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Alienability of Contingent Remainders

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With The Ohio Courts

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EDITORIAL NOTES

ALIENABILITY OF CONTINGENT REMAINDERS.

The question of the alienability *inter vivos* of a contingent remainder was before the Court of Appeals for the First Appellate District in *Pollock v. Brayton*.¹ It was disposed of as follows:²

"We are of the opinion that at the time of making the deed Mrs. Gould did not have any interest in the property that she could convey."

At the common law a contingent remainder was not alienable *inter vivos*,³ although there was authority the other way when the only uncertainty was in the event upon which the remainder was limited to take effect.⁴ This distinction, however, "has often been overlooked or denied."⁵

In most, if not all, jurisdictions in this country, in the absence of statute, contingent remainders are still inalienable *inter vivos*.⁶ "This is a survival of the feudal land law."⁷

¹29 Ohio App. 296 (1928).

²*Ibid.*, at p. 300.

³Lampet's Case, 10 Coke 51 (1635); SHEPPARD, TOUCHSTONE, 239; FEARNE, CONTINGENT REMAINDERS (4th ed.), 366.

⁴4 KENT'S COM., 261, 262.

⁵Moore v. Littell, 41 N. Y. 66 (1869).

⁶Hudson, *The Transfer of Remainders*, 26 YALE L. J. 24 (1916).

⁷KALES, FUTURE INTERESTS (2nd ed. 1920), p. 335.

Although it was held that a contingent remainder could not be transferred *inter vivos*, nevertheless, if the contingent remainderman attempted to alienate and the remainder subsequently vested in his lifetime, the remainder under certain circumstances passed by way of estoppel to the alienee.⁸ "In the United States either by statute or decision, the same effect is generally given to deeds containing covenants of warranty."⁹ It was so held in the instant case.

But suppose the remainder does not vest until after the death of the contingent remainderman who has attempted to transfer it by warranty deed. Is the grantee protected by estoppel as against the heir of such remainderman? Professor Kales argues that "on principle" the heir is not bound by the warranty.¹⁰ It has been so held in New York.¹¹ It was early held in this state that, in the case of an attempt by a tenant in tail to convey a fee simple by warranty deed, the heirs of the warrantor were not estopped because their title did not come from him as its source.¹² This would seem to indicate that an heir whose title to property has its source in an ancestor who made an attempted conveyance thereof by warranty deed, is estopped by the warranty.^{12a} The well-known case of *Golladay v. Knock*,¹³ supports the same inference, and it has been so held in Pennsylvania.¹⁴

If, then, the title of the heir of a contingent remainderman is traced from the latter as its source, and not from the first purchaser as at common law, it is not unlikely that our courts would hold the heir estopped. That, as to vested interests, the title of an heir is traced, not from the first purchaser, but from the one last "entitled", has been held in other jurisdictions under statutes of descent similar to ours.¹⁵ As said by Professor Kales, "since the

⁸*Ibid.*, sec. 321.

⁹*Ibid.*, p. 337, n. 7.

¹⁰*Ibid.*, sec. 322.

¹¹*Jackson v. Littell*, 56 N. Y. 108 (1874).

¹²*Pollock v. Speidel*, 17 Ohio St. 439 (1867).

^{12a}*Cf. Groves v. Groves*, 65 Ohio St. 442, 448, 62 N. E. 1044 (1902). "They stand as heirs . . . and . . . are therefore bound by the acts of their ancestors in relation to the property they seek to inherit."

¹³235 Ill. 412, 85 N. E. 649 (1908).

¹⁴*Carson v. New Bellevue Cemetery Co.*, 104 Pa. St. 575 (1883).

¹⁵KALES, FUTURE INTERESTS, sec. 381.

mode of tracing descent from the person last entitled depends upon the statute on descent, there can be no ground for saying that the descent of reversions and vested remainders is to be traced in one way and the descent of contingent remainders and contingent executory interests in another."¹⁶ Nevertheless, in Georgia, "where the descent of reversions and vested remainders is from the person last entitled, the descent of a contingent remainder or contingent executory interest is traced from the first purchaser at the time the contingency happens."¹⁷ There is, perhaps, an intimation in *Tharp v. United States Fidelity & Guaranty Company*¹⁸ that this latter view would be adopted in Ohio.

There is considerable *dicta* in Ohio to the effect that contingent remainders are alienable *inter vivos*.¹⁹ More recently it has been held that a contingent remainder is not alienable by quit claim deed,²⁰ and the decision would seem to rest rather on the nature of the interest than the character of the instrument.

The inalienability of contingent remainders reduces the mobility of real estate. Considerations of convenience lead to the belief, which appears to be generally accepted, that real estate should be freely marketable. This had led to the enactment of statutes in many states making contingent remainders alienable *inter vivos*.²¹

If not only a contingent remainderman who attempts to convey by warranty deed, but his heir as well, is estopped by the warranty, it probably makes no great difference whether contingent remainders are or are not said to be alienable. The effect of the warranty upon the heir, however, has not been determined in this state. In any event there would seem to be no reason why the courts should feel bound by the old rule that contingent remainders are not alienable (the reasons for which have long since

¹⁶*Ibid.*, sec. 382.

¹⁷*Ibid.*

¹⁸2 Ohio App. 28 (1913).

¹⁹White, *Some Ohio Problems as to Future Interests in Land*, 1 CIN. L. REV. 36 (1927).

²⁰Laver v. Kreiter, 7 Ohio App. 441 (1917).

²¹See POWELL, CASES ON FUTURE INTERESTS, 287 (1928); White, *op. cit.*, *supra*, note 19, at 56.

disappeared);²² in the face of what appears to be accepted as the public interest to the contrary. Chief Judge Cardozo has said:²³

"I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years."

Doubtless it may be objected that this is a "rule of property". It seems improbable, however, that any hardship or unsettlement of titles could result, the prevention of which must be at the bottom of the greater zeal for *stare decisis* in that regard.

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OHIO CONSTITUTIONAL REQUIREMENT THAT LAWS OF A
GENERAL NATURE SHALL HAVE A UNIFORM
OPERATION THROUGHOUT THE STATE.

Statutes creating a board of library trustees in cities of the "first grade of the first class", which were the survival of a day when "classification" of cities on the basis of population was used to put practically every large city in a different class, were held recently by the Supreme Court of Ohio to be in violation of Section 26 of Article II, of the Ohio constitution, requiring laws of a general nature to have uniform operation throughout the state.¹ The supreme court affirmed the common pleas court and the court of appeals of Hamilton County, which also had held that the statutes were unconstitutional. At the time of the

²²White, *op. cit.*, *supra*, note 19, at 39; *cf.* *Jeffers v. Lampson*, 10 Ohio St. 101 (1859).

²³NATURE OF THE JUDICIAL PROCESS, 150.

¹*Brown v. State*, (1929) 120 O. S. 297.