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Partition Where Life Estates and Remainders Are Involved

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PARTITION WHERE LIFE ESTATES AND REMAINDERS ARE INVOLVED

In the University of Missouri Bulletin (Law Series No. 14) Professor Manly Hudson considered the decided cases and very clearly and concisely summarized the law as then declared by the Supreme Court. Professor Hudson expressly states that "the last word" has not been spoken concerning the partition of remainders and it is believed that subsequent decisions require some modifying and supplementing of the conclusions stated by Professor Hudson in his article, and it is now endeavored to group all the cases for citation and discussion under what are deemed the applicable propositions of law.

By statute[1] there can be no partition of lands devised by will contrary to the intent of the testator. Cases have been decided on this ground.[2] They will not be considered here because each situation involving this statute will call for analysis of its own facts and the reaching of proper conclusions therefrom.

We shall not consider cases like *Mastin vs. Ireland*[3], where partition was denied on the ground of adverse possession. It may be noted that *Mastin vs. Ireland* apparently overlooks the fact that partition might have been had subject to the adverse estate, which was merely a life estate.

The rules may be stated and the cases grouped and discussed under the following divisions.

I.

LIFE ESTATE FOLLOWED BY VESTED REMAINDER

-A-

There can, in this situation, be no partition between the life estate and the remainder.[4]

In *Reinders vs. Koppelman*,[5] plaintiff held an estate pur autre vie (over whole property) and an undivided interest in vested remainder in an undivided one-half of the property. Some defendants held undivided interests in vested

1. Mo. Rev. Stat. (1919), sec. 2005.
2. Hill v. Hill, 261 Mo. 55, 168 SW 1165 (1914); Stewart v. Jones, 219 Mo. 614, 118 SW 1 (1909).
3. 8 SW (2d) 901 (1928).
4. Carson v. Hecke, 282 Mo. 580, 222 SW 850 (1920); Gray v. Clement, 286 Mo. 100, 227 SW 111 (1920); Stockwell v. Stockwell, 262 Mo. 671, 172 SW 23 (1914).
5. 68 Mo. 482 (1878).

remainder in said one-half. Other defendants held contingent remainder interests in the other undivided one-half. Partition was sustained but this decision is expressly overruled in *Gibson vs. Gibson.*[6]

A great many titles derived through partition suits based on the doctrine of *Reinders vs. Koppelman* (long followed) have been unsettled by the decision in *Gibson vs. Gibson,* and *Gray vs. Clement.* Apparently the Court did not feel bound to consider the doctrine of *Reinders vs. Koppelman* as a rule of property, and felt no hesitation in announcing what appears to be the correct rule.

–B–

The vested remainder may be partitioned subject to the life estate.[7]

Some comment should be given on several cases involving this situation.

In *Preston vs. Brandt*[8] partition between a number of plaintiffs with vested remainder interests, against defendant with vested remainder interests and a defendant with a life estate over the whole property, was sustained. Nothing was said in the opinion as to the partition being subject to or not affecting the life estate. In *Gibson vs. Gibson*[9], *Preston vs. Brandt* was overruled, without suggesting that partition subject to the life estate would have been proper. In *Preston vs. Brandt* the remainders had originally been contingent, but had become vested when the suit was brought. Overlooking of this fact may account for the total overruling of the case.

In *Dennig vs. Mispagel*[10], partition was refused because contrary to the intent of the testator, but the Court stated in the opinion that a vested remainder after a life estate might be partitioned subject to the life estate.

In *Doerner vs. Doerner,*[11] plaintiffs and several of the defendants had undivided interests in fee in two-thirds of the property and undivided interests in vested remainder in one-third of the property, these remainder interests being subject to a life estate in the undivided one-third. Partition was held to be authorized, and to include the life estate, and a decree for sale was affirmed. Nothing was indicated as to how the interest of the life interest was to be ascertained. So far as the partition of the remainder subject to the life estate is considered, the decision is sound and so far as partition of the life estate subject to the remainder is considered, the decision is also sound.

6. 280 Mo. 519, 219 SW 561 (1920).

7. Dennig v. Mispagel, 260 SW 72 (1924); Carson v. Hecke, supra note 4; Crowley v. Sutton, 209 SW 902 (1919); Flournoy v. Kirkham, 270 Mo. 1, 192 SW 462 (1917); Haye v. McReynolds, 144 Mo. 348, 46 SW 161 (1898); Atkinson v. Brady, 114 Mo. 200, 21 SW 480 (1893).

8. 96 Mo. 552, 10 SW 78 (1888).

9. Supra note 6.

10. Supra note 7.

11. 161 Mo. 399, 61 SW 801 (1901).

