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CAN AN ESTATE TAIL BE DOCKED DURING LIFE OF FIRST TAKER?

It frequently happens that, where land has been granted to one and the heirs of his body, thus creating an estate tail which the Missouri statute turns into a life estate in the first taker with remainder to those persons who would next have taken the estate tail "according to the course of the common law", it is desired to convey the entire fee during the life of the first tenant.[1] Thus where entailed lands are desired for the erection of some public work, or in the consummation of some other enterprise of general importance, it is necessary that the public or the corporation involved obtain a good fee simple title. Is this possible under our present statutes and decisions? The answer to that question involves a somewhat detailed analysis of the nature of estates tail. And this in turn involves a somewhat extended investigation of their history. For the roots of the law of real property go down deep into the soil of feudalism, and an understanding of the present state of the law is impossible unless regard be had to its evolution.[2]

I.

An extended discussion of the nature of the feudal system is neither necessary nor proper in the present paper. Yet it will not be amiss to recall briefly its most salient features.[3] After the Norman conquest all land in England was owned absolutely and alodially by the crown. The greater portion of it was parceled out among the great retainers of the king who held the same as his vassals. As this relation of tenure is fundamental to real estate law it deserves some special attention.[4]

The tenant was recognized as having a right to the possession of the land. He was privileged to use it in any way he desired, to use or sell its produce, or

1. In the practise of the present writer three instances of this kind have occurred within a few months. The present article was first read as a paper before the Hannibal Bar Association. At that time several other instances were called to the attention of the writer.

2. "It is impossible to apply the artificial rules of the modern law of real property without a clear understanding of the feudal system of land tenure in which they originated. The disappearance of the essentials of feudal society—the personal relation between lord and tenant and the duties owed by the tenant to the lord—had not taken away the feudal basis of the law of real property; nor has it made the common law rules, apart from statute, less applicable." Manley O. Hudson; *Land Tenure and Conveyances in Missouri* (1915) 8 Law Series. University of Missouri Bulletin, 3.

3. For a general description of the feudal system as it affected land tenure see Tiffany, *Real Property*, (1st Ed. 1912), sec. 7. Tiedeman, *Real Property* (3rd Ed. 1906) Chapt. III.

4. Tiffany *Op. Cit.* sec. 10.

to develop its natural resources. He had the right to prevent encroachments upon the land by any other persons. In short he had almost all of the complex rights, powers, privileges, and immunities touching and concerning the land to which we ordinarily attach the name of ownership. Yet he owed certain duties to the crown as lord paramount.[5] Among these were the payment of certain sums of money, the taking of an oath of fealty, and the performance of certain services, chiefly of a military character.

The grant or infeudation of the lands by the crown might be for the life of the tenant only, or it might be to the tenant and his heirs, in which latter case the eldest son of the tenant held as of right upon the death of his father under the same terms as his father.[6] This latter case was called a tenancy in fee simple. At first such a tenancy was not directly alienable. Yet the tenant could infeudate another as his tenant so that this subtenant would hold of the greater vassal even as the latter held from the lord paramount. In fact there might be a chain of tenancies one above the other from the king as absolute owner to the actual occupant.[7]

Later the right to alienate land by substitution was recognized. The distinction between these forms of grant can be made clear by a concrete illustration. In the case of subinfeudation A, the king, grants to B, the mesne lord. B subinfeudates C, and C subinfeudates D. After all this is accomplished we have B holding as tenant of A, C of B, and D of C. Each tenant owes his feudal dues directly to his own immediate overlord and not to the persons higher up in the chain. In the case of a substitution, however, A grants to B and B becomes A's tenant. B then grants all of his interest to C. Whereupon B ceases to have any legal rights whatsoever in the land and C becomes A's tenant, holding of A under the same terms under which B had previously held.

The evolution of the law of real property evidences the play of conflicting economic forces. From the first the great landed proprietors have sought to concentrate the ownership of lands within their own group. In order so to do, they have sought to prevent the division of estates and their alienation from the family originally holding them. The political and economic power of the *ancien noblesse* is bound up in the ownership of land, and this monopoly of ownership can be assured only where large properties pass intact from father to eldest son. On the other hand the rising commercial bourgeoisie, whose political power began to be felt in the reigns of the first Edwards, looked upon land as a commodity—an element in production—to be freely traded in, and used as security for commercial credits.

Strangely enough it was the landed aristocracy who struck the death

5. Tiffany *Op. Cit.* sec. 10.
6. Tiffany *Op. Cit.* sec. 11.
7. Tiffany *Op. Cit.* sec. 12.

blow at the practise of subinfeudation, thus making easy the freer method of alienation by substitution.[8] This was because subinfeudation was resorted to in many cases in order to defeat the rights of wardship of the greater lords. As these rights were financially of considerable value subinfeudation was looked upon with great disfavor.[9] In 18 Edward I, in a parliament, in which only the great nobility was represented, the representatives of the lesser gentry and the towns not having as yet arrived, the statute *Quia Emptores Terrarum*[10] was passed, abolishing subinfeudation and turning all attempts at such transfers into alienation by substitution.

The landed aristocrats who passed the statute *Quia Emptores*, however, had no fear of its possible effect upon the perpetuity of family estate. Five years before they had enacted a statute which fully protected their interests in this regard. To understand this act—the statute *De Donis Conditionalibus*[11] it is necessary to note the nature of a previously existing estate in land of a peculiar kind.

