

THE TRANSFER OF REMAINDERS—WITH MORE PARTICULAR REFERENCE TO THE LAW OF MISSOURI

INTRODUCTORY

The common law gave to vested remainders many of the qualities of present estates, and most of the questions arising in connection with their transfer have long been free from difficulty. But contingent remainders occupied such a precarious place in the law long after they were first recognized as legal interests,¹ that all questions as to their transferability were approached with exceeding reluctance. The contingent remainderman had only a mere possibility of an estate, and the employment of such a description was in itself sufficient to conjure difficulty, for *possibility* to the common-law lawyer was a dangerous word. A dealing in possibilities smacked of wager and its consequent taint. It is not surprising, therefore, that when all conveyances of interests in land were formal and restricted and when uncertain future interests were not favored, artificial rules for the alienation of contingent remainders took root; and although conveyances have been freed from most of the feudal restrictions and uncertain interests have come into greater favor, the force of the artificial rules has not entirely spent itself. A special treatment of the transfer of remainders seems to be justified, therefore, with especial reference to a few recent Missouri decisions.²

In dealing with contingent remainders it is necessary to keep constantly in mind the nature of the contingency, and it will be convenient to distinguish two classes of contingencies: (1) those which affect the determination of the person who may come into the enjoyment of the estate, and (2) those which affect the completeness of the title accruing to an ascertained person in whose favor the limitation was made. Typifying the first class,

¹ The recognition of contingent remainders was probably prior to 1430. Gray, *Perpetuities* (3d ed.) § 134. But it is possible that contingent remainders to uncertain persons were not allowed until later. See 14 LAW QUART. REV. 234, 238.

² Particularly, *Hauser v. Murray* (1914) 256 Mo. 58; *Eckle v. Ryland* (1914) 256 Mo. 426; *Tevis v. Tevis* (1914) 259 Mo. 19; and *Stockwell v. Stockwell* (1914) 262 Mo. 671.

a devise to A for life, remainder in fee to the heirs of X, a living person—no definite person can be said to have the contingent remainder because of the possibility that so many various persons may come to be clothed with the right; typifying the second class, a devise to A for life, remainder in fee to B if he survive X—the remainder is in B, although it is an incomplete interest pending the contingency. If a remainder is conferred on B, who may be heir apparent of X, on the contingency that he survive X as heir, we have a case clearly of the second class, although it closely resembles the typical case of the first class. This distinction was made by Fearne throughout his treatise,³ and it is important that it be observed in this study for historical reasons at least. The distinction is sometimes expressed by referring to B in cases of the second class as having “a vested interest in a contingent remainder,”⁴ but because of its tendency toward confusion that expression should be avoided.

The various methods of transfer will be treated under the titles of intestate succession, testamentary disposition and *inter vivos* alienation.

TRANSFER BY INTESTATE SUCCESSION

A vested remainder was descendible at common law⁵ and will of course pass to the heirs of the remainderman under the modern statute of descents.⁶ In *Jones v. Waters*,⁷ a vested remainder was sold by an administrator under order of the

³ Fearne, *Contingent Remainders*, p. 370. From Fearne, it was adopted in Shaw Fletcher, *Contingent and Executory Interests*, p. 172. Fearne's fourth class of contingent remainders was “to a person not ascertained or not in being.” See 2 Preston, *Abstracts*, p. 95.

⁴ See *Putnam v. Story* (1882) 132 Mass. 205; 2 Washburn, *Real Property* (6th ed.) § 1557; *Love v. Lindsteat* (Or., 1915) 147 Pac. 935. In *Rozier v. Graham* (1898) 146 Mo. 352, the court used the expression, “Tho a fee may vest as a contingent remainder.” The distinction is sometimes expressed by a reference to the contingent remainder's vesting “in interest” while yet contingent. See *Cummings v. Stearns* (1894) 161 Mass. 506.

⁵ Watkins, *Descents*, p. 4.

⁶ Revised Statutes 1909, § 332, “when any person having title to any real estate of inheritance.” *Reinders v. Koppelman* (1878) 68 Mo. 482; *Waddell v. Waddell* (1889) 99 Mo. 338; *Chew v. Keller* (1889) 100 Mo. 362. A reversion is a descendible interest under this statute. *Payne v. Payne* (1893) 119 Mo. 174.

⁷ (1853) 17 Mo. 587. The “county court” was probably the probate court.

county court. In *Wommack v. Whitmore*,⁸ land was conveyed to X in trust for A for life, remainder to her children; B, a daughter of A, predeceased A, leaving a daughter, C, who was her heir and C predeceased A, leaving her father (B's husband) as her heir: it was held that C's father took the remainder given to B, by descent from C upon whom it had descended from B. This case is of interest because of the rule of the common law as stated by Fearne,⁹ that one "who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir to such purchaser, at the time when that reversion or remainder falls into possession." While the Missouri court clearly did not have Fearne's statement in mind, the result of the decision is probably not consistent with an application of the rule, for B's husband was probably not heir to B at the time of A's death. The court seems to have been of the opinion that it was unnecessary for one claiming a remainder by descent to make himself heir to the first taker of the remainder as of the time of its vesting in possession, and this seems far more satisfactory than the artificial rule of descent which would have the effect of converting a vested remainder into a contingent remainder in the hands of the first remainderman's heir.¹⁰ The

⁸ (1874) 58 Mo. 448. Nothing turns on the fact that the remainder was equitable.

⁹ Fearne, *Contingent Remainders*, p. 561. See *Goodright v. Searle* (1756) 2 Wils. 29, upon which Fearne's statement is based, and *Doe d. Andrew v. Hutton* (1804) 3 B. & P. 643, where it is cited with approval. See also Shaw Fletcher, *Contingent and Executory Interests*, p. 174. *Goodright v. Searle* was followed by STORRY, J., in *Barnitz's Lessee v. Casey* (1813) 7 Cranch 456. For comment on this case, see Bingham, *Descents*, p. 223. See also *Buck v. Lontz* (1878) 49 Md. 439; *Garrison v. Hill* (1894) 79 Md. 75; *Jenkins v. Bonsall* (1911) 116 Md. 629, where the rule was applied to a remainder in personalty; *Lawrence v. Pitt* (1854) 46 N. C. 344; *Payne v. Rosser* (1875) 53 Ga. 662. But outside of Maryland the tendency of modern decisions is away from the rule of the common law as stated by Fearne, and where possible it will be found that the statute of descents has abrogated the rule. See *Early v. Early* (1904) 134 N. C. 258; *Oliver v. Powell* (1901) 114 Ga. 592; *North v. Graham* (1908) 235 Ill. 178. See also 3 ILLINOIS LAW REV. 185. For the rule in England since the Wills Act of 1837, see *Ingilby v. Amcotts* (1856) 21 Beav. 585.

¹⁰ In Shaw Fletcher, *Contingent and Executory Interests*, p. 174, it is said that a remainder "to B and his heirs" must pass to one who is heir to B at the time of its vesting in possession because of the limitation

terms of the Missouri statute of descents offer sufficient justification for repudiating the old rule, for the statutory descent is from one "having title."

