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KENTUCKY—ACCELERATION OF CONTINGENT REMAINDERS UPON THE WIDOW'S RENUNCIATION

The main object in the interpretation of a will is to ascertain and to give effect to the testator's intention. However, even if the will itself is quite clear in its terms, the ascertainment of this intention becomes difficult when the testator is survived by a widow who renounces her share under the will and elects to take the dower share provided for her by statute. The difficulty arises for the reason that the testator probably did not even consider the possibility of her renunciation, moreover, the testator's plan for the distribution of his property cannot be completely carried out where the interest that the widow takes as her dower share is either greater, or of a longer duration, than that which she would have received under the will. In order to dispose of the estate in the manner most consonant with what the testator did expressly provide and to establish order and certainty in this field of the law, certain principles or rules of construction have become accepted which "represent judicially crystallized conclusions as to what a conveyor [or testator] normally would have intended if he had actually considered the possibility of the partial ineffectiveness of his expressed complete plan."

The less discussed problem of the effect of the renunciation itself, rather than the effect that the derogating claim of the wife may have upon the distribution of the balance of the estate, has received attention in a recent Kentucky case, Farmers Bank & Capital Trust Co. v. Morgan. It is the purpose of this note to examine this decision after reviewing the cases leading up to it in this jurisdiction.

Determining the effect of a widow's renunciation in cases where the will creates future interests is basically a question of deciding whether those future interests accelerate so as to give the other devisees or legatees a right to immediate possession. Solution of the acceleration problem is essentially a matter of interpretation and here also the judicial technique is to use and rely on rules of construction. Wherever a widow's life interest, as provided in her deceased husband's will, is to be succeeded by another interest and the widow renounces, the question arises whether the testator intended the remainder to take effect in possession only upon the death of the widow, or whether he intended the remainder to take effect in possession upon the happening of any event which would terminate the widow's prior interest. For example, if A leaves his entire estate to his wife for life, remainder to B in fee, and the widow renounces, what is to be done with the balance of the estate? Since the widow cannot take because she has effectively renounced any interest except her dower portion, three possibilities remain open. If it is held that there is an intestacy as to that portion of the property which was renounced, the heirs of A will receive an

1 KY. R. S. 392.020, 392.080 (1948).
2 Restatement, Property 930 (1936). Where the satisfaction of the derogating claim of the wife causes "substantial distortion among the other testamentary dispositions, so much of the renounced interest as does not pass as part of such intestate share is sequestered for judicial distribution among the other testamentary distributees." 2 id. sec. 251. The main rules of will construction are set forth in Atkinson, Wills sec. 266 (1937).
estate for the life of the widow, the remainder to B.\(^4\) If it is held that B is entitled to the property, but that his interest is to take effect in possession only upon the death of the widow, the property will be sequestered for her life and B's interest will not become possessory until her death.\(^5\) However, if it is held that the widow's renunciation terminated her life estate, just as her death would have, B will be put into possession of the property immediately.\(^6\) If the latter course is followed, it is said that B's remainder is *accelerated*. In short, if the provisions of the will were that the estate was to go to the wife for life, "at her death to B," the words "at her death" are interpreted as "at her death or other termination of the life estate." Stated more formally:

"acceleration refers to a hastening of the owner of the future interest toward a status of present possession or enjoyment by reason of the failure of the preceding interest. The preceding estate, frequently a life estate, has not terminated, as might normally be expected, by the death of the life tenant or the happening of the event on which it was expressly limited. Something else has occurred which the law says ends the present estate; but the testator or grantor did not expressly provide for this situation."\(^7\)

The Kentucky Court's theory of acceleration is explained in *Trustees Church Home v. Morris*\(^8\) where the will provided that the whole of the net income of the estate was to go to the widow for life, the estate itself to be distributed to various legatees at her death. The court held that the remainders were accelerated upon the widow's renunciation, saying, "The only reason we conceive for the testator's postponement of the distribution until the death of his widow was that she might be provided for, and when the reason for postponement ceased, as it did upon her renunciation, we cannot see why those who were the chief objects of the testator's bounty should be delayed in the enjoyment of their legacy."\(^9\) It was also pointed out that although the legatees would receive less because of the immediate distribution, they would also have the benefit of having the estate distributed sooner.

