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Article 6

# Estates in Land - Life Estate Plus Remainder to the Life Tenant and Another

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# RECENT DECISIONS

**Estates In Land—Life Estate Plus Remainder to the Life Tenant and Another**—W held a life estate in certain land plus an undivided one-fourth interest in remainder. D owned the other three-fourths in remainder. W leased the land to L for eleven years but died before the lease expired. D brings a partition action against the devisees of W who now own her undivided one-fourth of the land and against L, the lessee. *Held*: the lease is still valid as to an undivided one-fourth of the land because the conveyance by W conveyed all her interest in the land for the term. Hence, in any partition sale L is entitled to be paid the value of his leasehold out of the proceeds resulting from sale of the one-fourth interest. *Statler v. Watson, 160 Neb. 1, 68 N.W. 604 (1955).*

The unusual nature of W's interests raises some interesting problems. First is the question of whether a valid future interest can be created in a person who also has the particular life estate. The problem arises because, assuming no merger, it appears that the remainder can never vest in possession so far as the life tenant is concerned. According to the Restatement definition[1] a remainder must be "limited in favor of the transferee in such manner that it can become a present interest upon the expiration of all prior interests simultaneously created . . . " Does this mean that the transferee himself (or herself) must have a chance of obtaining possession? This issue was not raised in the principal case. A close analogy appears in the situation where A devises "to B for life, remainder to my heirs" and B turns out to be A's sole heir. Here the courts are split as to whether as a matter of construction, heirs are to be determined at the death of A or at the death of the life tenant, B.[2] Wisconsin follows the view of the Restatement[3] and of Simes[4] by holding that since it is anomalous to have a life tenant also possessed of a remainder it is to be presumed that the testator *intended* the heirs be determined at the death of the life tenant.[5] This avoids bestowing both life estate and remainder upon one person by postponing vesting of the remainder until the death of the life tenant. However, it must be noted that in all these judicial and text discussions the reason alleged for holding that a remainder should not be created in the life tenant is that presumably the testator did not *intend* such an unhappy situation. There is no hint that such

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[1] 2 RESTATEMENT, PROPERTY, §156 (1936). Cf. the definition in WIS. STATS. (1953), §230.11.
[2] Cases collected in note, 30 A.L.R.2d 393, 416 (1953).
[3] RESTATEMENT, PROPERTY, §308, comment k (1940).
[4] 2 SIMES, LAWS OF FUT. INT., 234 (1936).
[5] Will of Latimer, 266 Wis. 158, 63 N.W.2d 65 (1954).

a result is legally impossible. In fact, an equal number of courts favor vesting the remainder in the life tenant.[6]

The fact that in the principal case W owned not only the one-fourth interest in remainder but also a life tenancy in the whole gives rise to the possibility of a merger of the two estates, the lesser life estate being merged in the remainder in fee.[7]

Although the life estate is in the whole while the remainder extends only to an undivided one-fourth, there can be a merger pro tanto.[8] In this way the life estate as respecting the undivided one-fourth in remainder could merge with the remainder and create a fee simple interest in an undivided fourth.[9] W would then hold a life estate in the remaining undivided three-fourths.

If W received both her life estate and remainder in the same will, the transfer would come within a well-settled exception to the doctrine of merger.[10] Another exception arises in the so-called cases of "immediate descent." In these cases the life estate is devised to the same person who receives the reversion under the laws of descent, usually because such reversion or remainder was not disposed of by the will. In these cases it is also held that no merger occurs.[11] The reason for these exceptions seems to be that if merger were to operate in such situations the intention of the testator would be defeated.

