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George F. Barbary

COLORADO PREFERS VESTING—
Liebhardt v. Avison

GEORGE F. BARBARY *

Every now and then a decision is handed down which, at first glance seems to strike the reader as not unusual, devoid of color, and completely lacking in the stuff which makes intellectual pugilistics a great sport, but which upon more than cursory examination shows all the aspects of being the perfect port in a stormy legal predicament, or the solid peg upon which the lawyer can safely hang his hat. Such a case is *Liebhardt v. Avison* decided on March 5, 1951 by the Supreme Court of Colorado.[1]

The problem presented to the Court was a future interest problem and arose out of the following situation:[2]

(1) Louis Liebhardt wished to provide for the following relatives: Two sisters, Minnie and Laura; two nephews, Harry and Fred; a niece, Georgia; and Georgia's son, Jack.

(2) Louis sought to do so with the following assets: Certain one-half interest in real estate in Denver, certain shares of stock (representing an interest in other Denver real estate), and the incomes from both the stock and the real estate.

(3) Louis Liebhardt's attorney set up the following trust to accomplish his client's purposes: To Minnie and Laura as trustees and upon the death of both to Harry and the Colorado National Bank of Denver as successors in trust.

(4) Then to fulfill his client's wishes, Louis' attorney arranged in part the following testamentary disposition:

(a) The net income of the real estate and of the stock to Minnie and Laura, share and share alike or to the survivor of them, for and during their natural lives.

(b) The net income of the real estate to Georgia for and during her natural life and to Jack [3] share and share alike upon the death of Minnie and Laura . . . as hereinafter provided.

(c) The entire real estate to be turned over and conveyed to Jack as and for his absolute property upon the death of Georgia and when Jack shall have reached the age of 30 years.

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* Student, University of Denver College of Law.

[1] ..... Colo. ....., 229 P. 2d 933.

[2] The situation and the problem arose immediately out of paragraph sixteen of the will of Louis Liebhardt. Other paragraphs will be mentioned later.

[3] As briefly presented by the Court one might read here an estate or interest in Jack pur autre vie (of Georgia). However the provision from paragraph sixteen was "The share of said net income belonging to Georgia Liebhardt Temple shall be paid to her by said successors in trust quarter-annually. The share of said net income belonging to Jack Liebhardt Temple shall be paid to him by said successors in trust at the rate of Three Hundred Dollars ($300.00) per month, until he reaches the age of twenty-six (26) years, and between the age of twenty-six (26) and thirty (30) years, the said share of said net income shall be paid to him by said successors in trust at the rate of Six Hundred Dollars ($600.00) per month. The excess of said net income . . . shall be invested and held in trust for him. . . ."

(d) The net income of the real estate (to certain communities for memorial purposes) upon the death of Georgia and upon the death of Jack without issue before being entitled to receive the property (real estate) as provided (that is upon the death of Georgia and the death of Jack prior to age 30).[4]

(e) The stock and the accumulations thereon to Harry and Fred, share and share alike, upon the death of both Minnie and Laura.

GENERAL PROVISIONS OF THE WILL

Grouped as to assets,[5] the disposition looks as follows: (1) *Net income of real estate*—to Minnie and Laura for life, then to Georgia for life and to Jack until he reaches the age of 30 years. Then, if Jack shall not fulfill the requirements for receiving absolutely the real estate itself, the net income to go to charity. (2) *The real estate itself*—in trust for Minnie and Laura, for Georgia and Jack, then (unless Jack shall meet the requirements for receiving absolutely the real estate) in trust for charity. (3) *Net income of the stock*—to Minnie and Laura for life (survivorship etc.) then trust ceases and (4) *The stock itself*—to Fred and Harry (no survivorship provided), share and share alike.