Prior to 13 Edward I, where land was granted to A and the heirs of his body, he was said to have an estate in fee conditional.[12] Should A die without having had issue born to him the land would revert to his grantor; but if issue were once born to A, his estate would immediately ripen into a fee simple absolute. Even the death of such issue before the death of A would not defeat his estate, and he could convey a good fee simple to a stranger. Obviously this offered no opportunity for a permanent tying up of an estate to the members of a family. All of this was changed by *De Donis*. That act had provided that, where lands were conveyed to one and the heirs of his body,

> "they to whom the land was given under such condition shall have no power to aliene the land so given, but it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing."

Thus it seemed that the interests of the great nobility had triumphed in 1285. Land could be granted in tail and would thereafter descend uninterrupted in perpetuity from father to son. It would remain forever in the family. The land monopoly of the aristocracy could not be broken, and their political and economic power would be preserved. But the influence of the

8. At the time the statute of Quia Emptores was passed, the representatives of the commons had not yet arrived at parliament. Hence with few exceptions only the peers voted for the measure. See Green, *History of the English People*, (1881) Vol. P. 718 *et sec.*

9. Tiffany *Op. Cit.* sec. 12.

10. Statute Westminster, III. 18 Edw. I. c 1; A. D. 1290.

11. Statute of Westminster, II (*De Donis Conditionalibus*). 13 Edw. I. c. 1 (A. D. 1285).

12. For a general discussion of fees simple conditional prior to the statute *De Donis* see *Blackstone's Commentaries on the Laws of England.* (Chase's Ed.) p. 293 et seq.

rising bourgeoisie was making itself felt not only in parliament but in the law courts as well. No sooner had *De Donis* become the law than astute conveyancers set about to find a way to circumvent its operation. In this effort they had the sympathy and aid of the judges. Success, however, seems not to have been achieved for nearly two hundred years. In 1473, in *Taltarum's case*,[13] the courts sanctioned the barring or docking of an estate tail by means of a collusive suit called a common recovery. In the 32nd of Henry VIII,[14] another and simpler sort of suit by which a tenant in tail could convey his estate in fee was sanctioned. This procedure was spoken of as the levying of a fine. And in the same year certain long term leases by tenants in tail were also made good by statute. Thus before the first English colonies were established in America, estates tail in England had become almost as easily aliened *inter vivos* as estates in fee.

When the English colonists came to the New World they brought with them the common law of the mother country. In all except one or two of the original colonies, that law included, as an integral part of the statute, *De Donis* and the institution of estates tail.[15] But it also included the commonly recognized methods of barring or conveying the estate tail above mentioned.[16] Nevertheless, while it was legally possible to convey an estate tail, giving a good fee simple title to the grantee, it is perhaps true that in practice this was infrequently done, and that generally, both in England and in colonial America, the intent of the creator of the entail was carried out and a family perpetuity created.

Although America was settled almost exclusively by the mercantile and yeoman classes of England and not by the aristocracy,[17] geographic and climatic conditions, together with the policies of the early colonial proprietors, soon led in the southern colonies to the establishment of large landed estates.[18] Thus an indigenous landed aristocracy came into existence. The entailment of estates, which was common practice among the landlords of England, was soon adopted by these colonial aristocrats to insure perpetuity of family ownership of lands.[19]

When, in the period following the revolution, political power came slowly into the hands of the small farmers, and somewhat later into those of the artisans and mechanics of the towns,[20] it was but natural that they should

13. (1473) Y. B. 12 Ewd. IV. pl. 19.

14. 32 Hen. VIII, c. 28.

15. See Gray, The Rule Against Perpetuties, (3rd Ed. 1915) Sec. 19, note. The estate tail was not, it seems, introduced into South Carolina.

16. *Dow v. Warren*, (1810) 6 Mass. 328.

17. Beard, *The Rise of American Civilization*, (1927) Vol. I. p. 126.

18. Beard, *Op. Cit.* Vol. I. p. 127.

19. Beard, *Op. Cit.* Vol. I. p. 127.

20. Beard, *Op. Cit.* Vol. I. Chap. 7.

strike at the institution of entailment along with the rule of primogeniture as buttresses of the political privilege and economic prestige of the great land owners and merchants.[21] We therefore find in this post-revolutionary period the adoption of statutes in many of the states abolishing the fee tail.[22] In some states the estate tail was converted into a fee simple,[23] in others the first taker was given an estate tail with remainder in fee to his issue,[24] in others the estate of the first taker was denominated a life estate with remainders in fee to his issue or his heirs at common law.[25] In some of the states in which the fee tail remained as under *De Donis*, a tenant in tail was authorized to convey in fee simple, by ordinary deed.

Prof. Hudson has traced in detail, in a most learned and interesting paper published in this bulletin, the history of the estate tail in Missouri.[26] It is somewhat questionable whether entailment of real property was permitted under the Spanish law which was in force in Missouri prior to 1816. In that year, however, the territorial legislature by statute substituted the common law for the civil law of Spain.[27]

The Louisiana Purchase was an accomplishment of the Jefferson administration. That administration was representative of the small farming interests, and was opposed to the Federalists—the party of wealth, landed and commercial.[28] Missouri, along with the rest of the trans-Mississippi country, was settled by pioneers who were independent farmers, artisans, laborers and members of the great "Farmer-Labor" political group we call Jacksonian democracy. Both politically and economically they were opposed to the interests of the landed aristocracy and the vested wealth of the commercial and industrial bourgeoisie. To them a monopoly of land in the hands of a hereditary landed gentry was anathema. It would have been strange therefore had not the legislature of the territory of Missouri followed the lead of the eastern commonwealths in seeking to destroy entailment.

