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Contingent Remainders

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CONTINGENT REMAINDERS

There is scarcely any subject of property law, upon which a greater amount of learning and erudition has been expended than upon the criterion for distinguishing between a vested and a contingent remainder. Not only is it a question of perennial interest to those, to whom the fascination of metaphysical subtleties makes a strong appeal, it is likewise an ever-recurring problem of practical importance. It is a natural inclination of our human nature to cherish the desire that those who are dear to us, should, after our death, have the use and enjoyment of our property as long as they live and that, after their death, other persons in whom we are interested, should have the use and benefit thereof. Thus arises the age-old problem of life estate and remainder. In many circumstances it is quite natural also that we should desire to attach conditions to the right of those who are to take the property in the second instance. If these provisions are not drawn with great care, they may present the most difficult question of construction to determine the issue between vested and contingent remainders.

And this distinction is of vital importance, because it may involve all the difference between getting and not getting the property. Thus a contingent remainder is destroyed by its failure to vest at or before the termination of the particular estate; but a vested remainder, being vested from the moment of its creation, is not subject to this contingency. Again, vested remainders are freely transferable by deed or devise; contingent remainders are not. Thirdly, where the life tenant surrenders to the remainder man, the application of the doctrine of merger depends upon whether the remainder is vested or contingent. Fourthly, the Rule against Perpetuities does not apply where the future interest is vested. Hence in order to determine its application to remainders, vested remainders must be distinguished from contingent. The fifth

situation is that of a fee limited after a remainder in fee, which is sometimes called an alternative remainder or remainder on a contingency with a double aspect. The distinction made by the common law is that there can not be a fee limited after a vested remainder in fee, but there can be two contingent remainders in fee limited in the alternative, so that one will take effect if the other does not. Sixthly, where the subject of a co-tenancy is a remainder, the right to partition depends on whether the remainder is vested or contingent. Seventhly, whether an inheritance tax is assessable on a remainder, likewise depends on the same distinction. Lastly, if the subject matter of a suit in chancery is land, those who have a vested remainder therein are necessary parties; not so, those who have only a contingent remainder. These rather elementary propositions are all well settled and require no citation of authority. They are discussed at considerable length with citation to Illinois cases in a very illuminative article by Professor Kales.¹ The bare enumeration here may suffice to show the great practical importance of the distinction.

The history of the use of the word "remain" in this connection² has led some writers to define a remainder, in contra-distinction to a reversion, as the fee with which the owner has parted and which by the terms of the instrument never returns to him, but remains away from him.³ According to the more common conception, however, when the owner of a fee creates in another person an estate less than his own, he thereby divides the fee, leaving a residue for himself which he may either retain or pass to a third person. This definition has the advantage of logical consistency as well as the sanction of the most eminent law writers;⁴ and may be regarded

¹ Albert Martin Kales, *Vested and Contingent Interests in Illinois*, 2 Ill. L. Rev. 301.

² 2 Pollock & Maitland, *History of English Law*.

³ 1 Tiffany, *Real Property*, 476.

⁴ 2 Min. Inst. 389; Coke Litt. 49a, 143a; Fearne, *Contingent Remainders* (10th ed.) 12; 2 Bl. Comm. 164; 4 Kent's Comm. 197; Challis, *Real Property* (3rd ed.) 83.

as the settled view of the courts. But when we come to distinguish between vested and contingent remainders as they are found in the cases, we encounter a problem of much greater difficulty. In determining this question, it seems universally agreed, however, that the possibility that the remainder man may never be entitled to possession is immaterial. Thus, where there is a limitation to *A* for life with remainder to *B*, the remainder man may never be entitled to possession, since he may die before the life tenant, yet the remainder is clearly vested.⁵ So also where there is a remainder after an estate tail, the heirs of the tenant in tail may never fail or he may convert it into a fee simple by a conveyance barring the entail. There is therefore a possibility here that the remainder man may never be entitled to possession and yet the remainder is not contingent on that account.⁶ There are two Connecticut cases to the contrary,⁷ but Tiffany is undoubtedly correct in pronouncing these two cases to be "unsound in principle."⁸ Then again this possibility may be due to the fact that there is an executory limitation over, but in neither case does this possibility make the remainder contingent.⁹

Thus far the authorities are agreed; but in attempting to formulate the criterion for distinguishing between vested and contingent remainders, there is considerable variance. In some states the solution has been attempted by statute. Thus in New York it was provided as follows:

"Future interests are vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain."¹⁰

⁵ Tiffany, *op. cit. supra* note 3, 491.

⁶ *Op. cit. supra* note 5.

⁷ *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110 (1895); *Horton v. Upham*, 72 Conn. 29, 43 Atl. 492 (1899).

⁸ Tiffany, *op. cit. supra* note 3, 492.

⁹ *Op. cit. supra* note 8.

¹⁰ Albert Martin Kales, *Distinction between Vested and Contingent Remainders*, 8 Ill. L. Rev. 309.

This has been held to mean that a remainder is vested at any time, if the remainder man at that time would be entitled to possession, should the particular estate then terminate, although he might not be entitled to possession, should it terminate later.¹¹ Passing the debatable question whether this statute is merely declaratory of the common law,¹² the purpose of the present article is to direct attention to the two principal formulations of the common law criterion, and to inquire whether in their practical application they result in different decisions.