The trial court found[6] that Louis died in 1937, Laura died intestate in 1941, Harry died later in 1941 and Minnie died in 1947, also intestate. The Colorado National Bank filed its complaint in the nature of interpleader when Harry's widow (together with

[4] In view of the discussion later to follow this portion ought to be set forth fully. Paragraph 16, subparagraph (b), is "Upon the death of Georgia Liebhardt Temple, and when said Jack Liebhardt Temple shall have reached the age of thirty (30) years, then the entire undivided one-half interest . . . shall be turned over and conveyed to said Jack Liebhardt Temple as and for his absolute property. Upon the death of Georgia Liebhardt Temple, and upon the death of Jack Liebhardt Temple without issue, before being entitled to receive and before receiving said property as above provided, then the net income of said undivided one-half interest . . . shall be distributed, and I give, devise and bequeath the said net income as follows: One-eighth of said net income to the City and County of Denver, Colorado, to maintain a water and field lily garden in Washington Park. . . ."

[5] This writer has deliberately placed emphasis upon the assets in order to avoid an error which he feels T. G. M. and perhaps others may have made. In an earlier comment on Liebhardt v. Avison in 28 Dicta 216 (1951), T. G. M. argues at page 217 as follows: "The condition precedent which might be infered from the words 'when they reach the age of 26 years' is nullified by the gift of income from the same property to the same persons until they reach the age of 26 years." T. G. M. then referred to Clobberies case that if money be given to one, to be paid at age 21 years, there, if the party dies before, it shall go to (his) executor.

The present writer however submits that the gift of income is entirely distinct and separate from the gift of the property (real estate) itself. It is important to make this distinction faithfully. In this light, the "nullification" asserted by the previous writer is not forthcoming. Moreover the specific reference to Cloberries case does not support the proposition since in the reference the concern is with only one subject matter, that is the income. In the argument there are two subject matters, the income, and the real estate itself.

[6] Summarized by the court on page 934.

the Executor under Harry's will) claimed an undivided one-half interest in the property devised to Fred and Harry under paragraph 16 of Louis Liebhardt's will. Fred resisted.

It seems to this writer that a proper and thorough examination of *Liebhardt v. Avison* may be conducted along the following lines:

(1) By a simple examination of the stage upon which the drama is presented.

(2) By an examination of the specific problems presented to the Colorado court by this production.

(3) By an analysis of the direct and immediate effect of the court's decision.

(4) By a somewhat subtle consideration of what one writer feels are implications of the decision which may lead to certain confusion.

THE STAGE

For some strange reason the subject "Future Interests" seems to excite more fear than respect. This fear is justified not so much by shades of feudal tenures and doctrines of uses as by a somewhat unfortunate lack of certainty as to just which way a court will lean and just what factors it will consider in that leaning on any specific problem. Thus, it is perhaps not so much that the lawyer is not aware that he is creating a future interest problem, as Dean King seems to feel,[7] as it is that the attorney has not been able in the past to determine just what the state of a particular problem is in his jurisdiction. The average prudent lawyer (there seems to be no reason to believe that the two adjectives necessarily require separation), is capable of examining his notes and examining the cases and texts, and drawing a contingent remainder situation where that is his client's desire, and of distinguishing between a vested remainder and a vested remainder subject to divestment. But there are other factors which place the attorney in a predicament. That predicament is or rather has been particularly acute in Colorado. For example in *Snyder v. O'Connor*[8] (X to 5 children; should a child die without issue, his shares to augment the other 4 children's shares) which seems to be the perfect vested remainder subject to divestment, is called by the Colorado court a contingent remainder. This same treatment was given by the court to interests which seem rather to follow the orthodox vested remainder in *New York Life Insurance Co. v. Brown*[9] and in *Hickey v. Costello.*[10] Then again in *Burden v. Colorado National Bank*[11] (X to A for life, remainder to such of the issue of A as shall survive her, if any) the Colorado court said that this interest (which traditionally has

[7] See King, "Future Interests in Colorado," copyright, 1950, by Wm. C. Brown Company, Dubuque, Iowa, at page 2.

[8] 102 Colo. 567, 81 P. 2d 773 (1938).

[9] 32 Colo. 365, 76 P. 799 (1904).

[10] 80 Colo. 461, 251 P. 595 (1927).

