1966

Future Interests: Transmissibility of Contingent Interests

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FUTURE INTERESTS — TRANSMISSIBILITY OF CONTINGENT INTERESTS

Action to determine title to land. The parties litigant claimed through the will of their ancestor. *T*, father of *A* and *B*, devised the real estate in question to *A*, providing:

> But should my son [*A*] . . . die without issue, then and in that event the real estate devised to him herein, I devise to my son [*B*] . . . , conditioned upon the payment by him of Two Thousand ($2,000.00) Dollars to each of my daughters . . . .

B predeceased *A* who died without issue. Plaintiffs claimed title as the sole heirs and devisees of *B*. Defendants were the two surviving daughters of *T* and the children of a deceased daughter. The trial court ruled for defendants. On appeal, *affirmed*. *B* took a "contingent remainder," which interest was extinguished by his death prior to the happening of the event upon which vesting depended — *i.e.*, *A*'s death without issue. Therefore, the plaintiffs could not take, and the fee reverted upon *A*'s death without issue to the heirs of *T*. *Schau v. Cecil*, 136 N.W.2d 515 (Ia. 1965).

Although the Iowa court termed *B*'s interest a contingent remainder, an inspection of the devise reveals that *B* was to take, not as a remainderman, but as an executory devisee.[1] Irrespective of the words of art used to describe *B*'s interest, the case principally stands for the proposition that contingent interests are not transmissible, a rule apparently applicable to contingent remainders and executory interest alike. By the adoption of this principle the Iowa court has placed itself in the untenable posture of espousing a proposition of law accepted almost nowhere for more than 200 years.[2]

Once the common law had recognized executory interest as valid, the courts apparently never much doubted that they were descendible,[3] and ultimately these interests were held to be devisable and assignable as well.[4] Contingent interest are freely alienable and descendible by force of later English statutes.[5]

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[1] *A* received a fee simple subject to divestment in favor of *B*, and a fee simple, since it represents the totality of ownership, is incapable of supporting a remainder. 1 AMERICAN LAW OF PROPERTY § 4.27 (1952). The difference between contingent remainders and executory interests are of dwindling importance today. 1 POWELL, REAL PROPERTY § 273 (1950).

[2] See FEARNE, CONTINGENT REMAINDERS 534 (1801); FEARNE, EXECUTORY INTERESTS 422 (1795).

[3] Goodtitled Gurnall v. Wood, Willes 211, 125 Eng. Rep. 1136 (C.P. 1740).

[4] Actually, the early rule was that contingent interests were not assignable at law, Lampet's Case, 10 Co. Rep. 46, 77 Eng. Rep. 994 (K.B. 1613); Fulwood's Case, 4 Co. Rep. 64, 76 Eng. Rep. 1031 (K.B. 1590), although equity would enforce an assignment for valuable consideration, Duke of Chandos v. Talbot, 2 P. Wms. 601, 24 Eng. Rep. 877 (Ch. 1731). *But* see Doe v. Polgrean, 1 H. Black 535, 540, 126 Eng. Rep. 307, 310 (C.P. 1791) where there appears dictum to the effect that contingent interests are assignable at law. The holder of a contingent interest might also release it to the person in possession. Lampet's Case, *supra*. Such interests were later held to be devisable. Jones v. Roe, 3 Term Rep. 88, 100 Eng. Rep. 470 (K.B. 1789).

[5] Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 3; Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 4(2).

The English courts were initially reluctant to accept the contingent interests as a complete estate, freely transferable and descendible because they feared that the claims involved would afford unique opportunities for the practice of champerty and maintenance.[6] Thus these interests were viewed as "mere possibilities," not actual estates, and the courts deemed them not to be entiled to the protection accorded vested or possessory interests. The subsequent piecemeal elevation of contingent interests to the status they now almost universally enjoy reflects the attitude of later courts which considered these fears unfounded.[7]

In the United States, courts at an early date recognized the transmissibility of executory interests.[8] The rule as announced by an overwhelming majority of American jurisdictions is in accord with this proposition,[9] and only a very few decisions flatly maintain that contingent future interests are never transmissible.[10] Often these contrary decisions are the result of confusing the issue of vesting with that of transmissibility.[11] Some courts seem inclined to imply a condition of survivorship whenever a contingent interest is under consideration. Other courts have attempted to dispel the confusion by talking of "a vested interest in a contingent interest,"[12] but have succeeded only in adding to the muddle. A number of states have enacted legislation making these interests descendible, devisable, and alienable.[13]

Some contingent interest are doubtless without the majority rule. If a devise imposes a condition performable only by the devisee, or contains an implied or express condition of suvivorship,[14] or a condition of survivorship to a certain date,[15] or makes the person in whom the estate will ultimately vest unascertainable until

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[6]For a discussion of the consideration which caused early English courts to regard executory interests as suspect, see Lampet's Case, *supra* note 4.

[7]The destructibility rule is an example of the disdain with which the common law viewed contingent remainders.

[8]Barnitz v. Casey, 11 U.S. (7 Cranch) 456 (1812). See also 4 KENT, COMMENTARIES ON AMERICAN LAW, § 284 (7th ed 1851).