In *Farmers Bank & Capital Trust Co. v. Morgan*,\(^10\) however, the theory is stated in a slightly different manner: "Nothing in the will indicates he [the testator] wished his estate held up indefinitely, without benefit to anybody, for the purpose of ascertaining who would be in existence when the widow actually died."\(^11\) To summarize the reasoning of these and similar cases, it may be said that where the widow renounces, remainders will be accelerated where it is impossible to ascertain the actual intention of the testator, both because this is the intent normally to be inferred from this type of will and also because there is a policy of the law favoring the early vesting and the early indefeasibility of titles.

However, since acceleration is a rule of inferred intention, it will not be

\(^4\) Augustus v. Seabolt, 60 Ky. (3 Met.) 139 (1860).
\(^5\) Simes, Future Interests sec. 761 (1936); 2 Restatement, Property sec. 234 (1936).
\(^7\) Simes, Future Interests, sec. 751 (1936).
\(^8\) 99 Ky. 317, 36 S.W 2 (1896).
\(^9\) Id. at 321, 36 S.W at 3.
\(^10\) 308 Ky. 748, 215 S.W 2d 842 (1948).
\(^11\) Id. at 750, 215 S.W 2d at 843.
applied where there is an actual contrary intention expressed in the will. To avoid confusion or apparent error, it should also be pointed out that remainders will not be accelerated where the derogating claim of the wife under the dower statute so changes the testator’s attempted plan of disposition that in cannot be substantially carried out. That problem is outside the scope of this note.

There seems to be little question that vested remainders will be accelerated, subject to the exceptions noted above, but the result is not quite so clear where the remainder is contingent. In Augustus v. Seabolt, decided in 1860, a situation analogous to renunciation is found, and the court took this occasion to make the unequivocal statement that contingent remainders could not be accelerated. In this case the testator had limited his wife’s estate in the following language:

“I give and bequeath the real estate and slaves herein devised to my beloved wife during her natural life, after her death to be equally divided among the lawfully begotten children of my brothers or such of them as may be living at the time of her death, or the said slaves and real estate to be sold and the proceeds to be equally divided among the children as aforesaid.”

However, the will further provided that if the wife remarried she was to keep only a part of the farm, no provision being made for the disposition of the other portion. Upon the widow’s remarriage two of the testator’s brothers claimed an interest in this undisposed portion as the heirs-at-law, while the children claimed that their remainder interest had been accelerated by the widow’s remarriage and asked for an immediate distribution of this portion of the estate. The court in denying acceleration because the interest of the remaindersmen was contingent held that there was an intestacy as to this portion of the estate and that the heirs-at-law were entitled to it until the death of the widow, when it would be distributed to the remaindersmen. The court said:

“Estates are contingent which are limited to take effect upon the happening of an uncertain and doubtful event, or when the persons to whom they are limited, are not ascertained or yet in being. Here the estate in remainder is limited to take effect upon the happening of a certain event—that is, the death of the widow; but it is limited to such of the children, of the brothers designated, as shall be living at her death. Whether any of such class will then be alive, or if so, how many is of course uncertain, and cannot be known until the event occurs.”

Although this case would seem to stand quite clearly for the proposition that contingent remainders cannot be accelerated, its effect has been modified by O’Rear v. Bogie, decided in 1914, where the will directed that the testator’s property should go to his wife for life, remainder to her brother for life, and

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12 O’Rear v. Bogie, 157 Ky. 666, 669, 163 S.W 1107, 1109 (1914).
13 Supra note 5.
15 60 Ky. (3 Met.) 139 (1860).
16 Id. at 141.
17 Id. at 145.
18 157 Ky. 666, 163 S.W. 1107 (1914).
upon the death of both to the then living descendants of testator's brothers and sisters. Compare this language of the material portion of the will with that of the preceding case:

"Upon the death of both my said brother and my wife, or in the event they both should be dead at my death, I give, bequeath and devise the remainder of my property hereon given them and not otherwise disposed of by this will, to my kindred as follows: To the descendants that are then living of my brothers and sisters as if I had died intestate.

"All my brothers and sisters (save ) being now dead, the said property is directed to go to the children then living of my said brothers and sisters, and to the then living descendants of such of them as are dead." (Italics writer's).