[11] 116 Colo. 111, 179 P. 2d 267 (1947).

been called contingent)[12] is vested. Were this the only word on the subject in Colorado the lawyer would be quite vexatiously placed. However, there is authority to the effect that the Colorado courts favor early vesting of interests. *Hignett v. Sherman*,[13] *Carmichael v. Cole*,[14] *Hazelwood v. Moore* [15] and *Jones v. Pueblo Savings & Trust Co.*[16] may be cited to support the proposition. It is submitted that this proposition deserves the attention of the attorney since it has become the "place to stand" from which the court will consider a close question as to whether an interest is vested or contingent. Thus Dean King was able to criticize the court's holding in *Burden v. Colorado National Bank* by advising that perhaps the attorney can assure his client that the interest will be contingent if he inserts a clause such as "it being my intention that no remainderman hereunder shall take any vested interest unless he survives the life tenant".[17] While that comment was directed specifically to the *Burden* case, it might well have described the condition of contingent remainders in Colorado but for another condition surveyed by Dean King in the same chapter. Dean King summarizes the status of vested remainders thus: "There seems to be no consistency in Colorado cases on vesting."[18] This, then, is the stage or the background for *Liebhardt v. Avison*—a lack of consistency, but a leaning toward early vesting of interest.

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[12] See Casner and Leach, "Cases and Text on Property," Little, Brown and Company, Boston, 1950, at page 354 and 355. The following is taken directly: "(1) 'To A for life, remainder to B and his heirs if B survives A.'—contingent. (2) 'To A for life, remainder to such children of A as shall survive A and their heirs.'—contingent. The children to take are not ascertain until it is determined which ones survive A. (3) 'To A for life, remainder to B and his heirs, but if B does not survive A, then to C and his heirs.' B's remainder is vested; it is subject to a condition subsequent and is thus distinguishable from case (1) above. Yes, the difference is only in the form of expression and doesn't make very good sense. But the disposition of millions of dollars of property have turned upon this type of verbal distinction and continues to do so."

See also Spitz "An Elementary Treatise on Conditional and Future Interest in Property," Baker, Voorhis & Co., New York, 1933, Chapter II.

Thus in Festing v. Allen (12 M. & W. 279), 1843, where the devise was to A for life, remainder to her children who shall attain 21, in default of issue over (A is survived by 3 minor children), the Court held that the children had contingent remainders in fee. "None of the children having attained majority when the particular estate determined by death, the remainder to them was defeated."

But see also Astley v. Micklethwait, 15 ch. D. 59, 1880, in which the principle was criticized as applying to both legal and equitable estates limited in remainder, when in fact it applies only to legal estates so limited.

See also footnote 22.

[13] 75 Colo. 64, 224 P. 411 (1924).

[14] 83 Colo. 575, 267 P. 408 (1928).

[15] 100 Colo. 556, 59 P. 2d 248 (1937).

[16] 103 Colo. 455, 87 P. 2d (1939).

[17] King, supra, page 75.

[18] King, supra, page 70. Dean King pressed the comment with a criticism of Fisher v. Minshall, 102 Colo. 154, 78 P. 2d 363 (1938), in which an interest is called a contingent remainder, when in fact it did not seem to him to be a remainder at all.

The problem presented to the court was whether under the will of Louis Liebhardt a vested remainder [19] was created in Fred and Harry, so that upon the death of Harry that portion of the property in controversy became a part of his estate and under his will passed to and is vested in his widow, Avison. The court affirmed the trial court finding that the interest was vested.

Briefly summarized, the court based its position on the following propositions: (1) The rule of construction announced in *Hignett v. Sherman* that, "Unless the expressed intention of the testator clearly appears in the will to the contrary, an absolute, rather than a qualified, a vested, rather than a contingent, interest or estate is created." The court further referred to *Carmichael v. Cole* that, "unless the expressed intention of the testatrix clearly appears in the will to the contrary, a vested, rather than a contingent, interest is created."[20] (2) The rule that the estate vests at the death of the testator, unless a contrary intention appears from the will, for which proposition the court referred to the same authorities as in the previous proposition. (3) The presumption against joint tenancies. This came in answer to the Plaintiff in Error's assertion that Harry and Fred took as a class and that Fred took all as surviving member of the class. (4) The cardinal rule of the interpretation of wills, which is to determine the intention of the testator. Here the court found that while in the case of Minnie and Laura he devised to them, "share and share alike or to the survivor of them", in the case of Harry and Fred he devised simply "share and share alike". The court noted that the testator stopped short of providing that the survivor should take ("although it is clear from other portions of the will that he knew how to so provide"), and called to play another rule of construction, (5) that the use of different words in a will, applying to the same subject matter, indicates that the testator had in view different results. (6) The same rule of construction as in the preceding proposition, but applied to the distinction between the manner in which the testator provided for the deferment of vesting in Jack but did not so provide in the case of Harry and Fred.