We are not here concerned with the exact phraseology of the act of 1816, but we shall quote the language of the amendatory act of 1825,[29] which did not effect any substantial change in the meaning of the law, as that act is, with slight verbal changes, identical with that now in force. It provided that the first taker of the estate tail would be given a life estate with remainder,

21. See Tiffany *Op. Cit.* Sec. 24.
22. See authorities listed in notes under sec. 24, Tiffany *Op. Cit.* sec. 24.
23. Cf. *Smith v. Greer* (1889), 88 Ala. 414; *Ewing v. Shropshire* (1888), 80 Ga. 374.
24. Cf. *St. John v. Dann* (1895), 66 Conn. 401, 34 Atl. 110.
25. The Missouri statute is substantially similar to those of Illinois, Arkansas, Vermont, and Colorado.
26. Hudson, *Estates Tail in Missouri*, (1913), I Law Ser. Univ. of Mo., Bul. 5.
27. 1 Mo. Terr. Laws 436.
28. Beard, *Rise of American Civilization*, Vol. I. Chapt. 9.
29. Laws of 1825, p. 216.

> "in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first donee in tail, first pass according to the course of the common law.

In 1846 the New Jersey statute, which gave the remainder on the first taker to the "children of such grantee", was copied in Missouri.[30] In 1865 the former statute was restored, and with the minor changes in phraseology, referred to above, has remained ever since the law of this state.[31] Although Missouri was settled for the most part by frontiersmen from Kentucky and Tennessee, representatives of the aristocracy of Virginia, Pennsylvania, New York, and New England were to be found among its population. Here and there large estates appeared. It was no doubt a compromise between the interests of these two groups which caused the enactment of the statutes of 1816 and 1825. It will be noticed that this legislation was less sweeping in its effect than that of many of the states in which estates tail were converted into estates in fee.

Had the pioneer legislators, who conceived these acts, been told that the estate which was created thereby tended much more surely toward a perpetuity, and could be alienated with much less facility than the ancient fee tail, they would probably have been greatly surprised. Yet such would seem to be the fact. In this connection we must bear in mind the fact that these territorial legislatures were composed, to a large extent, of persons unlearned in the law. Dean Pound has pointed out that the versatility, which was a necessary characteristic of pioneer life, led the frontiersman to believe that he could act as his own lawyer, just as he performed the duties of blacksmith, wheelwright, and even on occasion those of a surgeon.[32] We can readily see how a legislature of such a temper, impatient of the technicalities of property law, could enact statutes like those here under consideration, without fully comprehending their legal effect. What has been the effect of this legislation upon the alienability of estates tail? Before we attempt to answer that question we must first consider the nature of the estates created by the statute of entails in Missouri.

II.

A few questions of construction are of importance for our present discussion: (a) Who takes the remainder created by the statute? (b) Is that remainder vested or contingent? The language of the statute describing the remainder and identifying the remaindermen is as follows:

> "with the remainder to those persons to whom the estate tail would, on the death of the first grantee, devisee, or donee in tail, first pass according to the course of the common law."[33]

30. Laws of 1845, p. 216.
31. Laws of 1865 c. 108 sec. 4, now Sec. 2267, R. S. Mo, 1919.
32. See address at the dedication of Tate Memorial Hall (1927), 37 Law. Ser. Univ. of Mo. Bul. 29 666 sec.
33. Sec. 2267 R. S. Mo. 1919.

Now as estates tail are created by *De Donis* we must construe the term "common law", as above used, to include that statute.[34]

In England, and in those of the original thirteen colonies where entailment was recognized, the estate passed according to the rule of primogeniture to the eldest living son of the first taker in exclusion of the rights of his brothers and sisters, and passed to daughters only if there were no living male issue.[35] The obvious construction of the above statute is to hold that the "person to whom the estate tail would pass" on the death of the first taker is the eldest living son. Yet so odious was the doctrine of primogeniture to the dominant social class of the frontier, that this construction never met with much favor. The early cases are reviewed at great length in Dr. Hudson's article, above cited.[36] It will be unnecessary to cover again the ground of that discussion. A later case in the Supreme Court has, however, set at rest all doubt as to this point of construction.

In this case, *Gillilan v. Gillilan*,[37] property had been devised to A and the heirs of his body except his children B and C. D being the eldest child (except those mentioned as being excluded) claimed the entire estate as against certain other brothers and sisters not mentioned. It was held that all of the brothers and sisters except those expressly excluded would take the remainder. Though this decision might be explained as based upon the language of the will there in question, the court in general language repudiates the doctrine of primogeniture as applied to estates tail under the Missouri act. Bond J. speaking for the court uses the following language:

> "The doctrine of primogeniture is contrary to the theory upon which this and other commonwealths were built. This fact is conceded in the opinion of the commissioner cited by appellant, Lucas R. Gillilan, Stockwell v. Stockwell 262 Mo. l. c. 677, (After distinguishing that case)... No part of the common law which is 'repugnant to,' or 'inconsistent with,' our federal constitution or state laws was ever adopted as a part of the jurisprudence of this state. R. S. 1909 sec. 8047. The doctrine of primogeniture is radically opposed to the spirit, if not the letter, of both",

This reasoning has been severely criticized by Prof. Warren, who very properly points out that:

> "The Massachusetts lawyer does not prize highly the estate tail of England since the statute De Donis which the laws of the Commonwealth recognize as here existing; but he would be surprised to learn that it violated the Constitution of the United States".[39]

34. Hudson, *Op. Cit. note* 26 *supra*, p. 87.
35. Hudson *Op. Cit.* p. 13; Silvers *Missouri Titles*, (2nd Ed. 1923) p. 118.
36. Supra, note 35.
37. (1919), 278 Mo. 99, 212 S. W. 348.
38. 212 S. W. at p. 350.
39. Warren, *The Progress of the Law: Estates and Future Interests*, (1921), 34 Harvard Law Review, 510.