A contingent remainder was descendible at common law wherever the person was certain, *i. e.*, where the contingency did not involve a determination of the person who was to take. Thus, a devise to A for life, remainder to B and his heirs if C survive A; B clearly has a descendible interest during the lifetime of C and A, although it will of course be defeated by C's failure to survive A. But the nature of the contingency may involve a survival of the remainderman beyond a certain time, and it is equally clear that such a remainderman has no descendible interest prior to such survival, even though he be an ascertained person: for example, a devise to A for life, remainder to B and his heirs if B survive A—obviously B has no interest which can descend to his heirs prior to his survival of A, *i. e.*, prior to its becoming an estate in possession, for B's death during A's lifetime will entirely preclude the vesting of the remainder. Such a contingent remainder is not descendible because of the nature of the contingency.¹¹ If land is devised to A for life, remainder to the unborn son of B (a single person), it is unnecessary to deal with any question of descendibility of the remainder prior to its becoming vested. If the devise is to A for life, remainder to the heirs of X, clearly, also, no question can arise as to the descendibility of the remainder while it is contingent, for the death of a possible remainderman during the life of X would preclude his being an heir and thus destroy the possibility of his becoming the remainderman.

But more difficulty is encountered when the remainder is conferred on an unascertained person or persons, and where the death of a certain person or persons is not determinative of his or their being the person or persons who may later be ascertained to be the object or objects of the limitation. Thus, a devise to A

itself; but this seems to neglect the principle that the words "and his heirs" are words of limitation of B's estate only. A more plausible statement of the rule is to be found in Watkins, *Descents*, p. 118. The rule had its origin in the common law rule that descent should be traced from the person last actually seised, or from the first purchaser. See *Early v. Early* (1904) 134 N. C. 258, 265.

¹¹ This exception is clearly stated in Fearne, *Contingent Remainders*, p. 364. See also *Hennessy v. Patterson* (1881) 85 N. Y. 91; *Brown v. Williams* (1858) 5 R. I. 308.

for life, remainder in fee to the youngest child of X born prior to A's death; X has two children B and C; has C, the younger of them, a contingent remainder? So long as X lives, he may have other children. C seems to have a contingency of a vested remainder rather than a remainder on a contingency.¹² This distinction is slight, if not fanciful,¹³ but it has been seized upon and made the basis for a supposed rule that a remainder to an unascertained person is not descendible.¹⁴ This rule has been recognized by many American writers,¹⁵ but Professor Kales, whose opinion is entitled to great weight, seems to recognize no such exception to the general rule that contingent remainders are descendible unless the death of the remainderman precludes the later vesting

¹² It may be likened to an expectancy of succession to an ancestor's property as his heir, during the ancestor's lifetime. It would seem therefore to fall within Challis' classification of "absolutely bare possibilities" as opposed to "possibilities coupled with an interest," which latter phrase includes the ordinary contingent remainders. See Challis, *Real Property* (3d ed.) p. 76, note. See also 1 Preston, *Estates*, p. 76; 2 Preston, *Abstracts*, pp. 95, 204.

¹³ See *Parkhurst v. Smith* (1741) Willes 327, 338; *Doe d. Calkin v. Tomkinson* (1813) 2 M. & S., 165; Challis, *Real Property* (3d ed.) p. 234. In *Doe d. Calkin v. Tomkinson*, Lord Ellenborough asked, "How can a person be said to have a contingent interest, when it is uncertain whether he is the person who will be entitled to have it or not." In 1 Preston, *Estates*, p. 76, the distinction is made the basis for a division between possibilities coupled with an interest and those not coupled with an interest. See also 2 Preston, *Abstracts*, pp. 95, 204.

¹⁴ Watkins, *Descents*, p. 4; Fearne, *Contingent Remainders*, p. 370; *Doe d. Calkin v. Tomkinson* (1813) 2 M. & S., 165. Cf. *Roe d. Noden v. Griffith* (1767) 1 W. Bl., 605; Leake, *Property in Land* (2d ed.), p. 241 n.; 2 Preston, *Abstracts*, p. 95.

¹⁵ 2 Washburn, *Real Property* (6th ed.) § 1557; 4 Kent, *Commentaries* (14th ed.) p. 261; Tiffany, *Real Property*, § 129. In *Brown v. Williams* (1858) 5 R. I. 309, AMES, C. J., approved the distinction by saying that "if the contingency is to decide who is to be the object of the contingent limitation, as the person, or of the persons, to or amongst whom the contingent or future interest is directed, as it cannot be determined in whom the interest is, until the contingency happens, no one can claim before the contingency decides the matter, that any interest is vested in him to descend from, and hence to be transferred or devised by him." See also *Roundtree v. Roundtree* (1887) 26 S. C. 450; *Mohn v. Mohn* (1910) 148 Ia. 288; *Fisher v. Wagner* (1909) 109 Md. 443. The Georgia statute provides for the descent of a contingent remainder "when the contingency is not as to the person but as to the event." Park's Code, § 3677. See *Morse v. Proper* (1888) 82 Ga. 13.

of the remainder.¹⁶ Invariably, when the supposed rule is stated, it is connected with a discussion of cases in which the death of the remainderman would preclude a later vesting. It is doubtful whether the rule has been applied in any case where the contingency did not have to do with the remainderman's surviving the particular tenant. In the case supposed, if X should die without having had other children, C's death before X ought not to result in a defeat of the gift to X's youngest child. Yet this would be the effect of applying the supposed rule that a remainder to an unascertained person is not descendible. It is submitted that the authorities do not clearly establish such a rule and that its application at the present time would mean an unfortunate revival of the feudal refinements as to possibilities.

The Missouri cases on the point are disappointing because of their failure to notice the distinction above made. In *Delassus v. Gatewood*,¹⁷ there was a devise to the testator's widow for life and at her death to the testator's "children that are alive, or their bodily children." One son of the testator predeceased his mother leaving a widow and one son, and the latter died before the termination of the life estate. The court held that the remainder was contingent in the testator's children, but it would seem to have become vested in the "bodily children" of any child dying during the lifetime of the testator's widow. On this latter point, the court was by no means clear; it seems to have treated the remainder of the "bodily children" as contingent on their surviving the testator's widow, for it held that the widow of the testator's son took nothing by descent from her child upon the latter's death during the lifetime of the testator's widow. If the

¹⁶ Kales, *Future Interests in Illinois*, § 72, n. 27. In *Re Cresswell* (1883) 24 Ch. D. 102, KAY, J., said, "As far as I can discover, the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take." This is quoted in 2 Jarman, *Wills* (6th ed.) 1353. The supposed necessity that the remainderman be ascertained finds no countenance from Jarman. The strongest authority for the supposed rule is to be found in Preston's works.. 2 Preston, *Abstracts*, pp. 95, 205; 1 Preston, *Estates*, p. 76. In *Chess' Appeal* (1878) 87 Pa. St. 362, it is said that a contingent remainder is transmissible unless the contingency relates to the capacity of the remainderman to take.

¹⁷ (1880) 71 Mo. 371. The situation in *Ruddell v. Wren* (1904) 208 Ill. 508 was very similar, though the remainder was more clearly contingent. Whether the contingency was such as to preclude the descent of the remainder, *quaere*. The court's opinion clearly made it so.

remainder of the "bodily children" was contingent, the grandson's death during the continuance of the life estate precluded a later vesting. In any event, therefore, the case stands for nothing as to the descendibility of a contingent remainder, although the court seems to have thought it was applying a rule that contingent remainders are not descendible.¹⁸

The statement was made *obiter* in *Payne v. Payne*¹⁹ that "a remainder can only be acquired by purchase, and never by descent"; but this should be taken to refer to the creation of remainders, rather than to their devolution after creation. In *Sullivan v. Garesche*,²⁰ the remainder was given to "surviving children" and it was held that this meant surviving at the time of the termination of the particular estate, so that the death of a possible remainderman theretofore necessarily precluded the vesting of the interest and there was nothing to descend. In *Hauser v. Murray*,²¹ the flat statement was made that "contingent remainders are not descendible," but again the court was considering a remainder to the "bodily heirs" of a life tenant and the person from whom descent was claimed failed to become an heir by his non-survival.