The court summarized its position as follows: "It thus becomes evident from a study of other paragraphs of testator's will that he could, and did, by apt language, defer the vesting of a remainder to a time subsequent to his own death, make such vesting dependent upon the survival of the remaindermen until such time,

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[19] This writer takes the position that the term "vested remainder" means exactly what it says and does not have to be preceded by the term "indefeasible" to distinguish it from a "vested remainder subject to defeasance." The argument will be presented under the last of the four sub-topics in this analysis.

[20] To further amplify its position the Court referred to Jones v. Pueblo Savings and Trusts Co., 103 Colo. 45, 87 P. 2d 2, 4, that "The law favors the vesting of estates especially when given to children or those standing in like relation . . . the Court will construe a vested remainder if possible." (The court then noted that Louis left no children and that except for the two sisters Harry and Fred were his next of kin.)

and direct the disposition of the remainder in the event of the death of the remaindermen prior to the time fixed for such vesting. We can only conclude that the testator himself had fully in mind the difference between a contingent and a vested remainder. By the application of the rule in *Williams v. Fundingsland*, we must conclude that testator did not intend to create a contingent remainder by (the paragraph under consideration)".[21]

EFFECT OF THE DECISION

The writer, of course, does not propose to state what the effect of the decision is, but rather, in the light of the Colorado cases, to offer what he reasonably expects that effect to be. That expectation can be simply stated. The court has reasserted its position that, "The law prefers the vesting of estates." There is actually no departure from the principles of the common law, since vested remainders, contingent remainders and executory interests were clearly preferred in that order.[22] There is, however, a degree of certainty, in the statements of judicial policy herein, which is now available to the Colorado lawyer in the drafting of instruments and in the preparation for the litigation of existing instruments. There is, of course, no assurance that tomorrow the court would not say, "Colorado prefers contingent remainders," but to the degree within which the court operates within the framework of its judicial precedent, it seems to this writer that *Liebhardt v. Avison* very nicely gratifies the lawyer's search for consistency in this future interest problem in Colorado. It would seem that if *Hignett v. Sherman* and *Liebhardt v. Avison* can be relied upon, Dean King's critical analysis will no longer be justified. It seems also that Dean King's second suggestion (that if you do not want a vested remainder, make provisions in no uncertain terms) has been justified by *Liebhardt v. Avison.*

It is not so much the court's statement of preferential treatment of the vested remainder that concerns this writer but rather a suggestion directed to the opinion by T.G.M. who commented on this case earlier in *Dicta.*[23]

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[21] Liebhardt v. Avison, supra, at 937.

[22] See for example Moynihan, "Preliminary Survey of Real Property," West Publishing Co., St. Paul, Minn., 1940, p. 66, "The courts have generally favored construing doubtful language as creating a vested rather than a contingent interest."

Moynihan compares Blanchard v. Blanchard, 1 Allen 223 (Mass., 1861), and Bally v. Strahan, 314 Ill. 213, 145 N. E. 359 (1924), to Ryan v. Beshk, 339 Ill. 45, 170 N. E. 699, 130. In the former, "A to B for life, then to B's children, but if any child die before B, his share to go to surviving children"—each child had a vested remainder subject to divestment. In the latter, "A to B for life, then to such of the children of B as survive him"—each child has a contingent remainder. Moynihan adds, "In the latter case the remaindermen are unascertained because of the condition precedent of survivorship." This writer would criticize the comment, however, in the same manner and for the same reason that he does another writer's approach. See infra paragraph 5 under "Implication of Unorthodoxy."

[23] Liebhardt v. Avison: Remainders and Revisions, 28 Dicta 215, 216 (1951).