He might have added that primogeniture was recognized in most of the American states at the time of the adoption of the Constitution, and in many of them for some time thereafter, despite the fact that guarantees of "due process" and "equal protection" were contained in the constitutions of those commonwealths.

A much more pertinent line of reasoning in support of the rule in the Gillilan case is adopted by Mr. Silver.[40]

According to this writer, the grant of an estate to A and the heirs of his body is fundamentally like that of a grant to A and his heirs. The only difference is that under *De Donis* the class of heirs who take in the first instance is cut down to those who are lineal descendants of the first taker. Now where a fee simple was created at common law, the estate passed on the death of the grantee to his eldest living son, such son being his heir. If there were other children they would not be heirs at all. In the event there were no children, however, the estate would pass to other relatives of the grantee, who would under these circumstances be his heirs. The inclusion of the words "of his body" cut out these other non-bodily heirs from succession, but did not at all change the identity of the heirs who did take, provided they were lineal descendants. The question of who were heirs was left to be determined by the general law of descent. In other words, in both a fee simple and fee tail the estate passed on the death of the first taker to heirs; but in the case of the fee tail only certain kinds of heirs could take, i. e. those heirs who were lineal issue of the grantee. Now at common law the general cannons of descent named the eldest son as heir, but in Missouri, section 303 R. S. Mo. 1909 makes all of the children equal heirs with the issue of predeceased children, taking the share of their parents *per stirpes*. Therefore even if the Missouri statute of entails were not in existence and *De Donis* were unmodified, the property would pass, on the death of the first tenant in tail, to all of his living issue *per stirpes*. Ingenious as this argument is, it somehow fails to convince. How an estate tail would be possible under this construction is difficult to imagine. *De Donis* clearly created and was intended to create an estate which would, unless docked, pass from father to son for generation after generation. Of course, if all the children shared in the estate, it would soon become split up so by that this would be impossible. Primogeniture and entailment are, it is believed, necessarily bound together.

Whatever out notions as to the propriety of the rule of *Gillilan v. Gillilan* may be, that decision is and will probably remain the law of Missouri. We must therefore take as a starting point of our discussion the proposition that the statutory remainder created by section 2267 R. S. Mo. 1919 is given to the children of the first taker living at the time of her death, and to living lineal descendants of deceased children *per stirpes*.

40. Silver *Op. Cit.* 118 *et sec.*

We have next to inquire whether that remainder is vested or contingent. A remainder is said to be contingent whenever "in order for it to come into possession, the fulfillment of some condition precedent other than the determination of the preceding free hold estates is necessary."[41] But a remainder may be vested even though it is subject to be destroyed before the determination of the particular estate. Thus where lands are given to A for life, remainder to B for life, remainder to C and his heirs, B's remainder is said to be vested.[42] Therefore, where a remainder is given to a class, the membership of which may be increased before the determination of the particular estate, and some of the members of which may die and thereby lose their rights before the determination or that estate, it is still said to be a vested one.[43] Such, e. g., is a grant to A for life, remainder to the children of A. Here if some children are living at the time of the grant they get a vested remainder subject to be divested and cut down on the birth of subsequent children. Each time a child is born the share of the previously born children is cut down, but all of the children, including the after born ones, still have vested remainders.

The rule is, however, different in the case of a remainder to a class in which the contingency is said to be incorporated directly into the description of the class of remaindermen; e. g., where the devise is to A and those of his children, who shall survive him. Here the condition is that the children shall survive A before they can claim membership in the class of remaindermen. Hence the remainder is said to be contingent.[44]

Now applying this line of reasoning to the statutory remainder created by the statute of entails, can we say that the contingency is incorporated into the statutory description? The remaindermen are those persons who would take the estate tail at common law. As we have seen, that means those *heirs* of the first taker who are his lineal descendants. Now it is an ancient and well established rule of the common law that no one can be the heir of a living person.[45] Hence it is clear that the very description of the remaindermen incorporates the condition that they survice the first taker. The remainder is therefore contingent.[46]

III.

Keeping in mind the nature of the estates created by the operation of Section 2267 upon common law estates tail, let us return to the principal point of our discussion. *During the life of the first taker of the estate tail, can the*

41. Gray, *The Rule Against Perpetuties*, sec. 101; Tiedeman, *Op. Cit.* sec. 297; Tiffany, *Op. Cit.* sec. 120.
42. Gray, *Op. Cit.* sec. 102, note 41.
43. Gray, *Op. Cit.* sec. 110, note: *Doerner v. Doerner* (1900) 161 Mo. 399.
44. *Doe d. Planner v. Scudamore* (1800), 2 B. & P. 289.
45. Coke *On Littleton*, 22 b.; 2 Blackstone *Op. Cit.* 70; Brown, *Legal Maxims*, 522.
46. *Stockwell v. Stockwell* (1914), 262 Mo. 677, 172 S. W. 23.

estate be docked? Is there any possible method by which a fee simple title can be conveyed to a stranger? We shall consider separately conveyances to a stranger which are voluntary and by act of the parties, and those which are based upon action of a court.

(a) *Voluntary conveyances.* At common law the owner of a legal life estate held his estate subject to an implied condition that he would not convey, or attempt to convey, the land in fee simple.[47] If he did attempt to convey the fee, his grantee not only got nothing whatever, not even the life estate of the grantor, but that life estate itself was forfeited and destroyed for breach of the implied condition, above mentioned.[48] Now if contingent remainders were, by the original grant or devise, limited to take effect upon the determination of the particular life estate, and if the contingency necessary for these contingent remainders to vest had not happened at the time of the forfeiture above mentioned, the remainders could obviously not fall in.[49] When the contingency necessary to the vesting of the remainders did occur, the particular estate had ceased to exist, and as a remainder must come into possession *eo instante* upon the determination of the particular estate in order to avoid a lapse of seisin, the remainders failed.[50] This doctrine of the destruction of contingent remainders by a conveyance in fee of the life estate was known as the doctrine of tortuous feoffment,[51] and was recognized, not only in England, but in most American jurisdictions in the absence of statute.[52]

Is the doctrine law in Missouri today? This depends upon the answer to three other questions: (1) Is the condition that a life tenant may not attempt to alien the fee, still attached to a life estate? (2) Is a common law conveyance by way of feoffment still possible in Missouri? (3) Is the requirement that a remainder must vest before the determination of the particular estate, and fall into possession *eo instante* upon such determination, still existent in this state?

