FUTURE INTERESTS--EFFECT ON CONTINGENT REMAINDERS OF WIDOW-LIFE TENANT'S ELECTION TO TAKE AGAINST A WILL

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FUTURE INTERESTS—Effect on Contingent Remainders of Widow-Life Tenant’s Election to Take Against a Will—Testator devised one half of the income from an undivided one-third interest in certain real estate to the defendant, his wife, and provided that on her death the undivided one-third interest was to go to his brother and sister, plaintiffs here, if living, otherwise to his children in a certain named order if living. The defendant, testator’s widow, elected to take her statutory share against the will, and the county court decreed her a one-half interest in the undivided one third, the other one-half interest going to the plaintiffs. Plaintiffs, also having title to the other two thirds of the real estate, then brought suit for partition of the land. Held, the election of the widow-life tenant to take against the will terminated her life estate and accelerated the remainders so as to vest immediately in the plaintiffs an indefeasible title to the one half of the undivided one third that remained after the widow’s election; plaintiffs are, therefore, entitled to partition. Thomsen v. Thomsen, (Okla. 1946) 166 P. (2d) 417.

An examination of the authorities on the subject of what effect a renunciation by the life tenant has on contingent remainders indicates considerable disagreement among the courts both as to results and as to theory. Thus it has been variously held that the renunciation relates back to the death of the testator and the contingent remainder will be given effect as an executory devise; that a contingent remainder can never be accelerated on renunciation of the


2 Crossan v. Crossan, 303 Mo. 572, 262 S.W. 701 (1924); Rose v. Rose, 126 Miss. 114, 88 S. 513 (1921); Miller v. Miller, 91 Kan. 1, 136 P. 953 (1913), and note, L.R.A. 1915A 671; Wakefield v. Wakefield, 256 Ill. 296, 100 N.E. 275 (1912), and Ann. Cts. 1913E 414. This solution appears to have been evolved to save remainders from extinguishment by the destructibility doctrine, whereby a contingent remainder would be destroyed if it could not vest at the termination of the preceding freehold estate. 3 Simes, Future Interests, §755 (1936).

3 For an argument that the term “acceleration” is inappropriate in these cases, see 2 Tiffany, Real Property, 3d ed., §337 (1939).
life estate unless the conditions precedent have been exactly fulfilled; that the contingent character of a remainder does not prevent acceleration unless it is impossible to identify the remaindermen or a contrary intent has been expressed; and that the character of a remainder, as vested or contingent, is of no importance, the main problem being the intent of the testator. Moreover, the cases are often complicated by the existence of legatees who will be disappointed if, on election against the will by the widow-life tenant, the contingent remainders are held to vest immediately and indefeasibly as of the time of the death of the testator. Courts have uniformly been solicitous of such legatees and to protect them have employed such solutions as sequestering, the subject of the life estate or imposing a lien on it. In the principal case this element was not involved, and the Oklahoma court, not concerning itself with whether the remainders were vested or contingent, decided in favor of acceleration on the basis of the intent of the testator. It was held that since his intent in creating

4 2 Property Restatement, §233 (1936). While courts seldom phrase their refusal to accelerate contingent remainders in just this way, it is submitted that the basic requirement that is applied in the following cases is in fact equivalent. Blatchford v. Newberry, 99 Ill. 11 (1880), where devise of remainder to “surviving descendants” of the testator’s brothers and sisters was held to mean those surviving the widow-life tenant who had renounced, and acceleration was refused; Brandenburg v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885), where acceleration was refused because until the death of the widow-life tenant the court could not determine which nieces and nephews would be “then surviving”; and the theory was basically the same in Rose v. Rose, 126 Miss. 114, 88 S. 513 (1921), and Compton v. Rixey’s Executors, 124 Va. 548, 98 S.E. 651 (1919).