These decisions leave the question of descendibility unsettled in Missouri. But it is submitted that the way is still open to the Missouri court to declare that whenever the person to take is ascertained a contingent remainder is descendible unless the survival of the deceased is itself a part of the contingency. The law in other states is settled this far.²² It would undoubtedly be simpler if it were unnecessary to add, "whenever the person

¹⁸ The court cited Bingham, *Descents*, pp. 222, 223, where the opinion is expressed that contingent remainders are not descendible, and the authorities are reviewed very speciously, there being no citation of Fearne. In view of the comment here made on *Delassus v. Gatewood*, it is submitted that the case was improperly cited in Washburn, *Real Property* (6th ed.) § 1557 note. Cf. *Rindquist v. Young* (1892) 112 Mo. 25.

¹⁹ (1893) 119 Mo. 174.

²⁰ (1910) 229 Mo. 496.

²¹ (1913) 256 Mo. 58, 97. The court cites for the statement quoted *Delassus v. Gatewood*, already discussed, and *Dickerson v. Dickerson* (1907) 211 Mo. 483; in the latter case no question of descendibility was involved.

The same confusion seems to exist in the Illinois decisions. See Kales, *Future Interests in Illinois*, § 73.

²² See *Winslow v. Goodwin* (1884) 7 Metcalf (Mass.) 363; *Clark v. Cox* (1894) 115 N. C. 93; Tiffany, *Real Property*, § 129; Kales, *Future Interests in Illinois*, § 72.

to take is ascertained," and it is submitted that this would involve no departure from the common law as it has actually been applied by the courts in England and America. If a contingent remainder is held to descend, it may do so, however, subject to the rule of *Goodright v. Searle* noted above.²³

Since there is no seisin of a contingent remainder, there can be no dower or curtesy in it, and even the owner of a vested remainder does not have seisin so as to entitle his wife to dower.²⁴

TRANSFER BY TESTAMENTARY DISPOSITION

It would seem that if a remainder is descendible it should also be devisable,²⁵ but devisability depends upon statute and is to some extent a question of statutory construction. The early English Statute of Wills gave a limited power of testamentary disposition to persons "having or which hereafter shall have any manors, lands, tenements or hereditaments, holden," etc.²⁶ This was for many years construed not to include contingent remainders, the word "having" being read to mean "seized of";²⁷ but the contrary has now long been held in England and the statute is held to mean "that every person who has a valuable interest in lands shall have the power of disposing of it by will."²⁸ The

²³ *Ante*, note 9. See *Barnitz v. Casey* (1813) 7 Cranch 456. Cf. *Fisher v. Wagner* (1909) 109 Md. 243, 251. The Missouri statute provides a course of descent "where any person having title to any real estate of inheritance" dies. *Ante*, note 5. A contingent remainderman would seem to be such a person, in view of the interpretation of a similar expression in the statute on conveyances made in *Godman v. Simmons* (1892) 113 Mo. 122.

²⁴ Scribner, *Dower* (2d ed.) p. 321; Fearne, *Contingent Remainders*, p. 346; *Cochran v. Thomas* (1895) 131 Mo. 258; *Von Arb v. Thomas* (1901) 163 Mo. 33. In *Payne v. Payne* (1893) 119 Mo. 174, it was held that the widow of a reversioner had no dower in the reversion.

²⁵ See *Roe d. Noden v. Griffith* (1767) 1 W. Blackstone 605; *Ingilby v. Amcotts* (1856) 21 Beav. 585. Descendibility is not an accurate test of devisability. Rights of entry for condition broken are descendible but probably not devisable. See 5 Law Series, MISSOURI BULLETIN, p. 15; 9 COLUMBIA LAW REV. 548.

²⁶ (1540) 32 Henry VIII, c. 1. As amended in 34 and 35 Henry VIII, c. 5, § 4, this statute expressly included remainders.

²⁷ *Bishop v. Fountaine* (1696) 3 Lev. 427; *Ives v. Legge* (1743) 3 D. & E. 488. These cases are discussed in Fearne, *Contingent Remainders*, p. 366; Shaw Fletcher, *Contingent and Executory Interests*, p. 180.

²⁸ *Jones v. Roe* (1789) 3 D. & E. 88; Fearne, *Contingent Remainders*, pp. 366 et seq.

more modern Wills Act²⁹ is quite explicit in permitting the devise of any interest which would descend and of any contingent interest "whether the testator may or may not be ascertained as the person or one of the persons in whom the same may respectively become vested." This would seem to authorize the devise of a contingent remainder which might not be descendible because of the non-ascertainment of the person in whom it may vest, but English opinion does not seem clear on the point.³⁰

Of course a contingent remainder cannot be devised by one whose death precludes the later vesting of the interest,³¹ and it seems that the same objection may be made to the devise of a remainder, where the person to take is not ascertained, as was made to its descendibility above.³² But subject to these exceptions, it is now generally held that vested and contingent remainders are freely devisable,³³ and in some states this is confirmed by statute.³⁴

The Missouri statute permits a man to devise "all his estate, real, personal and mixed and all interest therein," and a woman to devise "her land, tenements or any descendible interests therein."³⁵ The decisions have not closely analysed the effect of

²⁹ (1837) 1 Vict. c. 26.

³⁰ A contrary view is expressed in Shaw Fletcher, *Contingent and Executory Interests*, p. 181. But see 1 Jarman, *Wills* (6th ed) p. 80. Fearne may have considered such a remainder as devisable in equity independently of statute. Fearne, *Contingent Remainders*, p. 548.

³¹ *Brown v. Williams* (1858) 5 R. I. 309.

³² But Professor Kales disapproves of any such reason for non-devisability. See his *Future Interests in Illinois*, § 73 n. Cf. 2 Preston, *Abstracts*, p. 95. In 1 Preston, *Estates*, p. 76, it is said that a remainder to an unascertained person is a possibility not coupled with an interest and is not devisable. In *Fisher v. Wagner* (1909) 109 Md. 243, the court emphasized the fact that the contingency did not affect the ascertainment of the person.

³³ *Loring v. Arnold* (1887) 15 R. I. 428; *Chess' Appeal* (1878) 87 Pa. St. 362; *Kenyon v. See* (1884) 94 N. Y. 563; *Fisher v. Wagner* (Md., 1909) 71 Atl. 999. See also Tiffany, *Real Property*, § 129; 9 COLUMBIA LAW REV. 546.

³⁴ See Reeves, *Real Property*, § 904. In Illinois, the statute is not explicit, but contingent remainders are probably devisable. Cf. *Harvard College v. Balch* (1898) 171 Ill. 275; and the comment in Kales, *Future Interests in Illinois*, § 73. The Georgia statute making contingent remainders descendible "when the contingency is not as to the person," Parks' Code § 3677, seems to apply by analogy to devises. *Morse v. Proper* (1888) 82 Ga. 13.

³⁵ Revised Statutes, 1909, § § 535, 536. An early Missouri statute authorized the devise of all "estate, right, title and interest in possession, rever-

this statute. There can be no doubt as to the devisability of a vested remainder,³⁶ but there is much to lead the unwary to conclude that contingent remainders cannot be devised. Under the terms of the statute there may be a difference whether the devise is by a man or a woman, and only descendible remainders may be devisable by a woman, thus opening up the uncertainty as to what is descendible. However, it seems unlikely that the court would favor such a distinction.