According to one of these formulations, a vested remainder is one given to an ascertainable person without a condition precedent; all others are contingent. This is the effect of Blackstone's definition who said that "contingent remainders are where the estate in remainder is limited to take effect, either to a dubious and uncertain person or upon a dubious and uncertain event."¹³ It is also the test approved by Tiffany¹⁴ and other eminent writers.¹⁵ Under this test, any remainder on a condition precedent is necessarily a contingent remainder, because, no matter what the condition is, it will be uncertain if the condition will be fulfilled, or, if it is certain to be fulfilled, it will still be uncertain whether the fulfillment will be before or after the termination of the particular estate. In either case the uncertainty makes the remainder contingent. There can be no condition which will certainly be fulfilled at or before the termination of the particular estate, since the particular estate may terminate at any time, if not by death, then by release, forfeiture, or merger.

According to the other formulation, as expounded by Professor Kales,¹⁶ a vested remainder is one so limited that

¹¹ Moore v. Littel, 41 N. Y. 66 (1869).

¹² W. L. Roberts, Transfer of Future Interests, 30 Mich. L. Rev. 349, 350.

¹³ 2 Bl. Comm. 169.

¹⁴ Tiffany, *op. cit. supra* note 3, 484.

¹⁵ Roberts, *op. cit. supra* note 12, 349.

¹⁶ Kales, *op. cit. supra* note 1; Kales, *op. cit. supra* note 10.

there is no possibility of a gap between the termination of the particular estate and the accrual of the remainder man's right of possession; all others are contingent. Slightly paraphrasing Professor Gray's expression of the same idea,¹⁷ it may be said that, under this test a remainder is vested, if by the terms of its limitation it can take effect in possession whenever and however the particular estate is terminated.

The statement by Professor Kales that a remainder may be vested and yet subject to a condition precedent,¹⁸ is correct, according to this definition, and yet even according to this test it is somewhat misleading. The condition referred to is that "the remainder man must survive the termination of the life estate."¹⁹ But the context and his later explanation²⁰ indicate that he refers to cases where there is an executory limitation over. Tiffany does not regard such cases as involving a condition precedent and expressly says that such an executory limitation over does not render the remainder contingent.²¹ On this point, therefore, Kales and Tiffany are in harmony. Such a limitation merely renders it uncertain whether the right to possession will ever accrue.

In nearly all cases, then, the application of these two definitions would, as a practical matter, lead to the same result: under either theory the same persons would get the property. But there are two cases where there may be a difference. Suppose there is a devise to *A* for life, remainder to *B*, provided *B* survives *A*. Tiffany, in three places, says the remainder is contingent.²² It seems, however, that even according to Kales' rule it would be contingent, because there is a possibility of a gap, *i. e.*, the right to possession would not accrue whenever and however the particular estate is terminated.

¹⁷ Gray, Rule against Perpetuities, § 101.

¹⁸ Kales, *op. cit. supra* note 1, 308.

¹⁹ Kales, *op. cit. supra* note 1, 303.

²⁰ Kales, Distinction Between Vested and Contingent Remainders, 8 Ill. L. Rev. 225, 237.

²¹ Tiffany, *op. cit. supra* note 3, 492.

²² Tiffany, *op. cit. supra* note 3, 486, 489, 494.

If, for instance, it should be terminated by merger or forfeiture, the right to possession by the terms of the limitation would not accrue.

The second situation in which the application of these two rules might yield different results is the case where there is a devise to *A* for life, remainder to *B*, provided *B* survives the termination of the life estate. Here there is no possibility of any gap between the termination of the life estate and the accrual of the remainder man's right to possession. If that right ever accrues, it will necessarily accrue whenever and however the particular estate is terminated. Hence, under Kales' rule it would be a vested remainder. Under Tiffany's rule, however, since the remainder is clearly subject to a condition precedent, it would be contingent. This seems to be the only case where the difference in the definition would lead to a different result.

It may be asked, which of these different results accords best with decisions of the courts. Professor Gray has made it clear that, in the case supposed, the remainder would be held to be contingent, because the conditional element is incorporated into the description of the gift to the remainder man, and is not, as in the case of executory limitation over, contained in an additional clause following the words which in terms describe a vested interest. In spite of the great amount of literature that has been written and the vast number of cases that have been decided, since Gray wrote his famous treatise on the Rule against Perpetuities, there is still no better exposition of the state of the law on this question than that which he has given us. Starting with a reference to the case of an executory limitation over, but, in the last paragraph here quoted, adverting to the case under discussion here, his answer is as follows:²³

"Suppose, for instance, a gift to *A* for life, remainder to *B* and his heirs, but if *B* dies before the termination of the particular estate, then to *C* and his heirs. Here, if the condition ever affects *B*'s estate

²³ Gray, *op. cit.* *supra* note 17, § 104 *et seq.*

at all, it will prevent it from coming into possession; it will never divest it after it has once, come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

“(1) If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted.

“(2) Such a condition might be regarded in all cases as a condition subsequent, the circumstance that the contingency must happen, if at all, at or before the end of the particular estate being regarded as immaterial. The effect of this construction would be to make a remainder vested at any time, if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although should the particular estate determine at some other time, such person might not be entitled to the remainder. Upon this theory, if there was a devise to *A* for life, remainder to his surviving children, the remainder would be at any particular moment vested in the children who would survive *A* should he at that moment die.

“(3) Neither of these views is that of the common law. Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to *A* for life, remainder to his children, but if any child dies in the lifetime of *A* his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to *A* for life, remainder to such of his children as survive him, the remainder is contingent.”

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