The implied condition in all life estates against tortuous feoffment was a necessary and essential incident of tenure. Now it seems clear that tenure was introduced in this state with the English system of real property. While our

47. *Archer's Case* (1597), 1 Co. 66 b. 5 Gray Ca. Real Property 42. Tiedeman, *Op. Cit.* sec. 25, Hudson, *Conditions Subsequent in Conveyances in Missouri,* (1914), 5 Law Ser. Univ. of Mo. Bul. 3.

48. *Archer's Case supra,* note 47. In the article last cited Prof. Hudson points out that the case of *Foote v. Sanders* (1880) 77 Mo. 616, was one of equitable, and not stricktly legal conveyance, so that it does not overrule *Archer's* case.

49. *Archer's case* supra.

50. Tiedeman (*Op. Cit.* sec. 314, Tiffany, *Op. Cit.* sec. 119. 2 Blackstone, *Commentaries* 168, Fearne, *Contingent Remainders,* 307, Gray, *Op. Cit.* sec. 10.

51. Tiffany *Op. Cit.* sec. 123; Tiedeman *Op. Cit.* sec. 317.

52. *Doe d. Pope v. Pickett* (1880) 65 Ala. 487. *Faber v. Police,* (1878) 10 S. C. 495; *Redfern v. Middleton's* Ex. (1837), 1 Rice (S. C. 495; *Dennett v. Dennett* (1860), 40 N. H. 498.

courts have never decided directly that tenure still exists here, the leading text writers are agreed upon the point.[53] Further, such an implied condition against tortuous conveyance seems to exist in the case of tenancies for years,[54] and no valid reason seems to exist for differentiating the case of life tenancies.

While most conveyances in Missouri today operate either by way of statutory grant or under the statute of uses,[55] it would seem that the doctrine of livery of seisin was adopted with the common law, and that it remains at least a part of the "law in reserve".[57] Often a grant which operates under our statute is also a common law feoffment; but it is quite possible so to word a deed that it will operate as a common law conveyance alone and not as a statutory grant.[58]

Although the statute of uses,[59] and that of wills,[60] made possible the creation of estates in land to begin in future, and which need not fit on to the termination of preceding life estates, the law still recognized common law remainders. In fact the rule was that wherever words could be construed as

53. Hudson. *Land Tenure and Conveyances in Missouri* (1915). 8 Law Series, Univ. of Mo. Bul. 3; Tiedeman, *Op. Cit.* sec. 25; Gray *Op. Cit.* sec. 23. Prof. Gray in the section cited gives a list of those states in which tenure has been abolished but does not include Missouri in the list. A great deal of the discussion over the question of the existence of tenure in the United States has arisen from a failure to carefully analyze the conception. In feudal theory, it is true, the notion of land tenure was closely coneected with the personal relations between a lord and his vassal. Yet when these personal connections are stripped away there remains a very definite residium of legal relations touching the land itself. Consider a typical case of ownership in feudal times. A, the king, grants Blackacre to B as his tenant in fee. Before the grant we say that the king is owner. By that we mean that he possesses a certain group or complex of legal relations concerning the land, which relations exist between the king as an individual and the other individual members of the particular national society involved. E. g. the owner has a right to exclude other persons from entering upon the land, the privilege of using the land in any way in which he desires, the right that the land shall not be injured by adjoining landowners, etc. After the royal grant, these same jural relationships, or rather similar ones, are possessed by the grantee while those of the crown cease to exist. Certain rights, powers, and privileges the crown however keeps. Among others are the right of escheat. Also the tenant was under a duty not to deny the title of his lord. The king had the power to declare a forfeiture of the estate of his vassal on certain conditions. It is the complex of these last named rights, powers, privileges, and immunities that constitutes the substance of tenure.

Now as between the state and the tenant in fee of lands in Missouri the same relations exist today. Likewise similar relations exist between the Reversioner and the tenant for years, etc. Hence we can say that tenure still exists here.

54. See cases cited in Tiffany *Op. Cit.* sec. 52.

55. Under sec. 2174 R. S. Mo. 1919.

56. Under sec. 2262 R. S. Mo. 1919.

57. Hudson, *Tenure and Conveyances, supra* note 53.

58. See Hudson, *Op. Cit.* note 57, p. 16; *Perry v. Price* (1825) 1 Mo. 553.

59. Hudson, *Executory Limitations of Property in Missouri*, (1916) 11 Law Ser. Univ. of Mo. Bul. 308.

60. Hudson *Op. Cit.* note 59 p. 10.

creating a remainder, they must be so construed, and the estate held to be such rather than a shifting or springing use or executory devise.[61] Our own statute had enabled the owners of real estate to create future interests therein "by deed in the same manner as by will."[62] It is believed, however, that the same rule of construction must be applied, and that whenever it is possible to construe the language of a deed as creating a common law remainder rather than a statutory executory estate, this must be done. As to common law remainders, the requirement of continuity of seisin still applies.