In *Eckle v. Ryland*,³⁷ the court recognized the practical impossibility of devising a contingent remainder where "the same event which makes the will effective makes it impossible for the contingency to happen," *i. e.*, where the testator's death precludes the vesting of any interest. *Tevis v. Tevis*³⁸ presents more difficulty. A testator disposed of certain land during the life of his son John, and provided that on the death of John, another son, Nestor, or his heirs, should have the right to purchase the land for a fixed sum of money, and that the money or the land, depending on Nestor's election, should "vest in the heirs of the body of John, and if there shall be no heirs of his body then living, the money or the land shall pass to and vest in" the testator's heirs at law. There was nothing in the will to refer the determination of the testator's heirs to the time of John's death, and it would seem that the will had the effect of creating a contingent remainder in the heirs of John's body subject to Nestor's right of purchase (which did not effect a conversion), and that subject to the vesting of this remainder, the heirs of the testator took the reversion by descent and not by devise,³⁹ with the result that upon John's

sion or remainder." Revised Statutes, 1825, p. 790. But this wording was dropped in 1835. Revised Statutes, 1835, p. 617.

³⁶ *Waddell v. Waddell* (1889) 99 Mo. 338; *Eckle v. Ryland* (1913) 256 Mo. 424 (semble); Tiffany, *Real Property*, § 129.

³⁷ (1913) 256 Mo. 424, 440.

³⁸ (1914) 259 Mo. 19.

³⁹ Where A devises land to B for life, and remainder to C if C survive B, A's heirs take the reversion by descent subject to the contingent remainder; *Plunket v. Holmes* (1658) 1 Lev. 11; Fearn, *Contingent Remainders*, p. 351; and if A's will purports to confer the remainder upon them it is so far void, for since they would take the same interest by descent, the law gives no effect to that portion of the will. Challis, *Real Property* (3d ed.) p. 239; Sanders, *Uses* (4th ed.) p. 133; Leake, *Property In Land* (2d ed.) p. 124. It is not, therefore, a case of alternate contingent remainders but a case of a descending reversion which is subject to B's contingent remainder.

death without bodily heirs the devisee of one of the testator's heirs who predeceased John should have taken that heir's share which was vested and therefore devisable. But the court held that such a devisee took nothing, saying that the persons who were to take on John's death without heirs of his body "could not be determined until" that contingency happened. This would make it seem that the court referred the determination of the testator's heirs to the time of John's death in spite of its previous declarations to the contrary, and if this is true the result of the case is sound for the deviser never qualified as a member of the class of objects of the limitation. But in the next breath the court said that "such interest was therefore a contingent interest and not devisable prior to the death of John," referring to *Eckle v. Ryland*. If it was contingent on the death of John without heirs of his body, such a contingency should not render it non-devisable. It is impossible to know what was meant, and in view of the court's failure to give any proper consideration to the general question of the devisability of a contingent remainder, *Tevis v. Tevis* must not be taken to stand for the proposition that contingent remainders are not devisable.⁴⁰

With this scant authority, the question is by no means settled in Missouri and it is open to the court to hold that contingent remainders are devisable wherever the person to take is ascertained, unless the death of the testator is an event which precludes the vesting of the interest. For the reasons stated above, it is submitted that it should not be necessary to include "wherever the person to take is ascertained."

TRANSFER BY INTER VIVOS ALIENATION

Voluntary Alienation. The common law permitted the free alienation of vested remainders by grant, but it did not allow contingent remainders to be transferred by grant.⁴¹ As early as *Lampet's Case*,⁴² it was thought that a possibility could not be assigned, for like the assignment of a chose in action it

⁴⁰ The various syllabi to *Tevis v. Tevis* in 259 Mo. 19 and 167 S. W. 1003 may easily mislead the casual reader. It seems altogether improbable that the court had in mind the rule of *Goodright v. Searle* noted above, though this is a possible explanation. But even that rule does not preclude a devise by an heir of a remainderman prior to the termination of the particular estate. See *Ingilby v. Amcotts* (1856) 21 Beav. 585.

⁴¹ Fearn, *Contingent Remainders*, p. 366.

⁴² (1612) 10 Coke, 48a.

would be the "occasion of multiplying of contentions and suits of great oppression of the people," to use Lord Coke's expression.⁴³ It was not unnatural that contingent remainders should be put with choses in action as mere possibilities at a time when they yet commanded very little respect from the lawyers. But with their greater security in the law, there came also some necessity of relaxing the rule against their alienability. It was early held that a contingent remainder could be released.⁴⁴ If A conveys to B for life, remainder to C and his heirs if D survives B, C may release to A who has the reversion subject to the contingent remainder and A will thereafter have the reversion as though the contingent remainder had never been created.⁴⁵ Such a release operates by way of extinguishment. It seems doubtful, however, whether C would have been permitted to release to B and his heirs, for although most writers make no restriction on the operation of the release,⁴⁶ it seems strange that C could release to B when he could not grant to D, inasmuch as B's previous interest would not be affected by the release. It would seem proper to say that a contingent remainder may be released only where the result will be its extinguishment, *i. e.*, it may be released only to that person whose interest would be defeated or postponed by the vesting of the contingent remainder.⁴⁷ It seems doubtful, too, whether a release can be operative

⁴³ It seems difficult to justify the statement in Williams, *Real Property* (17th Int. ed.) p. 424, that the reason why a contingent remainder "so long remained inalienable was simply because it had never been thought worth while to make it alienable." This reason was accepted, however, by BAKEWELL, J., in *Lackland v. Nevins* (1877) 3 Mo. App. 335, 339.

⁴⁴ See *Lampet's Case* (1612) 10 Coke, 48a; and *Marks v. Marks* (1718) 1 Strange, 129, 132.

⁴⁵ See Williams, *Real Property* (21st Int. ed.) p. 422, where it is said that "the law, whilst it tolerated conditions of reentry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving uninjured such vested estates as might happen to be subsisting."

⁴⁶ 1 Preston, *Estates*, p. 89; Reeves, *Real Property*, § 904. See 16 Viner, *Abridgment*, p. 461.

⁴⁷ This distinction has been expressed very clearly by Professor Kales in 2 ILLINOIS' LAW REV. 48, in comment on the *dictum* in *Ortmayer v. Elcock* (1907) 225 Ill. 342, that a contingent remainder may be released to the life tenant. The result reached in *Jeffers v. Lampson* (1859) 10 Oh. St. 101, and in *Miller v. Emans* (1859) 19 N. Y. 384, seems agreeable to it. The result in *Smith v. Pendell* (1848) 19 Conn. 107 may be explained on the ground that the remainder was vested, though the court thought it contingent.

when made by one who is not certain to take on the contingency, *i. e.*, where the remainder is to an unascertained person.⁴⁸

A contingent remainder was susceptible of transfer by fine or common recovery operating by way of estoppel,⁴⁹ so as to bind the interest which thereafter vested. Similarly, it would seem that the American doctrine of estoppel by deed is applicable, so that if one purports to convey land by a deed which contains covenants sufficient to pass an after acquired title by estoppel, he will not thereafter be permitted to assert a title upon the happening of a contingency upon which an estate vested in him;⁵⁰ for the application of such an estoppel with such effect on a contingent remainder, it would seem to be immaterial whether the remainderman were ascertained at the time the deed was executed.⁵¹ It would seem that a bare quit-claim deed should not create such an estoppel,⁵² although where it is clearly the intention of the parties to pass a contingent interest and there is a valuable consideration, a court of equity may later enforce such a transaction as an agreement to convey, of which specific performance will be decreed after the happening of the contingency.⁵³ This, indeed, is the meaning of the frequent statement that contingent remainders may be assigned in equity. It would seem essential to equity's enforcement that the conveyance disclose an unmistakable intent to pass the future interest. If an

⁴⁸ See 16 Viner, *Abridgment*, 463; Shaw Fletcher, *Contingent and Executory Interests*, p. 184. Cf. *Miller v. Emans* (1859) 19 N. Y. 384.

