such remaindermen are not made parties their interest shall not be bound by the proceedings." [26]

Connecticut and Massachusetts, however, have specific and detailed statutes on the effect of condemnation on future interests and it is in these statutes that we find what the other statutes have neglected or else purposely left to the courts. It will be profitable to examine these statutes and observe both how the appraisal of these interests is provided for and the manner in which the award is distributed among the several interests.

The Connecticut statute [27] says when land is subject to an estate for years in one or more persons with remainder, reversion, or executory devise to another or others, the court may assess the compensation to the entire title of the real estate and order that the income for the term of the particular estate that was limited belong to the tenant for life or years subject to charges to which the estate was subject, and at the expiration of the term the principal sum to belong to the remainderman, reversioner or executory devisee. When such remainder, reversion, or

[20] Md. Ann. Code (Bagby, 1924), Art. 33A, § 10.
[21] Ga. Ann Code (Parks, 1914), § 5215.
[22] Tenn. Code (1932), § 3113.
[23] Ga. Ann. Code (Parks, 1914), § 5215.
[24] Va. Code (1930), § 4374.
[25] Vt. Pub. Laws (1933), § 6207.
[26] Mo. Rev. Stat. (1929), § 1340; N. Mex. Stat. Ann. (1929), § 43-101.
[27] Conn. Gen. Stat. (1930), § 5078.

executory devise be contingent, the court is to order such payment as would preserve to all parties as nearly as possible the same rights as real estate. Upon application "the court of probate in the district . . . shall appoint a trustee to hold such compensation" and "carry out the order of said court," the court having the right to require a bond.

The Massachusetts statute [28] is even more detailed and includes specific mention of a power of appointment. It also provides that the damages shall be held in trust, the trustee here being appointed by the parties, unless legally unable to appoint a trustee in which case the court will do it upon application. Here the trustee must pay to the reversioner or remainderman the value of any rent or other items payable, the balance going to the tenant for the period of his estate and upon its termination he shall pay the principal to the reversioner or remainderman. Only damages to the whole estate are placed in trust, the special damages to the separate estates to be awarded separately. All possible contingent interests are brought in and they are to be protected by appointment of a trustee, fair assessment, and a fair apportionment of the damages.

Where the type of statute found in Connecticut and Massachusetts does not exist, there is a difficult problem as to what happens to the award when future interests are involved. Most statutes require that the money should be paid to the defendants according to their apportioned shares or else paid into the court or to the county treasurer. But this results in a serious question when there is no express method of apportionment as to how the award should be distributed. In this situation the decided cases are perhaps the best explanation. Though they do not agree in all respects as to the method, they do show some general theory which underlies apportionment when future interests are involved.

The accepted theory in the case of life tenant and remainderman in fee was that each was entitled to damages for his own estate, and each could be valued separately.[29] Some stated that the interest of the life tenant could be found by taking the net annual value of the premises, multiplying this by the years of the life tenant's expectancy of life and reducing it to a present cash value.[30] The use of annuity tables in determining the life tenant's interest is a common one. Most courts agree that the rule for determining the damages as a whole is the difference between the property before the taking and its value after the condemning of land by eminent domain, and of this difference the life tenant is entitled to the proportion of the whole which the value of the

[28] Mass. Gen. Laws (1933), c. 79, §§ 24, 25, 26, 27, 29, 30, 31.

[29] Borough of Harrisburg v. Crangle, 3 W. & S. (59 Pa. St.) 460 (1842).

[30] Pittsburgh, Virginia & Charleston Ry. v. Bentley, 88 Pa. 178 (1878).

life estate bears to the whole difference. Where the life tenant is paid out his proportion, the vested remainderman is considered to be entitled to the remaining share and it is usually paid out to him. Some courts, however, considered the fund in place of the land and the same interests in it were retained without providing for immediate apportionment.[31] Particularly is this so when the remainder is a contingent one.[32] Then the money is usually impounded until the contingency occurs, in the usual case it being determined at the death of the life tenant or a third party.[33] Where the contingency is determined at the death of the life tenant, in regard to the distribution of his share, the same procedure may be followed as is done in the vested remainderman cases. Where there is an executory devise over to another, the same method has been applied as in the contingent remainder situation, the money being held up.[34] This result reached by the courts where the remainder is contingent seems only fair: the court certainly cannot divide the award at once as it is not possible to tell who shall get the money. Logically, therefore, the payment is postponed as far as the recipients of it are concerned, the condemning party paying it into the court or to the county treasurer, and under the court's direction it is held until the proper time for its distribution arises.

The general conclusions we may reach, therefore, are that the owner of a future interest recovers a share in the award in most cases when his interest is that of a reversioner or of remainderman whether contingent or vested. In the case of the contingent remainderman, he usually receives his share only after the contingency arises. If he holds a possibility of reverter or right of entry for breach of condition his interest generally will not be considered as entitled to a share of the award, whether the theory is based upon impossibility of performance of a requirement as to the use of the premises, or is that the interest which he holds is too slight for valuation. And finally, state statutes generally do not specifically consider future interests in condemnation proceedings, Connecticut and Massachusetts being the chief exceptions.

B. B.

[31] See State ex rel. Scott v. Trimble, 308 Mo. 123, 272 S. W. 66 (1924).

[32] In Miller v. City of Asheville, 112 N. C. 759 at 767 (1893), the court stated:

> "When (as here) the property is taken under the right of eminent domain, the fund realized is substituted for the realty and is held subject to like charges and trusts, and when limited over on a contingent remainder it will be divided among the parties entitled upon the happening of the contingency in the same manner as the realty itself would have been if it had remained intact."

[33] See Chesapeake & Ohio R. R. v. Bradford, 6 W. Va. 220 at 236 (1873); Department of Public Works v. Porter, 327 Ill. 28, 158 N. E. 366 (1927), where money remaining after value of life estate is deducted until death of life tenant for until then the "remaindermen" will have no right to the money.

[34] Mayer v. McCracken, 245 Ill. 551, 92 N. E. 355 (1910).