For these reasons it is submitted that, where the first taker of an entail to attempt to convey in fee simple to a stranger by common law conveyance, his estate would be forfeited and the contingent remainders following would be destroyed. The holder of the reversion—the original creator of the estate tail or his heirs—would then come into the estate in fee, and could convey it in fee to the person desiring to purchase.

A similar result might be reached by the application of the doctrine of merger.[63] Where contingent remainders follow a life estate and there ars no vested remainders outstanding, the original grantor, or the heirs of the original devisor who created the estate, has a right to possession after the life estate in the event that the remainders fail.[64] This right is in the nature of a reversion and is a fee simple. Now if this reversion and the life estate come into the hands of one person, the two merge so that the holder thereof becomes the fee simple owner. Now, though an executory devise can be limited to take effect in defeasance of an existing fee, this is not true of a remainder. A contingent remainder may not be limited upon a fee.[65] Hence when the fee becomes vested in a single individual the contingent remainders are automatically destroyed.[66]

Hence, should the holder of a life estate make a statutory grant of his life estate to a stranger, and should the holder of the reversion after the estate tail also vonvey to the same party, such a merger would take place with the consequent destruction of the outstanding contingent remainders. This third party could then convey to the person desiring to purchase.

While the above methods of barring an entail seem theoretically possible, there are no Missouri cases directly sanctioning either method. We have been unable to find authority in the state directly supporting either the dostrine of merger or that of tortuous feoffment.

(b) *Conveyances by decree of court.* Can the remainder, which will take effect after the determination of the particular estate, be partitioned during

61. *Blanchard v. Blanchard* (1861). 1 Allen (Mass.) 223. Gray *Op. Cit.* Appendex J and cases cited.

62. Sec. 2271 R. S. Mo. 1919. Tiedeman *Op. Cit.* sec. 313.

63. Tiedeman *Op. Cit.* sec. 50.

64. *Stockwell v. Stockwell supra* note 46.

65. *Gray, Rule Against Perpetuities,* Sec. 8.

66. See authorities cited note 63 *supra.*

the life of the first taker of the entail? Obviously a partition cannot be had at the suit of the life tenant; nor could the life tenant be properly made a party to a partition suit by the contingent remaindermen.

In *Gray v. Clements*[67] property had been devised to A for life with the provision that after her death "the property should be divided equally among her children or their descendants". The remainder thus created seems to be a contingent one. During the continuance of the particular estate, there was a partition suit which was brought by the life tenant. In a subsequent proceeding, the Supreme Court held that the circuit court had been without jurisdiction to order sale in partition in this suit, and that a title derived from such sale was void. In so deciding the court used the following language:

> "The only estates. . . .authorized to be partitioned are estates which are conterminous, and not successive. Co-tenants of a life estate may have partition of their life estate which would not affect the remainder, *or remaindermen, tenants in common, may have a partition of the remainder subject to the life estate.* But there is no authority for a partition between the life tenant and the remainderman. *Stockwell v. Stockwell*, 262 Mo. 671, Carson v. Hecke, 222 S. W. 850. The opinions in these cases review many cases in this state and reach the conclusions stated." (Our Italics).[68]

Do the italicized words state the law of Missouri? If so, is the rule applicable to contingent as well as vested remainders? In England, during the existence of the particular life estate, remainders could not be partitioned.[69] And in the absence of statute this rule has been rather generally followed in this country.[70]

Section 1995 R. S. Mo. 1919 provides:

> "In all cases where lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or co-parcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, it shall be lawful for any one or more of the parties interested therein, whether adults or minors, to file a petition in the circuit court of the proper county asking. . . . . for partition."

Section 1997 R. S. Mo. 1919 provides:

> "The petition shall . . . . . . set forth the names, rights and title of all parties interested therein, so far as the same can be stated, *including persons entitled to the reversion, remainder or inheritance*, and of every person who, upon any contingency, may be or become entitled to any beneficial interest in the premises." (Our Italics).

67. (1920) 286 Mo. 10, 227 S. W. 111; see also the case between the same parties reported (1922) a96 Mo. 497, 246 S. W. 940.

68. 227 S. W. 112.

69. *Evans v. Bugshaw*, L. R. 5 Ch. 340; Cf. *Murcan v. Bolton* 5 Ont. 164.

70. *Sullivan v. Sullivan* (1875) 66 N. Y. 37; *Hunnewell v. Taylor* 6 Cush. 472.

Section 1999 R. S. Mo. 1919 is as follows:

> "In case one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the petitioner, or be 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."

In many cases it has been held that under these statutes vested remainders can be partitioned subject to the life estate.[71] As neither a vested nor a contingent remainder comes into possession until the determination of the particular life estate, the principal object to permitting a partition of contingent remainders would apply with equal force to the partition of those which are vested.

In the early leading case of *Reinders v. Koppelmann*,[72] a testator had devised lands to his wife A for life with remainder divided as follows: one-half to his adopted daughter J, and one-half to the testator's nearest lawful heirs. J died during the life of A without having been married, and leaving one R, her father, as her heir at law. P acquired the life estate and also any interest which R had. P brings action for partition and asks for a sale of the lands in fee. A demurrer filed by some of the living remaindermen as parties defendant was sustained by the trial court, (in special term). On appeal to the general term this decision was reversed, and the judgment of the general term was sustained in the Supreme Court. It will be noticed that the interest of the plaintiff was a vested remainder, but that all of the defendants had only contingent remainders. The court laid down the proposition that these contingent remainders were subject to partition, and that contingent remaindermen not now *in esse* could be represented by those who were in existence. There would seem to be but little difference between a case where both plaintiff and defendant are contingent remaindermen, and that in which plaintiff's interest is vested and that of defendant is contingent.