⁴⁹ Fearn, *Contingent Remainders*, pp. 365, 366. In *Doe d. Brune v. Martin* (1828) 8 B. & C. 524, BAYLEY, J., said that "a fine by a contingent remainderman passes nothing, but leaves the right as it found it, . . . it operates by estoppel only."

⁵⁰ *Robertson v. Wilson* (1859) 38 N. H. 48; *Walton v. Follansbee* (1890) 131 Ill. 147. Cf. *Stewart v. Neely* (1891) 139 Pa. St. 309.

⁵¹ *Robertson v. Wilson* (1859) 38 N. H. 48; Tiffany, *Real Property*, § 129 n. *Read v. Fogg* (1872) 60 Maine, 479, was such a case; the holding that there was no estoppel was based on the absence of a complete covenant of warranty. In *Dougal v. Fryer* (1831) 3 Mo. 40, it was said that "to pass an estate by estoppel the party must have had power to pass it by a direct conveyance." *Quaere*, does this apply to contingent remainders in Missouri?

⁵² See, however, *Hannon v. Christopher* (1881) 34 N. J. Eq. 459, where a contrary view is expressed but not held.

⁵³ Fearn, *Contingent Remainders*, p. 550; 3 Pomeroy, *Equity Jurisprudence* (3d ed.) § 1286; *Hannon v. Christopher* (1881) 34 N. J. Eq. 459. It is possible that a consideration of love and affection is sufficient for this purpose. Fearn, *Ibid.*, p. 549.

estoppel is created, it is binding on the heir as well as on the ancestor.⁵⁴

One of the first reforms accomplished, when the English law of real property began to be overhauled, was to make contingent remainders alienable. The Real Property Amendment Act⁵⁵ provides that "a contingent, an executory and a future interest, and a possibility coupled with an interest . . . whether the object of the gift or limitation of such interest or possibility be or be not ascertained . . . may be disposed of by deed." It will be noted that it was thought necessary to stipulate in this statute concerning those cases in which the object or person is not ascertained. The American statutes are usually less explicit,⁵⁶ and in many states where contingent remainders are made alienable by statute a question may still arise as to the possibility of alienation where the person who is to enjoy the estate on a contingency is not ascertained.⁵⁷

The Missouri statute, first passed in 1865,⁵⁸ authorizes the conveyance of "lands or of any estate or interest therein." Prior to 1865, contingent remainders were probably alienable in Missouri only as at common law, *i. e.*, by release operating by way of extinguishment and by some method of conveyance which would create an estoppel; but it seems that the supreme court was not called on to decide the question, and it is practically impossible that a case should now arise which would involve it. In *Lackland v. Nevins*,⁵⁹ there was a devise in 1853 to a trustee

⁵⁴ *Weale v. Lower* (1672) Poll. 54.

⁵⁵ (1845) 8 & 9 Vict., c. 106.

⁵⁶ For instance, the New York statute which has been copied in several states merely provides that "an expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession." N. Y. Real Property Laws, § 49. See Reeves, *Real Property*, § 904 note. For statutes of other states see Stimson, *American Statute Law*, § 1420.

⁵⁷ This question seems to have been recognized by the court in *Putnam v. Story* (1882) 132 Mass. 205, although it was held that a presumptive heir could alien his interest under a will which conferred a remainder on "heirs." See also *Whipple v. Fairchild* (1885) 139 Mass. 262. In Massachusetts, contingent remainders seem to be alienable without reference to statute. See Tiffany, *Real Property*, § 129.

⁵⁸ Revised Statutes 1865, c. 109, § 1—now Revised Statutes 1909, § 2787. There can be no doubt of the free alienability of vested remainders under this statute. *Byrne v. France* (1895) 131 Mo. 639. On the general subject of methods of conveyance in Missouri, see 8 Law Series, MISSOURI BULLETIN, p. 11 *et seq.*

⁵⁹ (1877) 3 Mo. App. 335. The will in this case was construed in *Hall v. Howdeshell* (1863) 33 Mo. 475.

for A for life, and if her husband survive her, remainder to her brother and sisters.⁶⁰ In 1854, one sister conveyed all her "right, title and interest, whether in law or equity, as well in possession or in expectancy," for a valuable consideration and it was held that her contingent remainder passed, although it was not clear whether it was intended that this result be rested on the statute,⁶¹ or achieved apart from statute, or whether the court was giving specific performance to the deed, treating it as a contract to convey. The statute of 1865 was not in force when the deed was executed, and could not have applied. The court denounced the doctrine that contingent remainders are inalienable, as "contrary to the policy of our system," but it is submitted that the result of the case must be explained as a specific enforcement in equity of the agreement found in the deed. It is improbable that other cases of attempts to convey contingent remainders prior to 1865 will arise in the future, and any attempt made since 1865 can probably be rested on the statute.

*Godman v. Simmons*⁶² arose under the statute of 1865; land had been conveyed to A for life, remainder to her bodily heirs; A's children conveyed their interests, one deed purporting to pass the fee simple, one purporting to pass all interest "whether present or prospective, vested or contingent," and one deed was in the ordinary language of a quit-claim. A was survived by these children,⁶³ and it was held in this action of ejectment that their deeds were all effective to pass their contingent remainders. The court was undoubtedly applying the statute of 1865, although it professed to be acting independently of it.⁶⁴ No special attention was given by the court to the question whether a contingent remainder could be conveyed when the person to take is not cer-

⁶⁰ It was thought to be unnecessary to decide whether it was a contingent remainder or an executory devise to the brother and sisters.

⁶¹ The court referred to Wagner's Statutes, p. 272, § 1. This is the same as Revised Statutes 1865, c. 109, § 1, which was not enacted until eleven years after the execution of the deed in question.

⁶² (1892) 113 Mo. 122. See also *Emmerson v. Hughes* (1892) 110 Mo. 629, where the same deed was construed to have created an estate tail. This was criticized in 1 Law Series, MISSOURI BULLETIN, p. 15. In *Wood v. Kice* (1890) 103 Mo. 329, the possibility of mortgaging a contingent remainder seems to have been admitted.

⁶³ It was held in *Emmerson v. Hughes* (1892) 110 Mo. 627, that the need of one child who failed to survive A passed nothing.

⁶⁴ BRACE, J., who wrote the opinion, said: "This ancient common law rule—that contingent remainders are inalienable, like the rule that choses in action are not assignable—does not obtain in this state; not because

tain, although it was raised by counsel.⁶⁵ Since the case was treated as one of an estate tail, though improperly so, this question may have been deemed less important by the court.⁶⁶ The *dictum* in *Sikemeier v. Galvin*⁶⁷ seems to approve the same result where no estate tail was involved. In *Brown v. Fulkerson*⁶⁸ there is a still further extension; land was devised to C and the heirs of her body with a gift over if she died without such heirs. Upon the death of C without heirs of her body, the estate would have devolved on her heirs under the statute of 1845;⁶⁹ but it was held that the deed of C's nieces and nephews who were her heirs, executed before C's death, had effectively conveyed their interests. Here the relationship was remote, and the uncertainty as to the persons to take the contingent remainder was greater than in *Godman v. Simmons*, but the alienability of the remainder was none the less upheld.

In *Finley v. Babb*,⁷⁰ where the remainder was in the heirs of the life tenant, it was held that it was conveyed by a deed executed by a son before the death of the life tenant. In *Clark v. Sires*,⁷¹ the remainder was in the life tenant's heirs of her body, with the same result. Similar facts existed in *Summet v. City Realty Co.*⁷² where the court said that it had "uniformly held that contingent remainders are alienable the same as are other estates."