That writer's position can perhaps be briefly stated as follows: In arriving at the conclusion that Harry had a vested remainder, the court relied on rules of construction, one of which was that where the testator created a contingent remainder in one part of the will, but omits such limitations as to Harry, a different result was intended. However, that writer continues, what the court in its comparison and analysis overlooks is that the interest referred to as a contingent remainder is really a vested remainder subject to divestment. Thus that writer feels that "erroneous inferences may be drawn".[24] It seems to the present writer, however, that no such improper analysis was present in the court's decision and that, therefore, these implications of unorthodoxy do not exist.

The court was primarily concerned with paragraph 16 of the will which was analyzed above. In Paragraphs 2 to 14 of the will, testator provided other outright gifts but in most cases provided for their lapsing and falling into the residuum if the named beneficiary be not living at the time of his death. In Paragraph 15 Louis created another trust in which he placed real estate, and securities as a protective fund. The Colorado National Bank was named successor trustee. Harry and Georgia were named as life tenants as to the net income from both the real estate and the fund, (the income from the fund not to be paid until ten years after Louis' death). On death of one life tenant, the incomes were to go to survivor with remainder over after the death of the second life tenant, to the issue of Georgia "living at the time of testator's death" in equal shares "when they reach the age of 26 years." Finally, "in case Georgia's issue living at the time of testator's death, die without issue before reaching the age of twenty-six years, and before receiving the trust property" then, the trustee shall pay over the income to certain religious institutions.

T.G.M. Takes Dangerous Position

T.G.M. in construing paragraph 15 claims that the remainder was not contingent as the Colorado court asserts, but was vested subject to divestment. Were the analysis correct, T.G.M. most certainly would have exhibited a dangerous quandary to the dismay of the practicing attorney. T.G.M. cites Simes for the proposition that "where a devise is to a remainderman at the death of the life tenant . . . the authorities declare that such words relate to the time of enjoyment and that the remainder is vested."[25] The analysis is acceptable as far as it goes, but this writer submits that the sound principle is not intended to operate in such a grandiose manner in the face of an additional and prior requirement that the vesting as well as the enjoyment depends on the taker's being alive at the time of the testator's death. Thus while there is no quarrel

[24] T. G. M. uses the terms "erroneous inferences" and "may lead to unorthodox conclusions" synonomously throughout his criticism.

[25] Simes, The Law of Future Interests, (1936) Section 74, note 26, citing among others an Iowa case, Dowd v. Scally, 174 N. W. 938 (1919).

with the proposition that X to A for life, then to B upon the death of A, gives B an immediate vested remainder, it certainly does not follow that X to A for life, then to B, if B be alive at the time of testator's death comes within that rule. In this respect the court properly found the remainder in B contingent. Nor does the court argue that the requirement that "payment (enjoyment) be postponed until B is 26 years of age" is a contingent remainder as T.G.M. seems to find. The court, having properly found the remainder expressly contingent upon B's being alive at the testator's death does not deny that B, having fulfilled the condition precedent, then has a vested remainder with enjoyment postponed and also subject to divestment if he has no issue at age 26. It does not in the least contradict the court's holding in *Clobberie's* case as T.G.M.'s fourth point seems to suggest.

T.G.M. further argues that "the identity of each remainder was as definitely determined as if he had said Mary, James and John, children of Georgia."[26] May I suggest first that he stops short of the full explanation of a contingent remainder, implying that only when the taker is unascertainable or indeterminable is there a contingent remainder. The other half of the criterion, of course, is ". . . or if the event on which it is limited to take effect remains uncertain."[27] Moreover, following the assumption and with a mere reference to the Restatement, T.G.M. states that "this present identification" (?) "tends to establish that survival is not a condition precedent." Perhaps a suggestion of the law's presumption as to human capacity to reproduce will create some doubt as to the "definitely determined" and "present identification". The point can no longer be pursued without danger of embarrassment to persons who unfortunately are serving as legal guinea-pigs.