As to the inclusion of the life estate in the partition, the decision is expressly based on *Reinders vs. Koppelman*,[12] and it would seem that this part of the decision is in conflict with the later cases and should no longer be considered as authority.

Partition to include the life estate might be authorized under the rule and procedure of *Byars vs. Howe*[13]. Under the reasoning of this case and that of *Rupp vs. Molitor*,[14] it would seem that it would have been proper to have ordered partition and sale, setting aside one-third of the proceeds for the benefit of the life tenant or ordering one-third of the proceeds delivered to the life tenant on her giving bond to deliver the corpus of the one-third at the termination of her life interest.

White vs. Summerville,[15] properly held that plaintiff, owner of an undivided one-third interest for life (dower) was not, in a suit against the other interest (the fee subject to the dower) entitled to have the land sold, the one-third interest for life computed according to the statutory mortality tables and paid to the life tenant, the balance of the proceeds to be distributed to the other interests.

The plaintiff did not ask, and of course the Court did not consider partition to the life interest subject to the remainder (considering the interest of the other parties to be split between a life estate in two-thirds, with vested remainder in the whole.) Under *Rupp vs. Molitor*,[16] such a judgment would have been proper.

The Court indicated that if the plaintiff (life tenant of an undivided one-third) had also owned an interest in the remainder (vested) she might have had partition. Nothing was said about such partition being of the life estate only and subject to the remainder, which, of course, would have been proper.

Invoking the reasoning of *Rupp vs. Molitor*, and an extension of the principle of *Byars vs. Howe*,[17] the Court might be justified in ordering a sale of the property, decreeing that one-third of the proceeds be invested, the income thereon to be paid the doweress, or the one-third of the proceeds be delivered to the doweress on her giving bond to deliver the corpus of the one-third at the termination of her estate, the other two-thirds of the proceeds being presently distributed to the other interest. No case, however, has yet sanctioned such a decree.

In *Dalton vs. Simpson*[18] and *Hammons vs. Hammons*,[19] it is held home-

12. Supra note 5.
13. 311 Mo. 14, 276 SW 43 (1925).
14. 9 SW (2d) 609 (1928).
15. 283 Mo. 268, 223 SW 101 (1920).
16. Supra note 14.
17. Supra note 13.
18. 270 Mo. 287, 193 SW 546 (1917).
19. 300 Mo. 144, 253 SW 1053 (1923).

stead may not be included in partition of real estate, but being set off, the balance may be divided in kind or sold and the proceeds divided. The same holding with reference to widowers dower under the Act of 1921 (Laws 1921 p. 109) is made in *Duncan vs. Duncan.*[20]

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The life estate may be partitioned subject to the remainder.[21]

This is, of course, merely the converse of B and logically follows from the same considerations as support partition of the remainder subject to the life estate.

II.

SEVERAL UNDIVIDED VESTED INTERESTS IN FEE, ONE OR MORE OF WHICH IS SUBJECT TO A LIFE ESTATE

Partition and sale may be had in such case at the suit of an owner of a vested interest not subject to a life estate, but there can be no division of the undivided interest subject to the life estate between the life tenant and the remainderman; such undivided interest is to be the subject of such order of the trial Court as will protect the interests of both life tenant and remainderman, e. g. ordering investment of the proceeds of that undivided interest and the payment of the income to the life tenant and the delivery of the proceeds of such undivided interest to the remainderman at the termination of the life estate; or ordering the delivery of the proceeds of that undivided interest to the life tenant upon the life tenant giving satisfactory security for the delivery of such proceeds to the remainderman at the termination of the life estate. Such is the decision in *Byars vs. Howe.*[22]

This represents an advance by the Court from the very restricted rule of cases like *Gray vs. Clement.*[23] These two cases were decided in different divisions of the Supreme Court, but there is no logical reason why the Judges who decided *Gray vs. Clement* should not concur in *Byars vs. Howe.* The doctrine of *Byars vs. Howe* seems to be thoroughly sound.

In *Philbert vs. Campbell, et al,*[24] it is held, that where there is a life estate followed by remainder in an undivided interest in land, and such undivided interest can fairly be set off by metes and bounds, and the other undivided interest in several persons is not subject to any life estate, that the undivided

20. 23 SW (2d) 91 (1930).

21. Rupp v. Moliter, supra note 14; Carson v. Hecke, supra note 7; Gray v. Clement, supra note 4.

22. Supra note 13.

23. Supra note 4.

24. 296 SW 1001 (1927).

interest subject to the life estate should be set off by metes and bounds and the other undivided interest may be sold and the proceeds distributed among those entitled, according to their undivided interests. This decision is well within the strict letter of our partition statutes.