It can no longer be doubted that a contingent remainder is an

there has been a positive statute abolishing these rules, but because they are out of harmony with its general affirmative statute upon these subjects, and long since have ceased—if they ever did exist—as rules governing the action of its citizens in the business relations of life."

⁶⁵ In *White v. McPheeters* (1882) 75 Mo. 286, NORTON, J., had quoted with approval the statement in 2 Washburn, *Real Property* (6th ed.) § 1557, that "if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder." The court in *White v. McPheeters* thought that the contingent remainder in that case was an alienable interest.

⁶⁶ There is still some doubt as to the nature of the statutory remainder in an estate tail, and this doubt may have influenced the court in *Godman v. Simmons*. See 1 Law Series, MISSOURI BULLETIN, p. 19.

⁶⁷ (1894) 124 Mo. 367.

⁶⁸ (1894) 125 Mo. 400.

⁶⁹ *Brown v. Rogers* (1894) 125 Mo. 302. For a criticism of this holding, see 1 Law Series, MISSOURI BULLETIN, p. 22.

⁷⁰ (1902) 173 Mo. 257.

⁷¹ (1905) 193 Mo. 502.

⁷² (1907) 208 Mo. 501. In *Armor v. Lewis* (1913) 252 Mo. 568, 589,

"interest" in land within the meaning of the Missouri statute. The early common-law view of contingent remainders as mere "possibilities" may therefore have no place in Missouri law to-day. Indeed, both vested and contingent remainders are mere idealities; the one no less imaginary than the other;⁷³ and the time has come when both may be stripped of their feudal clothes of uncertainty and put into a garb of substantial fiber. This being true, it may well be doubted whether the distinction should be continued between those contingencies which affect the person, and those which affect the completeness of the title which is conferred on an ascertained person.⁷⁴ Although the Missouri court has not expressly repudiated it, it is unlikely that it will be respected since the decision in *Brown v. Fulkerson*, and it is probably safe to say that any contingent remainder may be aliened by deed under the statute, whether the object of the gift or limitation of the remainder be or be not ascertained. Thus, the Missouri court has read the explicit provision of the English statute into Missouri law.

Of course the alienee of a contingent remainder takes it subject to the contingency, just as the alienor had it.⁷⁵

Involuntary Alienation. The seizure of land on execution depends entirely on statute. The Missouri statute of 1835 provided that the term "real estate" as used in the act on executions should be construed "to include all estate and interest in lands, tenements and hereditaments,"⁷⁶ and it has been continued in the same form to the present time.⁷⁷ There can be no doubt that a vested remainder is subject to execution under this statute.⁷⁸ It

BOND, J., dissenting, said: "That all estates in remainder are conveyable by the owner and available to his creditors is uncontrovertible."

Equity will decree specific performance of a contract for the sale of an alienable contingent remainder. *Matter of Asch* (1902) 75 App. Div. (N. Y.) 486.

⁷³ See Professor Kales' valuable discussion of this point in his book on *Future Interests in Illinois*, § 78.

⁷⁴ See 14 COLUMBIA LAW REV. 67.

⁷⁵ *Godman v. Simmons* (1892) 113 Mo. 122, 132. This is the explanation of *Emmerson v. Hughes* (1892) 110 Mo. 627. It will be noted that Revised Statutes 1909, § 2822, concerning the construction of the term "real estate" has not been referred to in this discussion. It is believed that it has no relevancy.

⁷⁶ Revised Statutes 1835, p. 262, § 59.

⁷⁷ Revised Statutes 1909, § 2194.

⁷⁸ See *Dunkerson v. Goldberg* (1908) 162 Fed. 120.

seems to have been thought at one time that this statute applied only where the owner of an interest was in some way seised,⁷⁹ and if this view had been continued, the statute probably would not have included contingent remainders. But in *White v. McPheeters*,⁸⁰ where land had been conveyed to a trustee for A for life, remainder in fee to her husband should he survive her, with power in A and her husband to direct a conveyance during their joint lives, it was held that the interest of the husband whether vested or contingent (it was plainly the latter) was subject to his creditor's rights to reach it for satisfaction of their debts, and that the joint deed of A and her husband, while the latter was insolvent, was not effective to bar his creditors. While the court was very clearly of the opinion that a contingent remainder was subject to execution under the statute, it must be admitted that the authority of the case on that point is weakened by the fact that the husband and wife also had a power of appointment, the attempted exercise of which in favor of a volunteer rendered the property subject to the claims of his creditors. On this ground the case was distinguished by the United States Supreme Court.⁸¹ Even if *White v. McPheeters* is not actual authority, there can be little doubt that a contingent remainder is subject to execution under the Missouri statute, at least where the person to take is ascertained; and in view of the application of the statute on conveyances in *Brown v. Fulkerson*, even where the person is not ascertained the contingent remainder may be an "interest" which is subject to execution.⁸²

It seems to follow from a contingent remainder's being subject to execution that it should be treated as part of the assets of a bankrupt or insolvent. This is the prevailing view under the Bankruptcy Act⁸³ which provides that all property which the

⁷⁹ *McIlwaine v. Smith* (1867) 42 Mo. 45.

⁸⁰ (1882) 75 Mo. 286. Cf. *Watson v. Dodd* (1873) 68 N. C. 528, where a court of equity refused to order the sale of a contingent remainder, there being no apparent statutory authority; followed in *Howbert v. Cawthorn* (1902) 100 Va. 649, which is criticized in 16 HARV. LAW REV. 377. See also *Daniels v. Eldredge* (1878) 125 Mass. 356; Tiffany, *Real Property*, § 129.

⁸¹ In *Brandeis v. Cochrane* (1884) 112 U. S. 344.

⁸² But see *Roundtree v. Roundtree* (1887) 62 S. C. 450. In Illinois, there is at least doubt as to a contingent remainder's being subject to execution. Kales, *Future Interests in Illinois*, § 80. Cf. *Hill v. Hill* (1914) 264 Ill. 219.

⁸³ Bankruptcy Act, § 70a (5).

bankrupt "could by any means have transferred or which might have been levied upon and sold under judicial process against him" shall pass to the trustee in bankruptcy,⁸⁴ although it may be necessary that the person to take should be ascertained.⁸⁵ The question does not seem to have arisen in Missouri.

Both vested and contingent remainders may be made the subject of taxation. The collection of inheritance taxes is probably seldom attempted until the estate vests in possession. It would seem that an inheritance tax imposed after the creation of a contingent remainder in a will is not collectible when the estate vests in possession.⁸⁶

Partition. The partition of lands is a means of transferring interests which may be voluntary or compulsory. Voluntary partition between contingent remaindermen may be effected by conveyances of the contingent interests which will operate as any other conveyances, but the anomalous doctrine of parol partition probably has no application because of the necessity that such partition be followed by possession.⁸⁷ The common law did not permit the compulsory partition of estates not lying in possession.⁸⁸

Compulsory partition is now entirely regulated by statute. The Missouri statute has long provided for partition "in all cases where lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower," and any party interested may ask "for the admeasurement and setting off

⁸⁴ *Clowe v. Seavey* (1913) 208 N. Y. 496. See also *National Park Bank v. Billings* (1911) App. Div. (N. Y.) 536; 14 COLUMBIA LAW REV. 66.

⁸⁵ *In re Wetmore* (1901) 108 Fed. 520; *Goodwin v. Banks* (1898) 87 Md. 425. In *Clowe v. Seavey* (1913) 208 N. Y. 496, a statute made it unnecessary that the person be ascertained. In 1 Preston, *Estates*, p. 76, it is "apprehended" that a remainder to an unascertained person is not "transferable to assignees under a commission of bankrupt."