[9]*E.g.*, Kean's Lessee v. Roe, 2 Del. (2 Harr.) 103 (1836), and cases cited; Blackstone v. Althouse, 278 Ill. 481, 116 N.E. 154 (1917); Wallhouser v. Rummel, 25 N.J. Super, 358, 96 A.2d 289 (1953); Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955); National Bank of Charleston v. Wehrle, 124 W. Va. 268, 20 S.E.2d 112 (1942); Kidwell v. Rogers, 103 W. Va. 272, 137 S.E. 5 (1927. See also RESTATEMENT, PROPERTY § 164 (1936); AMERICAN LAW OF PROPERTY §§ 4.73 - 4.74 (1952); SIMES AND SMITH, FUTURE INTERESTS, §§ 1885-1887 (2d ed. 1956).

[10]*E.g.*, Farrar v. Bingham, 93 F.2d 252 (1937).

[11]See, for example, Smith v. Sweetser, 19 F.2d 974 (1927).

[12]In Hays v. Cole, 221 Miss. 459, 73 So. 2d 258 (1954) the court adopts this phraseology.

[13]*E.g.*, OHIO CODE ANN. § 2131.04 (Rev. 1953), N.Y. REAL PROPERTY LAW, § 59.

[14]Henkel v. Auchstetter, 240 Ia. 1366, 39 N.W.2d 650 (1949). Interestingly, in deciding this case the Iowa court quotes with approval the following passage from 3 WALSH, COMMENTARIES ON THE LAWS OF REAL PROPERTY 173 (1947): ". . . Contingent remainders may be conveyed, devised and inherited *as freely as vested estates.*" (Emphasis added.)

[15]Bladt v. Bladt, 191 Ia. 1344, 181 N.W. 765 (1921).

the contingency occurs,[16] the interest is not transmissible. Obviously, if the interest is no longer capable of vesting, it is not devisable or descendable.[17] The rule of transmissibility may thus be expressed: contingent future interests are transmissible so long as the contingency which will vest the interest is not attached to the person who is to take, but is connected with or dependent upon some collateral event.[18]

It is difficult to see how the instant case fails to satisfy the above rule. None of the cases which the Iowa court cites as supporting its conclusion seem in point. In each, the court found a condition of survivorship implicit in the language of the gift over.[19] No such condition is discoverable in the principal case. By the terms of *T*'s will, *A* received a fee simple subject to divestment in favor of *B* as the executory devisee, and there was no condition imposed upon *B*'s interest which should take it from the general rule.[20]

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TORTS — INSTRUCTIONS — UNAVOIDABLE ACCIDENT

P was injured when *D*'s brakes failed causing him to hit *P*'s car. *D* denied negligence and contended that the collison was an unavoidable accident. *D* requested and obtained an instruction on unavoidable accident in addition to an instruction on negligence and proximate causation. On appeal, *Reversed* and *Remanded*. The unavoidable accident instruction was unnecessary because the defense of unavoidability was merely a denial of negligence and proximate causation. Therefore, ordinary instructions on negligence and proximate cause are sufficient. An instruction on unavoidability confuses the jury by creating the impression that it is a separate ground of non-liability, and confuses the proper manner of determining liability, which is considering negligent conduct, proximate causation and injury. The court said it would have to be an exceptional situation before an unavoidable accident instruction would be permissible, and in ordinary negligence cases such an instruction is reversible error. *Houston v. Adams*, 239 Ark. 346, 389 S.W.2d 872 (1965).

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[16]The transmissibility of this kind of contingent interest is discussed in Huxley v. Security Trust Co., 27 Del. Ch. 206 33 A.2d 679 (1943). ARK. STAT. ANN. § 50-405 (1947), which substitutes for a fee tail a life estate in the first taker and a remainder in fee simple absolute in "the person to whom the estate tail would pass" gives rise to this type of interest. See Fetters, *The Entailed Estate: Ferment for Reform in Arkansas*, 19 ARK. L. REV. 275, 289 (1966). In England, a contingent interest is devisable whether the testator be ascertained as the person in whom the interest will vest or not. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 3.

[17]See generally Simes and King, *Transmissibility of Future Interests in Colorado*, 27 ROCKY MT. L. REV. 1 (1954).

[18]Willoughby v. Trevisono, 202 Md. 442, 97 A.2d 307 (1953).

[19]Fulton v. Fulton, 179 Ia. 948, 162 N.W. 253 (1917).

[20]The condition that *T*'s daughters receive $2,000.00 each is not a condition so personal as to be performable only by the executory devisee, Marks v. Marks, 1 Strange 129, 93 Eng. Rep. 429 (K.B. 1718). Also, the payment of the money is probably not a condition precedent to vesting, but merely operates as an equitable charge on the fee. Woodward v. Walling, 31 Ia. 533, (1871). See also Sick v. Rock, 240 Ia. 584, 37 N.W.2d 305 (1949). For a collection of the authorities, see *Annot.*, 62 A.L.R. 589 (1929).