III.

CONTINGENT INTERESTS

There can be no partition of a contingent remainder.[25]

Sikemeier vs. Galvin,[26] sustaining a partition of a contingent remainder is expressly overruled in *Gibson vs. Gibson*.[27]

Shelton vs. Bragg,[28] also held partition would have been contrary to the intent of the testator. This was the first and major point ruled in the case. The question of partition of contingent remainders was in the case and, of course, it was proper to pass on it.

Acord vs. Beaty[29] holds that where there were four life estates followed by contingent remainders and one life estate followed by vested remainder, a voluntary partition in kind by the life tenants, (fair at the time) was valid and binding on after-born contingent remainderman, such after-born child being bound on the doctrine of representation by the parent. This would seem a proper decision—the remainders in undivided interests in the whole property being lifted therefrom and attached to the separate interests, following partition in kind.

In *Sparks vs. Clay*,[30] there were two undivided fourths owned in fee while as to two other undivided fourths there were life estates with contingent remainders, and the trial Court had ordered a sale, providing that as to the two fourths in which there were life estates with contingent remainders, the two fourths were to be distributed to the life tenants for their use for life and at their respective deaths for the contingent remaindermen. Such decree was on appeal held proper. The controversy was over the decree being binding on a contingent remainderman born after the decree but before order of distribution. The Court held under the partition statute in force when the decree was rendered, the decree was the final judgment and the unborn contingent remainderman was bound, being represented by her mother the life tenant. The case is expressly overruled in *Gibson vs. Gibson*.[31] It would seem that the

25. Shelton v. Bragg, 189 SW 1174 (1916); Stockwell v. Stockwell, supra note 4.
26. 124 Mo. 367, 27 SW 551 (1894).
27. Supra note 6.
28. Supra note 25.
29. 244 Mo. 126, 148 SW 901 (1912).
30. 185 Mo. 393, 84 SW 40 (1904).
31. Supra note 6.

partition between the life estate and contingent remainder was not attempted. Further comment on this case is made in considering *Gibson vs. Gibson.*

Buckner vs. Buckner[32] holds that where a remainder has vested in certain members of a class in being but is subject to open (by way of executory devise) to let in after born children of the ancestor (whose heirs were the class) there may be partition between all those of the class then in being. Two Judges (of Div. 1) concurred in the result and indicated that a sale would transfer the whole title and that such possible contingent interests would be transferred to the proceeds of the sale, and the trial Court should preserve the proceeds in such way as to safeguard such contingent interests.

It might be that the principle of *Byars vs. Howe*,[33] (considered in connection with the concurring opinion in *Buckner vs. Buckner*,[34]) is applicable where contingent remainder interests following life estates are involved and that subject to the limitations of that case partition should be allowed. In view of the express holdings against the partition of contingent remainders, it would not be safe to predict such an application of the decision in *Byars vs. Howe.*[35]

In *Gibson v. Gibson*,[36] a testator devised certain real estate in trust for the use and benefit of a daughter for her life and at her death provided that the trust was to cease and the property to descend and vest in fee simple in the daughter's children then in being, with gifts over in default of issue of the daughter. The daughter sought partition and a termination of the trust.

The Court properly held that partition would be contrary to the intent of the testator and denied the relief sought. It also held that there could be no partition by the life tenant against the contingent remainderman. Discussing some of the cases already discussed in *Hill vs. Hill*,[37] the Court took occasion (in order to clarify the situation) to expressly overrule *Reinders vs. Koppelman*,[38] *Preston vs. Brandt*,[39] *Sikemeier vs. Galvin*,[40] and *Sparks vs. Clay*,[41] in so far as they were in conflict with the holdings in *Hill vs. Hill.* If by "holdings" is meant the decision in *Hill vs. Hill*, this overruling of the cases just mentioned is very unhappily expressed. *Hill vs. Hill* was decided on the point that partition would be contrary to the intent of the testator, there being a statute prohibiting partition in such case. *Hill vs. Hill*[42] involved a suit for partition

32. 210 SW 889 (1919).
33. Supra note 13.
34. Supra note 32.
35. Supra note 13.
36. Supra note 6.
37. Supra note 2.
38. Supra note 5.
39. Supra note 8.
40. Supra note 26.
41. Supra note 30.
42. Supra note 2.

by life tenants and a contingent remainderman against other contingent remaindermen. So far as *Reinders vs. Koppelman*[43] held otherwise, the Court might have overruled the case. But in *Reinders vs. Koppelman*, the holder of the life estate over the whole was also the holder of an undivided interest in an undivided vested remainder in one half of the property. No mention was made of that point. *Reinders vs. Koppelman* did not in any way involve partition contrary to the intent of the testator, and this being the actual decision in *Hill vs. Hill*, it is difficult to see how overruling *Reinders vs. Koppelman* (so far as it conflicts with *Hill vs. Hill*) clarifies the situation.