⁸⁶ *In re Smith* (1912) 135 N. Y. S. 240; 12 COLUMBIA LAW REV. 727.

⁸⁷ *Nave v. Smith* (1888) 95 Mo. 596. See Tiffany, *Real Property*, § 174.

⁸⁸ *Evans v. Bagshaw* (1869) L. R. 8 Eq. 469, (1870) L. R. 5 Ch. App. 340. See however *Fitts v. Craddock* (1906) 144 Ala. 437, 113 A. S. R. 53; Freeman, *Cotenancy and Partition* (2d ed.) § 440. At common law, a tenancy in parcenary could be partitioned on a writ of partition, but the partition of joint tenancies and tenancies in common depended on the early statutes of 31 & 32 Henry VIII. Equity's jurisdiction of suits for partition was later. See *Gudgell v. Mead* (1843) 8 Mo. 53; Tiffany, *Real Property*, § 175.

of any dower interest therein, if any, and for the partition of the remainder, if the same can be done without great prejudice to the parties in interest; and if not, then for the sale of the premises and a division of the proceeds thereof among all of the parties, according to their respective rights and interests."⁸⁹ It is also provided that "where any party's interest is uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent so that such parties cannot be named, the same shall be so stated in the petition."⁹⁰ This clearly contemplates that the existence of uncertain future interests shall be no bar to partition. To determine the extent to which contingent future interests may be partitioned under this statute, requires a close analysis of the cases.

*Reinders v. Koppelman*⁹¹ is the first leading case. The plaintiff was in possession as owner of an estate *pur autre vie*, and he was also owner of one-fourth of one-half of the remainder; the other half of the remainder had been devised to the "nearest and lawful heirs" of the testator, and his widow who was still alive. The owners of the three-fourths of the first half, the heirs of the testator, and certain other persons denominated the "ostensible heirs" of the testator's widow, were made defendants. The court admitted that the heirs of the widow could not be determined until her death, but held that under the statute above quoted their interest constituted no bar to the partition.⁹² It will be observed

⁸⁹ Revised Statutes 1909, § 2559, first enacted in its present form in Revised Statutes 1865, p. 611. But the earlier statute in Revised Statutes 1825, p. 609, was not very different.

⁹⁰ Revised statutes 1909, § 2563. The substance of this section first appeared in Revised Statutes 1835, p. 422, § 4. One who may contest the will and if successful take by descent, has not a contingent interest within the meaning of the statute. *Robertson v. Brown* (1904) 187 Mo. 452.

⁹¹ (1878) 68 Mo. 482. *Simmons v. MacAdaras* (1878) 6 Mo. App. 297 was decided about the same time as *Reinders v. Koppelman*, but it seems to have been wholly neglected in later decisions. The suit was begun by the owner of one-third of a leasehold and one-half of the reversion, and the lower court had ordered a sale of the property as a whole. The St. Louis Court of Appeals held this to be error, although leave was given to the plaintiff to ask for the separate partition of the leasehold, and of the reversion. See also *Reinhardt v. Wendeck* (1867) 40 Mo. 577.

⁹² The court relied on *Wills v. Slade* (1801) 6 Ves. 498, *Gaskell v. Gaskell* (1836) 6 Sim. Ch. 643 and *Mead v. Mitchell* (1858) 17 N. Y. 210. In all of these cases there were several cotenants of vested present estates, and the principle of representation was applied as to the future estates.

that the interest of the plaintiff in this case was definite and vested, and that he also had a vested *pur autre vie*. The contingent interest represented not more than one-fourth of the remainder. It is difficult to reconcile the court's statements that "the parties not *in esse* are represented by those who take subject to their rights," and that such persons not *in esse* cannot be made parties to the suit "except by naming the owner of the particular estate to which, on certain contingencies, they become entitled." The possibility of a merger of a portion of the particular estate in the remainder was not mentioned by court or counsel, and the case may be distinguished on the ground that a merger had occurred.⁹³

In *Preston v. Brant*,⁹⁴ it was held that partition could be maintained by two remaindermen against the life tenant and the other remainderman, the remainder being vested. No contingent interests were involved and the court's reliance on *Reinders v. Koppelman* would seem to have been misplaced. In *Atkinson v. Brady*,⁹⁵ a tenant by curtesy who also owned one-fifth of the

⁹³ It seems clear that there may be a merger in such a case. The question of a merger *pro tanto* was raised but not decided in *Simmons v. MacAdaras* (1878) 6 Mo. App. 297, and it might have been raised in *Burns v. Bangert* (1887) 92 Mo. 167 and in *Atkinson v. Brady* (1892) 114 Mo. 200. If A is sole tenant for life, with remainder to B and C in fee, and if A conveys his life estate to B, there will be a merger as to a moiety; if A and B are joint tenants or tenants in common for life, with remainder to C in fee, and if A conveys his estate to C, there should likewise be a merger as to a moiety. 3 Preston, *Conveyancing*, p. 89; *Clark v. Parsons* (1897) 69 N. H. 147; *Harrison v. Moore* (1894) 64 Conn. 344; *Fox v. Long* (1871) 8 Bush (Ky.) 551. But see *contra*, *Johnson v. Johnson* (1863) 7 Allen (Mass.) 196. If A and B are tenants in common for life, remainder (without distinguishing the moieties) to C and D in fee, and if A conveys his estate to C, there would seem to be a merger only as to one-half of A's estate. 3 Preston, *Conveyancing*, p. 100. But cf. *Badeley v. Vigurs* (1854) 4 E. & B. 71. It is hardly necessary to add that a vested estate will not merge into a contingent remainder.

⁹⁴ (1888) 96 Mo. 552. This case was followed in *Hayes v. McReynolds* (1898) 144 Mo. 348; and in *Doerner v. Doerner* (1900) 161 Mo. 399. It is sometimes said that the plaintiff in partition must have actual or constructive possession. See *Chamberlain v. Waples* (1905) 193 Mo. 96. But what is really meant is that the defendant shall not have a possession adverse to the plaintiff. See *Rozier v. Griffith* (1860) 31 Mo. 171. In *Rhorer v. Brockhage* (1883) 13 Mo. App. 397, it was said by THOMPSON, J., for the St. Louis Court of Appeals that "the statute of partition does not contemplate the partition of reversionary interests."

⁹⁵ (1892) 114 Mo. 200.

vested remainder was permitted to maintain partition as to the remainder against the other remaindermen; the court seemed to rely on the phrase in the statute "for the admeasurement and setting off of any dower interest therein, if any, and for the partition of the remainder," but it may be doubted whether the word "remainder" in this statute is to be given its artful meaning. In remanding the case to the trial court, the Supreme court directed a partition "subject to the curtesy." The possibility of a merger of one-fifth of the curtesy in the remainder was not noted. No reason is perceived why such a merger should not have occurred, and if it did occur the partition might have been subject to four-fifths of the curtesy.

In *Sikemeier v. Galvin*,⁹⁶ a testator devised land to his daughter for life and on her death to her heirs, and provided that at any time the land might be sold "by the concurrence in the deed, as parties, of the ostensible heirs," but that the proceeds were to be reinvested after such sale, subject to the interests created by the will. The daughter and one of her sisters who was a possible heir brought suit for partition against the other sister and her two brothers, and a demurrer by the defendants was sustained below. This was held to be error on the authority of *Reinders v. Koppelman*, but it will be noted that since neither of the plaintiffs had a vested interest in the remainder that case was not controlling. The existence of a reversion in the testator's heirs subject to the vesting of the remainder in the daughter's heirs was not noted; probably all the heirs of the testator were parties to the suit. *Sikemeier v. Galvin* would seem to have permitted partition by one contingent remainderman against the others, the life tenant also being a party plaintiff. But since the parties included all of the "ostensible heirs," the authority of the case is much weakened by the provision in the will for a conveyance by them. The case has been explained in *Stockwell v. Stockwell*⁹⁷ on the ground that it was decided only that the "partition was a mode of alienation and reinvestment to which the parties might resort in carrying out these provisions of the will;" but it is submitted that his explanation neglects the fact that some of the parties were thus being forced to convey against their will.