However, if instead of receiving both interests in the same transfer W had taken only one from the original transferor and received the other by conveyance, devise, or descent from some third party, there could be a merger. This would occur, for example, if her husband had left W only the life estate and given the one-fourth remainder interest to some third party who in turn transferred it to W. In such cases the courts hold the intent of the testator is not defeated and a merger can take place.[12]

Another problem is the relationship of W and D prior to the death of W. The only unity required for a tenancy in common is that of possession[13] but that is lacking here. This is because while W was alive she as life tenant had sole right to possession of the premises and her daughter, D, had only a future interest by virtue of her remainder.[14] Therefore, the relationship was simply that of one remain-

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[6] Cases collected in note, 30 A.L.R.2d 393, 424 (1954).
[7] 31 C.J.S. §123 (1942).
[8] Craig v. Warner, 5 Mack. 460, 60 Am. Rep. 381 (D.C. 1887).
[9] Bosley v. Burk, 154 Md. 27, 139 Atl. 543 (1927).
[10] Fisher v. Eaton, 299 Ill. 493, 132 N.E. 442 (1921). SIMES, FUTURE INTERESTS (Hornbook series) p. 51 (1951).
[11] Biewer v. Martin, 294 Ill. 488, 128 N.E. 518 (1920).
[12] Bond v. Moore, 236 Ill. 576, 86 N.E. 386 (1908).
[13] 2 TIFFANY, REAL PROPERTY §426 (3rd ed. 1936).
[14] Cline v. Henry, 239 S.W.2d 205 (Tex. Civ. App. 1951).

derman to another, or of "tenants in remainder" as the opinion in this case labels it.[15]

As life tenant, W could give a valid lease for her life. A remainderman can also contract or convey in reference to the remainder,[16] at least when it is vested,[17] as in the principal case. Since W and D were not tenants in common, there was, as the court held, no question of an ouster.

The fact that W and D were not tenants in common might have caused some difficulties had a partition action been started prior to W's death. In the absence of statutes, a cotenant has the power to secure partition only if he is entitled to seisin or possession.[18] Since W and D were not cotenants of this type, neither could have maintained such an action and this is true even though W has in addition to her remainder the right to possession by virtue of her life estate.[19] However, statutes governing partition now exist in every state.[20] Some of them vary the common law rule and allow additional parties to maintain such an action.

The statutes in Nebraska[21] and Wisconsin[22] allow a co-remainderman holding an indefeasible, vested interest to compel partition.[23] Therefore, in Wisconsin and Nebraska either W or D could have brought action to partition the remainder interest.

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**Constitutional Law—Validity of Wis. Stats. (1953) Section 105.13, Regulating Employment Agencies**—The petitioner was denied the right to open and operate an employment agency by an order of the Wisconsin Industrial Commission made pursuant to the authority vested in the commission by WIS. STATS. (1953) Section 105.13 which reads as follows:

> **Refusal to issue and revocation of license.** It shall be the duty of the industrial commission, and it shall have the power, jurisdiction and authority to issue licenses to employment agents, and to refuse to issue such license whenever, after due investigation the commission or a majority of the members thereof finds that the character of the applicant makes him unfit to be an employ-

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[15] 68 N.W.2d at 606.
[16] 31 C.J.S., *Estates,* §88, p. 100 (1942).
[17] Ruggles v. Tyson, 104 Wis. 500, 79 N.W. 766, 81 N.W. 367 (1889). A contingent remainder is also alienable in Wisconsin, WIS. STATS. (1953) §230.35; First Wisconsin Trust Co. v. Taylor, 242 Wis. 127, 7 N.W.2d 707 (1943).
[18] Morse v. Stockman, 65 Wis. 36, 26 N.W. 176 (1885).
[19] Shannon v. Ogletree, 202 Ala. 219, 80 So. 41 (1918).
[20] 2 RESTATEMENT, PROPERTY, ch. 11, topic 1, Intro. Note (1936).
[21] NEB. COMP. STAT. (1929) §20-2170.
[22] WIS. STATS. (1953) §276.01.
[23] 2 RESTATEMENT, PROPERTY, ch. 11, Topic 1, Special Note (1948 Supp.); Greeny v. Greeny, 155 Wis. 621, 145 N.W. 201 (1914).