Possible Unorthodox Results

It is submitted that there are, however, two sound approaches to this problem, which neither the court nor T.G.M. touched upon, which might "lead to unorthodox results." First in Gray's old stand-by that it stands ready to become possessory wherever and however a preceding estate is terminated."[28] If the law's presumption as to man's capacity can be dissuaded here, it would seem that, though the issue of Georgia may precede the testator in death, for the period of time during which the issue did persist, he stands ready to become possessory, etc. Thus, the vested remainder which T.G.M. sought to establish might well be so to Gray. Second is the test suggested by the Colorado court in *Hignett v. Sherman* which is only slightly different from Gray's. That suggestion is that the distinction between contingent and vested remainders has to

[26] 28 Dicta 215, 217 (1951).

[27] Leach, Cases on Future Interests, (2d ed.) p. 56; New York Real Property Law, section 40; Moynihan, supra, p. 65; Fearne, C. R. 3, 4; 1 Reeves, Real Property 96; 1 Tiffany, Real Property, section 118.

[28] Gray, Rule Against Perpetuities, section 9.

do not with the time when the remainder becomes a present or possessory interest, but with the time when the remainder vests in the sense that it stands ready to become so if the immediate prior interest now terminates. I submit that here, too, this interest might be vested since should the emphasis be placed on the possible death of the life tenant at any time during the life of Georgia's issue which persists at the testator's death, he would meet the test.

The question arises: If at the time of the creation of the interest Georgia had no issue, then the remainder would be singularly contingent. Would T.G.M. then argue that the particular usage of the words "absolute," "without issue" and "postponed enjoyment"[29] point to a distinction between vested and contingent? I think not. Obviously the determination as to vested or contingent is established, as the court found, *prior* to the introduction of the above mentioned defeasance considerations, by the condition precedent that the issue survive the testator. The conclusion is that once the issue survived the testator as required, *his contingent remainder is converted into a vested remainder* [30] (awaiting only the termination of the life estate to become possessory), enjoyment of which is postponed, and *which is then subject to defeasance* if he has no issue on his 26th birthday.

FURTHER CONSIDERATIONS

Several other assertions made by T.G.M. require consideration. That writer states, "It seems strange that this idea of vesting subject to divestment as opposed to absolute vesting does not appear in the court's reasoning. It quotes the conclusions of law of the trial court wherein the idea is twice expressed: '. . . Fred . . . and Harry . . . each took an indefeasibly vested remainder . . .' and '. . . Fred . . . and Harry . . . each took an indefeasibly vested interest.' "[31] This "idea" referred to is, of course, nothing more than a rule of property law as old as the vested remainder itself; I am sure the court has considered it. In fact the court treats the "idea" in the only place it is applicable to the problem before it when it surveys paragraphs 2 to 14 and notes that "in most cases (he) provided for their lapsing and falling into the residuum in the event the named beneficiary is not living at the time of his death."[32] For that matter the "idea" has no place in a discussion of the interest left to Harry and Fred and if used in any way but in a non-technical sense, for purposes of placing emphasis on the certainty of the vesting as opposed to a contingency, the trial court was in error and the court did well to omit it. As to Fred and Harry the words were "Upon the death of Minnie and Laura I give all my stock . . . to Fred and Harry, share and share alike." There is not one suggestion of a condition subsequent, a special

[29] 28 Dicta 215, 18 (1951).

[30] Moynihan, supra, p. 65, "A contingent remainder becomes a vested remainder if the condition precedent is fulfilled and if the remainderman is ascertained before termination of the preceding estate."

[31] 28 Dicta 215, 221 (1951).

[32] Liebhardt v. Avison, 229 P. 2d 933, 937.

limitation, or an executory devise; in fact there is nothing more than a vested remainder.