So far as *Preston vs. Brandt*[44] is concerned, as heretofore pointed out while the remainders involved had originally been contingent, at the time of suit they had become vested and under all the cases partition was fully authorized —subject to the life estate. It is difficult to see how the overruling of this case clarifies any situation. A suggestion that the holding should be sustained only if partition was subject to the life estate would have made for clarity.

Sikemeier vs. Galvin[45] is really to be sustained on the ground that under the will, the life tenant and contingent remaindermen were expressly authorized to alienate the property and their partition suit and sale was nothing more than such an alienation. Such a suggestion in *Gibson vs. Gibson*[46] would have made for clarity, but a mere overruling of the case can hardly be said to accomplish such result.

Sparks vs. Clay[47] did not involve intent of the testator at all. The estates involved were created by deed. Of course *Gibson vs. Gibson* does not mean to overrule *Sparks vs. Clay* so far as it enunciates the doctine of a party being before the Court by representation. And we can see no reason for *Gibson vs Gibson* overruling any part of the decision. The proper comment to have been made was that the case involved a different situation than either *Hill vs. Hill*[48] or *Gibson vs. Gibson.*

In *Sparks vs. Clay*[49] the only question discussed was the doctrine of "representation". It is true that partition was sustained which was had in a case between two vested remainder interests and two life estates followed by contingent remainders. It would seem that this situation in principle is not different from *Buckner vs. Buckner*,[50] for the reason that there is substantially no difference between contingent remainders and vested remainders which open to let in after-born persons to share in the remainder.

43. Supra note 5.
44. Supra note 8.
45. Supra note 26.
46. Supta note 6.
47. Supra note 7.
48. Supra note 2.
49. Supra note 7.
50. Supra note 32.

In Applying the "Rule against Perpetuities" such is the holding of the Courts. *Gibson vs. Gibson* has nothing to say about *Buckner vs. Buckner*, and has not therefore confused the situation with reference to that case.

In *Stockwell vs. Stockwell*,[51] it is expressly indicated that owners of undivided interests may not debar their co-owners (of undivided interests in fee) from partition, by limiting contingent remainders upon their own vested interests. In such cases it may rather be expected that the Court will apply the rule and procedure of *Byars vs. Howe*.[52]

Collins vs. Campbell,[53] involved the following situation:

A testator devised his property subject to his debts and certain advancements to his eight children. As to two children (a daughter and a son) the shares were given to a trustee on active trust. The share of the daughter as to the property involved in the case was an equitable life estate with contingent remainder to her children at her death. The children of the testator (said son and daughter acting by their said trustee) brought suit in partition against the minor children of one of testator's deceased daughters, for partition in accord with the will of the testator. The petition set forth the terms of the will regarding the trust for the daughter. A decree in partition was entered and an order of sale made providing that the proceeds of the sale be paid to testator's executors to be distributed under the orders and judgments of the Probate Court according to the provisions of his will. The land was sold; purchased by one of the children, and the sale confirmed. The proceeds (less cost, etc.) were paid to the executors and by them finally distributed, the share of the daughter, less advancements chargeable against her being paid to her trustee, and the proceeds were used (as permitted by the will) for her support. A son of the daughter whose share was so held in trust, was not a party to the partition suit. This son (grandson of testator) brought suit in ejectment against the purchaser at the partition sale.

The decree in partition was sustained, the Court holding that the grandson (whose interest was a contingent remainder in an undivided one-eighth held in active trust) was not a necessary party, being represented by the trustee who held the legal title.

It is apparent (as Professor Hudson stated thirteen years ago) that as respects partition where contingent interests are involved, the last word has not been written by the Supreme Court. The trend of the recent cases is towards a liberal construction of the partition statutes, and the Court may find some means of sustaining partition where contingent interests are involved. It may, however, not seek to do so since in particular situations a recent statute (presently considered) may be held to have been intended to cover sufficiently this field, or to indicate that the legislature has occupied the field.

51. Supra note 4; 262 Mo. l. c. 688.
52. Supra note 13.
53. 214 Mo. 167, 112 SW 538 (1908).

IV.

COLLATERAL ATTACK

A decree in a partition suit not within statutory authority, is subject to collateral attack.

Gray vs. Clements,[54] clearly holds a decree in a partition suit between a life tenant and vested remaindermen was beyond the jurisdiction of the Court and was subject to collateral attack.