⁹⁶ (1894) 124 Mo. 367.

⁹⁷ (1914) 262 Mo. 671, 686. On p. 685, the court through BROWN, C., stated that in *Sikemeier v. Galvin* all the "ostensible heirs" were petitioners, but this seems to be an error for the report distinctly states that some of them were defendants and demurred.

In *Sparks v. Clay*,⁹⁸ where an undivided one-fourth of a tract of land was conveyed to A for life and remainder to her heirs, it was held that a child of A, born after final judgment in a partition suit to which A was a party, was bound by the judgment in that suit. A was one of the four tenants in common, two of whom were owners of present estates in fee simple, and on the doctrine of representation of persons not *in esse* as announced in *Reinders v. Koppelman*, A was therefore entitled to represent her unborn children. In *Acord v. Beaty*,⁹⁹ the doctrine of representation of remaindermen not *in esse* by the owner of the particular estate was applied to a voluntary partition between various life tenants, which was shown to be "fair and equal when made," and in which the deeds provided for the interests of the remaindermen.¹⁰⁰

In *Hill v. Hill*,¹⁰¹ it was held that the partition sought would contravene the intention of the testator, and the court's expression of disapproval of *Reinders v. Koppelman* and *Sikemeier v. Galvin* would seem to have been gratuitous. This led to the decision in *Stockwell v. Stockwell*,¹⁰² land had been conveyed to A and her bodily heirs, and A and one of her two children sought partition in a suit against the other. Clearly a reversion remained in the grantor subject to the vesting of the statutory remainders of the estate, yet neither he nor his heirs was joined.¹⁰³ This alone, should have been sufficient for disposing of the case; but the court expressed the opinion that the contingent interests were not susceptible of partition. The attempt to explain the decision in *Sikemeier v. Galvin* is not convincing,¹⁰⁴ and if it were

⁹⁸ (1904) 185 Mo. 393.

⁹⁹ (1912) 244 Mo. 126.

¹⁰⁰ The voluntary parol partition in *Gulick v. Huntley* (1898) 144 Mo. 241, was contrary to the provisions of the will and hence the question of representation did not arise. A partition will not be made where it would defeat a testator's intention. Revised Statutes, 1909, § 2569; *Cabbage v. Franklin* (1876) 62 Mo. 364; *Stewart v. Jones* (1909) 219 Mo. 614.

¹⁰¹ (1914) 261 Mo. 55.

¹⁰² (1914) 262 Mo. 671. In so far as it attempts a history of estates tail in Missouri, the opinion in this case is grossly inadequate. See 1 Law Series, MISSOURI BULLETIN, p. 11.

¹⁰³ The grantor was doubtless dead, although the fact does not clearly appear except in the objection that his heirs were not joined. On the effect of a failure to join parties having vested interests in a partition proceeding, see *Hiles v. Rule* (1893) 121 Mo. 248; *Cochran v. Thomas* (1895) 131 Mo. 258.

¹⁰⁴ See *ante*, p. 45.

not for the fact that the result may clearly be rested on the failure to join all necessary parties, the decision would have the effect of overruling that case.

It is apparent from this review of the decisions that the last word has not been spoken concerning the partition of remainders. In the simple case where A is tenant for life, with remainder to B and his heirs, neither A nor B is entitled to partition, for there is in no sense a cotenancy. Where A and B are tenants for the life of A, remainder to C and his heirs, either A or B may partition without in any way affecting the remainder. If A owns one-half of a tract in fee, the other half being vested in B for life, remainder to B's heirs, either A or B may have partition and B would represent his heirs sufficiently to bind them; if the remainder is to the heirs of C, B as tenant of the particular estate may possibly represent C's heirs so as to bind them.¹⁰⁵ Where A is sole tenant for life, with the remainder in fee vested in B and C, *Preston v. Brant* would seem to permit either B or C to maintain partition against the other and A may be joined as a party, although it seems clear that A's interest would not necessarily be affected in such a case.¹⁰⁶ If A is sole tenant for life and owner of a part of a vested remainder,¹⁰⁷ it would seem that he may maintain partition as to the remainder against the other owners of the remainder, if their interests are vested;¹⁰⁸

¹⁰⁵ In *Betz v. Farling* (1916) 274 Ill. 107, A and B were tenants in common for their respective lives, with remainders as to the share of each to his surviving children and if one left no surviving child, remainder to the children of the other. A died leaving children one of whom was permitted to maintain partition against the others and B and his living children.

¹⁰⁶ See also *Hayes v. McReynolds* (1898) 144 Mo. 348. Cf. *Doerner v. Doerner* (1900) 161 Mo. 399. The general rule in other states is *contra*. See 32 A. S. R. 780. In *Haenssler v. Missouri Iron Co.* (1892) 110 Mo. 188, partition was decreed subject to a perpetual mining lease. In *Beckner v. McLinn* (1891) 107 Mo. 277, a homestead was included in the partition sale under the statutory provision.

¹⁰⁷ If the court were pressed to decide that there is a merger in such a case, the result of the partition suit would probably be the same. In *Jameson v. Hayward* (1895) 106 Cal. 682, there were several owners of a term and one of them owned the reversion; the court ordered a partition of the term only, leaving the reversion unaffected and ignoring the merger on equitable grounds.

¹⁰⁸ *Atkinson v. Brady* (1892) 114 Mo. 200.

and if their interests are contingent *Reinders v. Koppelman* would seem to permit partition wherever the principle of representation of persons not *in esse* can be applied; but the authority of that decision is weakened since the decisions in *Hill v. Hill* and *Stockwell v. Stockwell*, and the narrowing of its doctrine may now be expected. If A is tenant for life, with a contingent remainder to other persons, it would seem folly to permit any partition even though A be joined as a party, and *Sikemeier v. Galvin* is to be confined to its actual facts if indeed it is not to be abandoned altogether since the decision of *Stockwell v. Stockwell*; if A is not joined, and if one possible remainderman seeks partition against the others, clearly it should be denied because of the interest of the reversioners; nor should partition be decreed if the reversioners are joined, for there can be no definite basis for division pending the contingency, and if a sale were decreed, the whole proceeding would be idle in that no advance is made toward division.¹⁰⁹

Originally the object of partition was to enable cotenants to enjoy peaceful possession. It was distinctly a remedy to facilitate the enjoyment of present estates in possession. But the broad terms of the Missouri statute seem to have authorized its extension to such future interests as vested remainders although the actual step was taken in *Reinders v. Koppelman* and *Preston v. Brant* apparently without appreciation of its significance. But it seems undesirable that this principle should be extended to permit the partition of contingent future interests, and *Stockwell v. Stockwell* therefore represents a proper disposition to restrict *Reinders v. Koppelman*.

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¹⁰⁹ This has been recognized by the Illinois court which has persistently refused to permit partition of remainders after a life estate where the interests of the remaindermen could not be definitely ascertained until the death of the life tenant. *Seymour v. Bowles* (1898) 172 Ill. 521; *Ruddell v. Wren* (1904) 208 Ill. 508. And partition was recently refused where the remainder was "vested in quality" but "contingent in quantity." *Richardson v. VanGundy* (1916) 271 Ill. 476.