5 “... the sounder view appears to be that, except where it is absolutely impossible to identify the remaindermen until the death of the life tenant ... or there is other evidence of an intention to postpone the taking effect of the remainder, the contingent character of the remainder does not prevent acceleration, but the identity of the persons who are to take becomes fixed upon the termination of the precedent estate.” 5 A.L.R. 473 (1920). See also: Dean v. Hart, 62 Ala. 308 (1878); O’Rear v. Bogie, 157 Ky. 666, 163 S.W. 1107 (1914); Rench v. Rench, 184 Iowa 1372, 169 N.W. 667 (1918); American Nat. Bank v. Chapin, 130 Va. 1, 107 S.E. 636 (1921); Eastern Trust & Banking Co. v. Edmunds, 133 Me. 450, 179 A. 716 (1935); and 17 A.L.R. 314 (1922); 62 A.L.R. 206 (1929).

6 Courts who decide that the testator’s intent is to control must necessarily also adopt the view that the contingent character of a remainder will not prevent its acceleration. Nevertheless, it is felt that there is enough of a difference in emphasis in the cases to justify a separation into the categories outlined above. Fox v. Rumery, 68 Me. 121 (1878); Scroten v. Moore, 5 Boyce (25 Del.) 545, 93 A. 373 (1914); In re Diston’s Estate, 257 Pa. 537, 101 A. 804 (1917); American Nat. Bank v. Chapin, 130 Va. 1, 107 S.E. 636 (1921); Nelson v. Meade, 129 Me. 61, 149 A. 626 (1930); Eastern Trust & Banking Co. v. Edmunds, 133 Me. 450, 179 A. 716 (1935).


9 From this, it appears that the life estate was created for the benefit of the widow
the life estate was to benefit the life tenant, and not to postpone enjoyment of the remaindermen as of the death of the testator. Indeed, regardless of the particular theories they have adopted, almost all of the courts have placed a strong emphasis on the intent of the testator, occasionally asserting, as did the court in the principal case, that since the testator made no provision for that contingency, he must have intended that renunciation by the widow-life tenant should be equivalent to her death.\(^\text{10}\) The obvious difficulty with such a theory is, of course, that actually the testator probably had no intent at all as to what should be done in case of a renunciation, for if he had contemplated any such development, he would undoubtedly have provided for it expressly in his will. With this in mind the approach suggested by the American Law Institute in its *Property Restatement* seems particularly sound. The rule there is that a remainder which is subject to an unfulfilled condition precedent will not be accelerated.\(^\text{11}\) However, the Institute explains that the intent of the testator is to be considered in determining whether the limitation involved is a condition precedent or merely "indicates the course of events which is to be significant if the attempted prior interest takes effect."\(^\text{12}\) This approach appears to have the advantage of laying down a consistent, and thus predictable, pattern to be followed in a field where there has heretofore been considerable confusion; and also of narrowing the general consideration of the testator's intent to the particular aspect of it that seems most important in these cases—whom the testator intended to benefit by the limitations imposed. Thus, while ignoring neither the form in which the limitations are framed, nor the probable purpose of the testator in so framing them, the problem would be recognized as essentially one of construction, which is what it would in fact appear to be.\(^\text{13}\)

*Neil McKay, S.Ed.*

and not for any independent purpose of postponing the division of the estate." Principal case at 420.


\(^{11}\) "When an attempted prior interest fails because it is renounced by the person to whom it is limited, a succeeding interest is not accelerated so long as a condition precedent to such succeeding interest continues unfulfilled." *2 Property Restatement, §233* (1936).

\(^{12}\) *2 Property Restatement, §233, comment c* (1936). The comment continues: "Thus a description of the persons to take after the attempted prior interest as the 'then surviving descendants' of a named person or as 'such children of (a named person) as are then living' is not necessarily sufficient to create a condition precedent which is required for the operation of the rule stated in this Section. In resolving this preliminary problem of construction, the criterion is whether the terms and circumstances of the limitation manifest an intent to benefit persons living at the termination of the preceding interest or at the death of the person to whom such preceding interest was limited."

\(^{13}\) "The problem is then worked out as a matter of construction. In the case of the widow's renunciation, that event, for purposes of construction, is regarded as relating back to the death of the testator, and the instrument is reconstrued in the light of that fact. In this process of reconstruction the court does not regard itself as bound by the