In a number of subsequent cases, where a partition suit was brought by one of several remaindermen whose remainders were *vested*, sale was ordered.[73] In none of them does the interest of the plaintiff seem to have been contingent.

In the case of *Stockwell v. Stockwell*,[74] however, the title had been conveyed to A and the heirs of his body. During the life of A one of his children and heirs presumptive sought partition, and it was denied. The court pointed out the fact that the holder of the reversion after the estate tail, whose interest was at least as substantial as that of the remaindermen, had not been joined.

71. *Hayes v. McReynolds* (1898) 144 Mo. 348; *Dennig v. Mispagel* (1924) 260 S. W. 72; *Crowley v. Sutton* (1919) 209 S. W. 902.

72. (1878) 68 Mo. 482.

73. See authorities cited note 71 *supra*.

74. Note 46 *supra*.

But it placed its decision on other grounds. The right of a contingent remainderman was held not to be of sufficiently definite and tangible a nature as to permit a partition suit by him. In regard to the first ground of the decision, it may be pointed out that if, as our court has repeatedly held, only interests which are of the same order (coterminous) can be partitioned so that partition must be denied as between life tenant and remaindermen, then, by the same token, partition ought to be allowed between the remaindermen without joining the interest of a reversioner. The thing partitioned is the remainder, an estate which intervenes between the life estate and the reversion, and its partition in no way can effect the reversion. Hence it is hard to imagine how the reversioner is a necessary party.

As to the second and real ground of the decision, it may be pointed out that if the interest of a contingent remainderman is sufficiently substantial and definite to permit its partition when the plaintiff is the holder of a vested remainder, the same ought to hold true when the contingent remainderman himself is the plaintiff. Neither of the court's reasons entirely satisfies us.

To really understand the case one must go beyond these expressed reasons for the decision to the court's fundamental ideas of the public policy involved. Fortunately we have, in an excerpt from the decision, a definite indication as to those views. It is as follows:

> "We do not care to become pioneers in invention of judicial devices, to frustrate the attempts of owners to devote these lands to the sustenance of their families and others, so that it may be preserved and transmitted in kind either as a whole or in parcels representing their respective interest to the ultimate objects of their solicitude."

As to the soundness of this view of public policy we will not now comment, leaving its consideration to the last division of this paper. We will merely summarize the law as it now stands. Compulsory partition may not be had between a life tenant and remainderman, whether the estates of the latter be vested or contingent. Among vested remaindermen such partition may be had, subject to the life estate. Where the plaintiff holds a vested remainder in an undivided portion of the lands, he may compel partition; though the remainder in the other undivided portions be contingent. Hence the remainder, after the particular life estate created by our statute out of an estate tail, is not subject to partition. Even where the remainders are vested, partition may not be had if the estates to be partitioned were created by will, and partition would contravene the intention of the testator.

Although the rule of the *Stockwell*[75] case completely precludes the possibility of conveying an estate tail by means of compulsory partition,[75a] there

75. Note 46 *supra.*

75a. The above statement is subject to modification in the case of lands the value of which is being eaten up by taxes and expenses. Such lands are, in spite of the existence of

remains one possible objection to this means of conveyance not mentioned in that case but discussed in full in the Reinders[76] case, which must receive our attention at this point because of its relation to other forms of judicial conveyance of entailed property. Until the death of the first taker of the entail it is, as we have seen, always possible that other children or descendants who will take may be born. Thus it is always possible that some of the contingent remaindermen are not *in esse.* Could such nonexistent remaindermen be bound by a decree in partition? The *Reinders* case, and those which have followed it, hold that they can. They are, it is said, represented by remaindermen who are now *in esse.* If they cannot be so represented, they may be represented by the life tenant. This is in accordance with the old equity rule in regard to parties by representation.[77] If then the rule of the *Stockwell* case were out of the way, partition could be had among contingent remaindermen except in cases where the estate tail was created by will.

Is entailed property subject to condemnation for some valid public use? The power of eminent domain is inherent in the very nature of government, and is based on necessity. The necessity which creates it involves its extention to all classes and kinds of property.[78] Accordingly it has been held that "Whatever exists in any form, whether tangible or intangible may be subjected to the exercise of this power."[79] It is held that a legislative grant of power to condemn "property" includes all classes and kinds of property. It is true that the inherent power of eminent domain lies dormant until put in the form of statutory law by legislative enactment. Yet the above view of the nature of

contingent remainders, subject to partition under section 1546 R. S. Mo. 1929. This section reads as follows: Whenever under or thru any deed, conveyance or will heretofore or hereafter made, an estate for life or a conditional or contingent or other estate of uncertain vesting or duration is created, or provided for in lands with remainder over or reversion, whether absolute, contingent or conditional, or an estate in lands is created, or provided for to commence or vest in the future, either absolute, contingent or conditional, any person or persons holding the estate or an interest in the estate, carrying the right of immediate use and enjoyment of such lands, may sue in equity for sale of such lands or any of the same upon the ground that the life or other estate of immediate enjoyment is burdensome and unprofitable for that the cost of paying the taxes and assessments thereon and holding, maintaining, caring for, and preserving the lands from waste, or injury, and deterioration, exceeds the reasonable value of the rents and profits thereof, and a greater income can probably be had from proceeds of a sale thereof invested in bonds of the United States or Missouri. . . . . It will be noted that only the life tenant may bring the action and partition cannot be had at the suit of the remaindermen. It will also be noted that certain special circumstances must in every case be shown to exist. It is believed that, present these circumstances, a partition suit can be instituted by the first taker of an entailed estate.

76. Note 72 *supra.*

77. 16 Cyc. 188 and cases cited.

