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## EMINENT DOMAIN - DISPOSITION OF AWARD WHEN LAND IS SUBJECT TO LIFE ESTATE AND REMAINDER

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EMINENT DOMAIN — DISPOSITION OF AWARD WHEN LAND IS SUBJECT TO LIFE ESTATE AND REMAINDER — Testator devised property to his adopted daughter for life and remainder to her children, but should she leave no children at her death, then the estate was to go to a named charity. The United States took title to this property and paid the compensation into court. The life tenant and one of the five children filed a motion that the life tenant be permitted to withdraw the funds arising from the condemnation for the purpose of having them immediately reinvested in other real estate and/or government securities. This motion was approved by the guardian ad litem for the one infant remainderman. But the remaining three children objected to the granting of the motion and insisted that the proceeds be divided between the life tenant and the remaindermen according to their respective interests, as might be determined by

the use of life tables. *Held*, the proceeds should remain under the control of the court to be reinvested in other suitable real estate, the title to be taken in accordance with the provisions of the will concerning the property condemned. In ordering a reinvestment of the proceeds, the court reasoned that it was carrying out the intent of the testator to provide a home for his adopted daughter for life, and that since the remaindermen would not have had a right to the proceeds had this been a judicial sale at their request,<sup>1</sup> their rights should not be increased merely because the government had taken the property. *United States v. 380 Acres of Land*, (D. C. Ky. 1942) 47 F. Supp. 6.

The problem of disposing of the condemnation award when the land is subject to a life estate and remainder interests is one capable of varied solutions. This particular situation is generally not specifically provided for by statute, Connecticut and Massachusetts being the exception.<sup>2</sup> Usually the condemnation statute merely provides for serving notice upon the owners of various interests,<sup>3</sup> or there may be some general provision for making distribution of the proceeds to the parties having regard to their respective interests.<sup>4</sup> The Kentucky statute is of the latter type, making no specific provision for reinvestment of the proceeds in other property or for holding them in trust subject to the corresponding interests the parties held in the property.<sup>5</sup> In the absence of statutory direction, the court must determine what is to be done with the award. It is not questioned that the life tenant and remainderman is each entitled to damages for his own estate.<sup>6</sup> Thus an immediate distribution of the proceeds may be made after determining the share going to the holder of the life estate and that going to the remaindermen.<sup>7</sup> With the application of life tables, the interest of the life tenant

<sup>1</sup> Ky. Civil Code of Practice (Carroll, 1938), §§ 491, 491a. Sec. 491 provides that in an action by the owner of a particular estate of freehold in possession against the owner of the reversion or remainder, the real property may be sold for investment of the proceeds in other real property. Sec. 491a provides that remainder and contingent interests in real estate may be sold upon petition of any person having a present or vested interest by making all persons having an interest in the estate parties to the action. The proceeds are to be reinvested by the court in the same kind of property, to be conveyed and held in the same manner, subject to like limitation, trust, and conditions, as the property which was sold, or in government bonds.

<sup>2</sup> Conn. Gen. Stat. (1930), §5078; Mass. Gen. Laws (1933), c. 79, § 24; *Boston v. Robbins*, 121 Mass. 453 (1877).

<sup>3</sup> Ga. Code Ann. (1935), §§ 36-304, 36-308, 36-310; Tenn. Code Ann. (Michie, 1938), § 3170 (4).

<sup>4</sup> Tenn. Code Ann., (Michie, 1938), § 3170 (8); Va. Code Ann. (1942), § 4374. This section of the Virginia statute is typical of that found in most states: "After the payment of the amount of compensation and damages into court . . . [the owners] shall have such interest or estate in the compensation or damages paid into court as they had in the property so taken . . . and the court shall make such distribution of such money as to it may seem right, having due regard to the interest of all persons therein, whether such interest be vested, contingent or otherwise. . . ."

<sup>5</sup> Ky. Rev. Stat. (1942), §§ 416.010 to 416.090. Damages are paid to the owners or into court.

<sup>6</sup> *Borough of Harrisburg v. Crangle*, 3 W. & S. (Pa.) 460 (1842); *Stubbs v. United States*, (D. C. N. C. 1938) 21 F. Supp. 1007.