Again that writer states, "Furthermore, the Brief and Argument of Defendants in Error contained this language. (1) 'We shall now demonstrate that the language of this subparagraph (c) is the language of immediate and absolute vesting . . .' and (2) '. . . unless the expressed intention of the testator clearly appears in the will to the contrary, an absolute, rather than a qualified, a vested rather than a contingent interest or estate is created'."[33] The present writer submits, however, that such emphasis is clearly outside the context of the particular usage and without justification. As to the first quotation, the full paragraph appears on page 11 of the Defendant in Error's Brief and followed this statement: "Subparagraph (c) contains no provision for deferment of vesting as does subparagraph (b)." The full paragraph continued the argument thus: "We think that in each instance the testator's intention is perfectly clear, but our primary concern is with subparagraph (c), and we shall now demonstrate that the language of the subparagraph is the language of immediate and absolute vesting at the moment of testator's death, and the fact that Harry Liebhardt died before Minnie Liebhardt, the surviving life tenant, had and could have no effect upon Harry Liebhardt's vested interest."[34]

DISTINCTION CRITICIZED

Read in the context then, it appears that the first assertion was not well taken, since the attorney clearly uses the word "absolute" to emphasize the distinction he asserts between contingent and vested. As to the second quotation, this writer regrets that he was unable to discover this in the direct argument of the attorney. But nevertheless the statement itself contains the destruction of the proposition for which it was cited. There the term "absolute" is specifically declared to be contrasted to the term "contingent", and synomously compared with the term "vested". This writer notes that the Colorado court in one of the cases cited by the attorney is "loose" in the same sense as to the word "absolute", and suggests that the attorney was clearly following judicial precedent in comparing the vested with the contingent remainder. This citation was from *Hignett v. Sherman* and appears on page 13 of the Brief as follows: ". . . an absolute rather than a qualified, a vested rather than a contingent interest or estate is created." The attorney on the very next page wisely quotes from *Carmichael v. Cole* in which the court cited *Hignett v. Sherman* this way . . . "Unless the expressed intention of the testatrix clearly appears in the will to the contrary, a vested rather than a contingent interest is created."

[33] 28 Dicta 215, 221 (1951).

[34] Brief and Argument of Defendants in Error, p. 11, Supreme Court of Colorado No. 16328.

This writer did find, however, ample passages from the attorney's Brief to substantiate the proposition that the problem considered was that of vested versus contingent, and that he did *not* allude to vested subject to defeasance. Thus on page 18: ". . . in subparagraph (c) there is complete absence of any provision for deferment of vesting." Thus on page 19: ". . . only the enjoyment was deferred." Thus on page 32: ". . . at all times from and after the death of Louis Liebhardt each of his nephews had a vested interest which he could transfer inter vivos." Finally in the conclusion, after citing authorities the attorney states, "These words created a vested remainder in both Harry Liebhardt and Fred Liebhardt within all the above quoted definitions."[35]

ANOTHER POINT DESERVES DISCUSSION

That writer quotes as follows from the opinion: "Counsel argue that the interest which Harry . . . took should be treated as a lapsed legacy . . . This argument could only be applicable in the event that Harry's . . . interest . . . was a contingent, instead of a vested remainder. It cannot apply as long as Harry . . . has a vested remainder, because if it is the latter it then becomes part of his estate and is disposed of by his will . . ." Then that writer makes the following criticism: "From the above, erroneous inferences may be drawn; first because it seems to be based upon the assumption that no contingent remainder can be inherited or devised (which is not the authority) and second because of the apparent implication that every vested remainder goes to the heirs or devisee of the remainder," and the writer adds, "not so if it were a life estate or remainder subject to defeasance under circumstances . . . such as Jack here."[36]

This writer submits that neither inference can fairly be drawn from the Opinion. Perhaps a quoting of the full paragraph, and a reading of that paragraph within the context of the whole case would have prevented such assertions as above drawn. The full paragraph is: "This argument (of counsel that Harry's legacy lapsed) could only be applicable in the event that Harry's interest *under this paragraph* was a *contingent* instead of a vested remainder. It cannot apply as long as Harry has a vested remainder, because if it is then it then becomes part of his estate . . ."[37] May I suggest that the court was concerned here only with the problem of contingent versus vested, and that if it had been a contingent situation, it would have been one of the specific situations contemplated by the lapsed legacy rule [38]—that is the death of the remainderman prior to the death of the life tenant. But this was not the situation. May I further suggest that the court in speak-

[35] Ibid, p. 21.
[36] 28 Dicta 215, 222 (1951).
[37] Liebhardt v. Avison, 29 P. 2d 933, 938.
[38] For the latest Colorado expression see Feeney v. Mahoney, 121 Colo. 599, 221 P. 2d 357 (1950), in which the Court applies the lapsed legacy doctrines where devisee preceded the testator in death, no substitution or provision for the contingency having been made.

ing of "Harry's vested remainder" was not including a vested remainder subject to defeasance nor was it concerned with a vested remainder for life. The court was concerned with, and the language was framed around the specific use of the terms as to the present factual situation. That was simply a vested remainder, which by definition is not a vested remainder subject to defeasance, and which as specifically used by the court did not involve a life estate.