78. Grotius, *De Bel. ac Pac.* III, 20.

79. Lewis, *Eminent Domain* sec. 262. Cf. *Metropolitan RR. Co. v. Ry. Co.* 87 Ill. 317; *Alabama R. R. Co. v. Kenny* 39 Ala. 307.

the power and its basis in public necessity should lead to a broad interpretation of the statutes.

Our own legislative enactment is found in section 1791 R. S. Mo. 1919 as amended laws of 1921, p. 199. In its terms it applies to "Land or other property". These words are certainly broad enough to include every species of interest in property whether such interest be vested or contingent. It is believed that it reaches the interests of persons having remainders after the life estate of the first taker of a fee tail.

This being true, we are confronted with the problem of how to bring nonexistent owners into court in order to bind them by its decree. As we have seen, this can be done in a partition proceeding through the equitable doctrine of party representation.[80] Can that doctrine be applied to a condemnation proceeding? The doctrine of class representation did not exist in civil procedure at common law.[81] In most of the code states it has been adopted by express statutory enactment, and applied to all classes and kinds of action.[82] This is not true in Missouri. Yet as our code, in terms, attempted to sweep away the difference between equitable and legal proceedure,[83] it would seem that the doctrine should now be applied to any kind of action, provided the circumstances which made it appropriate in suits in equity are present. The obvious necessity of permitting the interests of non-existing persons to be bound by proceedings in condemnation would clearly indicate its application here.[84]

IV.

The discussion thus far has arrived at the following conclusions: applying common law rules of real property, the interest of contingent remainderman in a Missouri estate tail ought to be held destructable either by a merger of the life estate of the first taker with the reversion or by a tortuous feoffment of

80. See *Reinders v. Koppelman, supra* note 72.

81. See 30, Cyc. 132 et sec.

82. *Supra* note 81.

83. Sec. 1153 R. S. Mo. 1919.

84. The suggestion has been made that our condemnation act might permit the bringing of a suit against the "unknown heirs" of owners of the land and hence joining non-existent contingent remaindermen as "unknowns" of the life tenant. The act (Sec. 1791 R. S. Mo. 1919 as amended by act of March 28, 1921, Laws of 1921 p. 199) expressly provides for the bringing of a condemnation where "such corporation and the owners cannot agree upon the proper compensation to be paid, or in case the owner is incapable of contracting, be unknown, or be a non-resident of the state." Obviously in case the owner is non-existent it will be impossible to enter into an agreement with him. But can we say that these owners are unknown? It is submitted that this is not at all a strained construction of the statute and permits the joining of parties whom the legislature must have meant to be joined. This conclusion is borne out by the later provisions of the same section permitting the joinder of remaindermen.

the life estate. Yet there are no decisions so holding. It would seem that, in the light of the existing decisions, partition of such an estate cannot be had, and that there is some question as to whether or not entailed lands are subject to condemnation.

The problem is, like most legal questions, one of balancing conflicting interests. The interest of the holder of real estate, in safeguarding the economic security of his descendants through entailment, is in conflict with the demands of society for the free alienation of realty. Changing economic conditions, it would seem, have shifted the balance in favor of free alienation.

The most important fact in connection with the economics of land ownership, which has emerged during the last decade, is the decrease in value of agricultural land and the increase in value of land used for industrial purposes. As a form of wealth guaranteeing the economic security of the possesser, agricultural land has ceased to have great importance. The large increase in available tillable lands in the United States, together with the growth of agricultural production in India, Russia, China and South America, make it improbable that rural land-values will greatly increase for many years. The industrial expansion of the country, however, has been rapid and its industrial future is great.

Now it is obvious that free alienability of land is not of tremendous importance where it is to be used for agricultural purposes only. Although agricultural production is hindered to some extent by tenant farming, still such farming is possible and has always been widely employed. On the other hand where land is to be used for the erection of a manufacturing plant, an office building, or an apartment hotel, or where it is to be taken for a public utility such as a power development, a railroad right of way, or other similar purposes, it is highly essential that a perfect and indefeasible fee simple title be vested in the corporation planning the development. A comparatively small amount of capital has to be invested in farming in addition to the value of the land itself, but for any of the commercial and industrial uses above mentioned an enormous capital investment is required. Obviously if buildings and improvements amounting to millions of dollars are to be erected upon land, it is necessary that the persons or corpoıations expending such sums of money must know that their title is one which cannot be defeated. It is also obvious that industrial and commercial development requires the use of a particular land which happens to be advantageously located, and that the demand for such land is imperative. A farmer who is unable to secure Blackacre because it is entailed can buy the adjoining farm of Whiteacre, and succeed in farming it with little loss or disadvantage; but if Blackacre is in the flood way of a proposed hydro-electric system, and the utility company can not obtain its title, a power development which would involve the expenditure of many millions of dollars, and make possible the creation of industries in a hundred cities, may become impossible.

These changed economic conditions therefore have meant that free alienability of land has become an imperative necessity. In like manner land as such has ceased to be a secure and valuable investment; and property owners desiring to provide for the economic security of their descendants find it advisable to invest their wealth in corporate securities, so that the legal ownership of land is coming very largely to be in the hands of corporations. Such corporate control of all classes and kinds of business based on corporate ownership widely diffused among all classes of our population, has come to be recognized as a phase of the second industrial revolution. That this new conception of ownership may even be extended to agriculture is possible and even probable.

Faced with these economic facts it is believed that the court should, in every possible and legitimate manner, favor the destructability of entailed estates, and that the common law doctrines of merger and tortuous feoffment should therefore be applied in the manner above indicated, and our condemnation statutes so construed as to permit the taking of property interests held by contingent remaindermen not *in esse*.

BEN ELY, JR.[85]

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85. LL.B., University of Missouri, 1922, of the Hannibal, Missouri Bar.