<sup>7</sup> *Pittsburg, Virginia & Charleston Ry. v. Bentley*, 88 Pa. 178 (1878).

can be found by taking the net annual value of the premises and multiplying it by the years of the life tenant's expectancy of life.<sup>8</sup> If the remainder is contingent or there is uncertainty as to who is or will be entitled to it, the value of the life estate may be ascertained and paid to the life tenant and the balance impounded until the shares of the remaindermen can be determined.<sup>9</sup> Other courts have held that since the award takes the place of the property, there should be no immediate apportionment, but rather the fund should be maintained intact with the life tenant and remainderman retaining the same interests in it which they held in respect to the land.<sup>10</sup> Another view is that the life tenant is entitled to the use and possession of the entire fund for his life and that, in the absence of statute, there is no power to compute the value of the life estate and to compel the life tenant to take a gross sum representing such value out of the condemnation award.<sup>11</sup> However, the life tenant may be required to give adequate security before receiving the principal of the award.<sup>12</sup> In contrast, another court decided that there is no authority whatsoever for paying the award to the tenant absolutely; and if it is paid to the tenant at all, the principal should first be secured to the remaindermen.<sup>13</sup> Some merit may be had in comparing the problem at hand with that where land subject to a lease is condemned, in which case the values of the reversion and the leasehold are determined and appropriate awards made to the respective owners of the estates.<sup>14</sup> And where land condemned was held subject to a condition subsequent, the award was given to the holder of that estate, but it was required to hold the award in a separate fund and to receive only the interest from the fund so invested.<sup>15</sup> Precedent is lacking for the decision in the principal case. Under the change of circumstances resulting from the government's taking the land, other courts have not attempted to carry out the intent of the testator to the extent of ordering a reinvestment of the proceeds in similar land to be held subject to the same estates as the land condemned. The court emphasized the proposition that had this been a judicial sale at the request of either party, the proceeds would have been reinvested in similar property and that neither would have had a right to a share of them as such. But inasmuch as the Kentucky condemnation statutes make no specific provision for the disposition of the proceeds, it is questionable whether the provisions of the

<sup>8</sup> *Id.*

<sup>9</sup> *Department of Public Works v. Porter*, 327 Ill. 28, 158 N. E. 366 (1927); *Miller v. City of Asheville*, 112 N. C. 769, 16 S. E. 765 (1893).

<sup>10</sup> *State ex rel. Scott v. Trimble*, 308 Mo. 123, 272 S. W. 66 (1924) (fund was awarded to life tenant for herself and as trustee for remainderman); *In re Smith's Will*, 170 Misc. 556, 11 N. Y. S. (2d) 945 (1939) (life tenant is trustee of fund and entitled to income therefrom).

<sup>11</sup> *Matter of Camp*, 126 N. Y. 377, 27 N. E. 799 (1891).

<sup>12</sup> *In re Gilroy*, 60 Misc. 125, 112 N. Y. S. 111 (1908), *affd.* 194 N. Y. 551, 87 N. E. 1119 (1909).

<sup>13</sup> *Bartlow v. Chicago, B. & O. R. R.*, 243 Ill. 332, 90 N. E. 721 (1910).

<sup>14</sup> *City of Cincinnati v. Smythe*, 57 Ohio App. 70, 11 N. E. (2d) 274 (1937) (land was subject to a 99-year lease, renewable forever).

<sup>15</sup> *In re Cook's Will*, 243 App. Div. 706, 277 N. Y. S. 26 (1936) (court said the award took the place of the land and was subject to the same limitations to which the real property represented by the award was subject).

Civil Code of Practice relating to voluntary judicial sales at the request of either party should have any application when the government has taken the land. It is at least interesting to note that similar provisions for the sale of land where future interests exist are found in almost half of the states,<sup>16</sup> yet no other court appears to have treated their provisions as a guide in disposing of the fund arising upon the government's taking the land by eminent domain. The reason behind a statute like that of Kentucky relating to a judicial sale at the request of the life tenant or the remainderman is no doubt that neither should be permitted to deprive the other of his estate in land as such. Thus the proceeds are reinvested. However, when the land is not sold at the request of the owner of either estate, but rather is taken by the government, the reason, if it be such, for the procedure set forth in the statute fails. The reliance on this statutory procedure as a guide in the dissimilar circumstances of the principal case seems to dodge the problem of determining the disposition of the condemnation award in the absence of a specific provision in the condemnation statute itself.

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<sup>16</sup> 2 PROPERTY RESTATEMENT, §179, note d (1936), stating, "statutes treating the situation where the future interest exists as to land and a sale of the complete ownership is sought, existed in . . . twenty-three jurisdictions."