Her brother having predeceased her, the widow renounced and the court held that the remainders were accelerated and that the descendants described in the will living at the time of the renunciation took the property immediately. The court said that in Augustus v. Seabolt there was an actual intention expressed in the will that the property was not to be distributed until the death of the widow. Reiterating the old maxim that the testator's intention is controlling, the court was able to find an intention that the remainders should be accelerated in O'Rear v. Bogie, and the question whether a contingent remainder could be accelerated in the absence of any indication of intention was deliberately sidestepped. The court pointed out:

"While there are not a few cases holding that the renunciation of a will by the widow will not precipitate a contingent remainder, they recognize the rule that this will not be so held where to do so will defeat the testator's intention apparent on the whole will, and we are of the opinion that this case falls within the exception."20

While it would be possible to reconcile these two cases if merely the language of the opinions were taken into consideration, yet when the wills themselves are examined the distinguishing difference as to intention which the court was able to say it had found in O'Rear v. Bogie is not quite so obvious. Since the language in neither will was unusual, since both involved contingent remainders, and since neither will really shows any actual intention either to accelerate or not to accelerate, the cases are probably contra. Taking this into consideration, the conclusion to be derived from the later case would seem to be that contingent remainders will be accelerated where no contrary intention is found, the court supplying a type of inferred intention in such a case.

In two later cases vested remainders were accelerated21 and rather general statements on the subject were made but in another it would seem that a contingent remainder was accelerated.22 However, the latter case did not involve renunciation, and the issue of contingent remainders was not raised. In

19 Id. at 667, 163 S.W. at 1108.
20 Id. at 670, 163 S.W at 1109.
21 Ruh's Ex'rs. v. Ruh, 270 Ky. 792, 110 S.W 2d 1097 (1937); Breckinridge v. Breckinridge's Ex'trs., 264 Ky. 82, 94 S.W 2d 283 (1936).
22 Brooks v. Stuart, 238 Ky. 235, 37 S.W. 2d 56 (1931)
Baldwin's Coexrs. v. Curry (1938)\(^a\) the facts squarely presented the question and what were in fact contingent remainders in a trust fund were accelerated. However, the authority of this case would not seem to be definitely controlling since the general proposition that remainders accelerate upon renunciation was conceded by counsel and the contingent nature of the interests was not discussed.

The latest case in point, mentioned at the beginning of this note, is Farmers Bank & Capital Trust Co. v. Morgan (1948).\(^b\) The testator bequeathed his property to the trustee for the use and benefit of his wife for life, then:

>"At the death of my said wife the said trust shall cease, and the whole of my estate shall then go in fee simple in equal parts to my two sons. If at the time of the death of my said wife either of my two sons shall be dead without leaving descendants, the whole of my estate shall go to the surviving son; but if at such time either of said sons shall be dead, leaving descendants, such descendants shall take the share which would otherwise go to such son if he were living, per stirpes and not per capita."

The widow renounced the will, and the two sons contended that their remainder interests were thereby accelerated and that they were entitled to the estate immediately. The trustee and the infant daughter of one of the sons maintained that the two sons had been bequeathed only contingent remainders, and that the parties entitled to the estate could not be determined until the death of the widow. It was held that the estate should immediately be distributed to the two sons, the court characterizing their interests as "vested remainders subject to defeasance."\(^c\) This decision was rationalized in the following interesting language:

>"The intention of the testator manifested in the will is, of course, controlling. Two principle objectives are shown by this instrument: (1) the testator's widow was to have the use and benefit of this estate during her lifetime, and (2) when her interest had been satisfied, the two sons were to receive the estate 'in fee simple.' A third possibility was also in the mind of the testator: that is, if either or both of the sons did not survive the widow, the survivor or descendants of a deceased son or sons, if any, were to take their shares.

>"It is argued for the appellants that the testator, having fixed a time for the termination of the trust, made the objects of his bounty those persons who would then be in existence. We do not think the will may be construed as indicating the testator had any such thought in mind. Clearly he was more interested in his sons who he specifically named than he was in their possible descendants about whom he might never know."\(^d\)

This rationalization is interesting for several reasons. First, it shows that the court realized quite clearly that it was accelerating what is normally termed a contingent interest. Second, from this case the proposition may be derived that this type of remainder will be accelerated unless an actual contrary intention is

\(^a\)272 Ky. 827, 115 S.W 2d 333 (1938).
\(^b\)308 Ky. 748, 215 S.W. 2d 842 (1948).
\(^c\)Id. at 749, 215 S.W. 2d at 842.
\(^d\)Ibid.
found in the will. Finally, the use of the term "vested remainders subject to defeasance" shows an unwillingness to hold that a contingent remainder can be accelerated.