Rupp vs. Molitor[55], holds that where plaintiff was the owner of undivided one-half interest for life, the remainder in such undivided one-half being in her children (defendants) and the other undivided one-half interest was owned in fee by other defendants, the Court had jurisdiction to partition and the judgment was not subject to collateral attack. The Court distinguished *Gray vs. Clement* by saying that there the life estate was over the whole property and the life tenant could not have been co-tenant with any other party. In the case at bar the Court indicated that plaintiff as owner of a life estate in an undivided one-half was co-tenant with defendants other than her children, as to a life estate and hence the Court had jurisdiction to partition the life estate (subject to the remainder although this is not mentioned in the opinion). The Court indicated that the undivided one-half fee interest of defendants other than plaintiffs children included an undivided life estate in one-half, thus making them co-tenants of the whole life estate with plaintiff. Of course the children of plaintiff (on that splitting of interest of the other defendants) were co-tenants of the remainder with the other defendants.

The court recognized that there had been a partition of an undivided one-half interest between plaintiff (life tenant) and her children (remaindermen) which was improper, but remarked that such fact did not render the decree void saying "plaintiff's children were long since of age and were not complaining."

Perhaps the Court had in mind that since those whose interests had been improperly partitioned were not complaining, others, a part of whose interest was subject to partition, could not collaterally attack the judgment. It would seem there would be no reason under the decision in *Gray vs. Clement* (barring some estoppel) why plaintiff's children could not collaterally attack the judgment.

Under some extension of the rule of *Byars vs. Howe*,[56] it would seem that if the Court had protected the proceeds of one-half of the sale, going to plain-

54. Supra note 4.
55. Supra note 14.
56. Supra note 14.

tiff and her children in accord with the suggestion of that case, partition would have been valid as to plaintiff's children. This, of course, extends the decision of the case, but the difference between the two situations would not seem to be one of principle.

The splitting of an undivided interest in fee, involved in *Rupp vs. Molitor*,[57] into an undivided life estate and an undivided vested remainder is novel. It is perhaps the underlying (unstated) logic of the decision in *Byars vs. Howe*.

V.

STATUTES

The old statute authorizing partition is, of course, the subject of construction in the cases we have heretofore considered. In 1925 there was passed an act[58] providing for a proceeding in equity to procure a sale of land, where estates for life, or conditional or contingent estates of uncertain vesture or duration in such land created by deed or will with remainder or reversion absolute, conditional or contingent, are created or provided for to commence or vest in the future. This statute is limited to a particular situation, viz: that the life estate or other estate of immediate enjoyment is burdensome or unprofitable because the payment of taxes and assessments and the cost of maintaining and preserving the lands from waste, injury and deterioration, exceeds the reasonable value of the rents and profits and a greater income may be probably had from the proceeds of a sale invested in bonds of the United States or of the State of Missouri and certain other securities named in the act. An extended consideration of this act is not here attempted.

This act will give rise to several questions that will have to await Judicial determination before the act and decrees procured thereunder may be relied upon as definitely settling the validity of title derived through sale pursuant thereto.

First of these questions is that of whether the act is constitutional. If that question is determined in the affirmative, (and even in considering that question) the further question may arise as to whether the act is intended to apply to such estates, mentioned in the act as were in existence at the time of its passage. If the act should be held as a general proposition to be unconstitutional, then the question might arise as to whether it could be construed as applying only to estates created after the passage of the act; and if so, as to such estates would it be constitutional. Other questions may arise, but what has been indicated is sufficient to indicate that until the act is quite definitely

57. Supra note 14.
58. Laws 1925, p. 138.

and comprehensibly construed, titles derived through the sale provided for, cannot be definitely held to be valid.

In *Duncan vs. Duncan*[59], it is held that the remedy of the statute is available only to the person holding an estate or interest giving right to immediate enjoyment, and is not available to remaindermen.

VI.

CONCLUSION

It may be definitely stated (1) that there can be no partition contrary to the intent of the testator; (2) that there can be no partition between life tenant and remainderman and that such partition decrees are subject to collateral attack, (3) that there may be partition of a vested remainder subject to the life estate; and (4) that there may be partition of a life estate subject to the remainder.

It is probable that the doctrine of *Byars vs. Howe*[60] and *Rupp vs. Molitor*[61] will be maintained and perhaps extended to meet some problems resulting from contingent interests (in common with other vested interests) being involved.

It is hardly to be expected that the Court will sanction any partition where contingent remainders alone are involved.

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59. Supra note 20.
60. Supra note 13.
61. Supra note 14.

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