One more comment. The court referred to Section 4, Article 12, Chapter 40, Colo. Stat. Ann. 1935 as being applicable to *Liebhardt v. Avison* and found that a joint tenancy rather than a tenancy in common was created. In his article entitled "Reversions and Revisions" T.G.M. demonstrates that Section 47, Article 1, Chapter 40, Colo. Stat. Ann. 1935 specifically prohibits a construction of this Article so as to embrace last wills and testaments. The former writer then suggests that a revision of the Article ought to be forthcoming from the Legislature.[39] To the extent that the former writer's comment was intended as a constructive criticism of the Legislature and not a criticism of the means used by the court to correct the error of Section 47, this writer finds himself in full agreement.

The full text of Section 4, Article 1, Chapter 40, Colo. Stat. Ann. 1935 upon which the court found a joint tenancy is as follows: "No estate in joint tenancy, in any lands, tenements, or hereditaments, shall be held or claimed under any *grant, devise* or *conveyance* whatsoever hereafter unless the premises therein mentioned be thereby expressly declared to pass, not in tenancy in common, but in joint tenancy." As amended by the Session Laws of 1939 there was added to the statute an easy means of creating a tenancy in common, if desired, by the words "provided always that such expressed declaration as aforesaid shall be deemed effective to create an estate in joint tenancy, whether in grant, devise, or conveyance hereafter made. . ."

Except for the restriction placed on Article 1 by Section 47, the clear import is that the statute *shall* cover not only *conveyances* and grants (see *Leadville v. Coronada Min. Co.*[40] "The word 'convey' is the equivalent of the word 'grant'.") but also *devises*. The court early found it necessary to disregard Section 47 for in the principal case of *Estate of Kwatowski*[41] the Colorado court said, "In the absence of an affirmative declaration that the estate devised is in joint tenancy, an estate in tenancy in common *will be devised,* unless it clearly and explicitly appears from the language employed that the *testator* understood the nature and incidents of the different estates and intended to create a joint tenancy." It seems to this writer that the court is on firm ground in so construing Article 1. As has been shown, Sec. 4(a) of Article 1,

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[39] 28 Dicta 215, 222 (1951).

[40] 29 Colo. 17, 67 P. 289.

[41] 94 Colo. 222, 29 P. 2d 639. See also Miller v. Buyer, 82 Colo. 474, 261 P. 659. Concerning the transfer of estates by means other than conveyances see Patton on Titles, Ch. 10, Sec. 278 and Sec. 279.

specifically provides for devise. Section 48 provides for recording of wills. Section 50 provides for recording "of any such certified will and probate . . . to any real estate so devised by will." Section 41 permits fraternal orders to purchase, grant, devise, give real estate, etc. Section 8 provides that "every estate in lands which shall be granted, conveyed or devised . . . shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or does not appear to be granted, devised or conveyed by operation of law." Other than those sections cited the remainder of the 51 sections of Article 1 prescribe conduct peculiar to conveyancing inter vivos, such as acknowledgments, after acquired title, mortgages, seal, foreign deeds, and the office of the clerk in relation thereto. Thus while it is incontestable that a strict application of Section 47 to the article would restrict the article to conveyances, at least five of the sections specifically involve wills, and the remainder pertain to matters peculiar to conveyances inter vivos. Therefore, until the revision suggested by T.G.M. is forthcoming, it is well that the court has recognized the inconsistency of the Legislature's surface attempt to limit the whole article and has judiciously chosen to disregard it. The only reasonable construction is to apply Section 47 to those sections peculiar to conveyances inter vivos, and to interpret it so as not to apply to those specifically concerned with wills or devises.