While the court admitted that the characterization of the estate did not solve the problem and decided the case just as it would have if the issue of contingent remainders had not been raised, yet it does not seem accurate to term the interest of the remaindermen vested subject to defeasance, even though such terminology has been used by the leading legal writers on this subject. According to accepted legal definition a vested interest is one which is "deprived of the right of immediate possession by the existence of another estate created by the same instrument." Also, it is elementary that the will is to be read and interpreted as of the death of the testator. If the will in Farmers Bank & Capital Trust Co. v. Morgan is interpreted in the light of these two principles, it will be seen that the interests of the remaindersmen were actually contingent. At the time of the death of the testator and before the renunciation of the widow, they were deprived of the right of possession by more than the life estate of the widow. The possibility that their estate might become possessory was dependent upon their survival of the preceding life estate. Since such survival was a condition precedent to their enjoyment of the remainder, it is apparent that according to ordinary legal terminology their remainders were contingent. However, since the question whether the remainder is contingent or vested subject to defeasance is one of intention, to the extent that there is an intent to accelerate ascertainable from the will the remainder is vested. Because the interpretation of testamentary language is rarely free from doubt it is difficult to say absolutely in any particular case whether or not the remainder is contingent or vested subject to defeasance. Hence, it would seem unwise to call such terminology improper in these cases were it not that the results of these cases are so uniform—regardless of terminology.

Upon analysis it seems that what really takes place is that those using this terminology treat what are in terms contingent remainders as if they were vested subject to defeasance because of the policy of the law favoring the early vesting and the early indefeasibility of titles and because of the belief that such is the intention normally to be inferred from the testator's use of certain words. Then by reasoning that the question of whether a remainder is vested is a matter of intention and since an "intention" to treat the remainder as if it were vested has been found, the conclusion is reached that the remainder was really "vested subject to defeasance." When reduced to its simplest form, the hidden and unproved assumption in this line of argument is that as vested remainders are accelerated, all remainders which are accelerated must be vested. Obviously this is a non sequitur.

In consequence there are now three types of remainders to consider in solving renunciation problems—vested, contingent, and those "vested subject to defeasance," the latter being disguised contingent remainders which the courts will accelerate. Now it is true that once this special use of these terms is understood, no harm is done; but it would seem that since little is accomplished by such use and since this use does not correspond to the ordinary and accepted

2 Restatement, Property sec. 231, comments h, i, sec. 233, comment b (1936).
1 Tiffany, Real Property sec. 135 (2d ed. 1920).
29 Ky. R. S. 394.390; McElroy v. Trigg, 296 Ky. 543, 177 S.W. 2d 867 (1941).
use of the same terms, and thereby causes confusion, it should be abandoned. Multiplication of terminology should not be substituted for plain talk.

To briefly recapitulate the results of the three cases in which the question of acceleration of contingent remainders was both raised and discussed, Augustus v. Seabolt held that contingent remainders could not be accelerated. It was later said in another case, however, that there was an actual contrary intention expressed in the will involved in the Seabolt case. In O'Rear v. Bogie it was intimated that contingent remainders might be accelerated, but the court said that it based its decision on an actual intention. In Farmers Bank & Capital Trust Co. v. Morgan a contingent remainder was characterized as a vested remainder subject to defeasance and an intention to accelerate was found. In other words, the question has yet to be answered squarely in plain terms.

Taking this body of opinion as a whole, however, the following would seem to be a fair statement of the law in this jurisdiction. First, an actual expressed intention, either to accelerate or not to accelerate, is controlling. Second, in the absence of a contrary intention contingent remainders will be accelerated, either by finding an inferred intention or by characterizing the remainder as vested subject to defeasance. Third, the use of words such as "at her death" or "then living," by themselves, will not be held to indicate an intention not to accelerate. In brief, the rules governing the acceleration of contingent remainders are exactly the same as those applicable to the acceleration of vested remainders! The intention upon which the decisions rest certainly is not an actual intention, but the intention normally to be inferred from the use of certain words in a particular way. This comes close to making these principles substantive rules of law, rather than rules of construction.

It is submitted that for the sake of clarity and order in this field of the law, and in order to state the law as it has actually been applied, the court at its earliest opportunity should state clearly that the rules governing the acceleration of both contingent and vested remainders are the same.

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