Michigan Law Review

Volume 38 | Issue 3

1940

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DEEDS — CONSTRUCTION — EXECUTORY INTERESTS — DESTRUCTIBILITY RULE — In 1883, the grantor conveyed by warranty deed to *A* for life, remainder to the heirs of *B*. *A* died in 1931; *B* died in 1935, leaving two

children and one grandchild as his heirs-at-law. Claiming an undivided one-third through the grandchild, plaintiff started partition proceedings against *B's* children. *Held*, that the intent of the grantor must control, and he did not intend to create a contingent remainder in the heirs of *B*. The deed was a bargain and sale, adapted to a conveyance to uses. On the death of the life tenant, the fee was in the grantor or his heirs, subject to a springing use in favor of *B's* heirs, which the statute of uses executed on *B's* death.[1] *Bass River Savings Bank v. Nickerson*, (Mass. 1939) 21 N. E. (2d) 717.

A limitation to *A* for life, remainder to the heirs of *B*, then living, was probably the first type of contingent remainder to be recognized at common law. About the middle of the fifteenth century, it became settled that such a limitation was valid, if the heirs were determined before the preceding estate ended.[2] This reservation of the dubious justices was developed by later courts into the doctrine of destructibility of contingent remainders; that is, that contingent remainders must vest before the termination of the particular estate, otherwise they must fail. However valid this might have been under the doctrines of feudal law, which allowed no gaps in seisin, the reasons were certainly lost with the appearance of the statute of uses.[3] It was not until the fore part of the seventeenth century that executory interests were held to be indestructible.[4] After this, as a necessary corollary to the destructibility rule, it was laid down as a rule of law that "where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only." [5] No reason was given for such a rule. It might have been the argument of counsel in *Chudleigh's Case*[6] that the intent of the statute of uses was to abolish uses entirely and restore the common law. It might have been a desire to rid estates of contingent interests so that they might be freely alienable. Whatever the reason, the rule was religiously followed. When the House of Lords held that under a limitation to *A* for life, remainder to *A's* son in tail, a posthumous son would take, "all the Judges were much dissatisfied with this judgment of the Lords, nor did they change their opinions thereupon." [7] The first deviation from these time-honored precedents in England was

[1] The Massachusetts statute abolishing the destructibility rule does not apply to interests created before 1916. Mass. Gen. Laws (1932), c. 184, § 3.

[2] YEAR BOOKS, 9 Henry VI, Trin., Pl. 19 (1430); FITZHERBERT, ABRIDGEMENT, "Feffements & faits," Pl. 99 (1577) (H. 32 Hy. VI, 1453). Cf. also KALES, FUTURE INTERESTS, 2d ed., § 96 (1920); 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 3d ed., § 135 (1923).

[3] 27 Henry 8, c. 10 (1536).

[4] Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620); Snow v. Cuttler, 1 Lev. 135, 83 Eng. Rep. 335 (1664).

[5] Purefoy v. Rogers, 2 Wm. Saund. 380 at 388, 85 Eng. Rep. 1181 (1670).

[6] 1 Co. Rep. 120a, 76 Eng. Rep. 270 (1590).

[7] Reeve v. Long, 3 Lev. 408, 83 Eng. Rep. 754 (1694). The House of Lords held that the posthumous son of *A* would take "because it being a will they construed it according to the intent and equity and meaning of the parties, which they said could never be to disinherit the heir of the name and family of the devisor, nor would they do it on such a nicety."

in *In re Lechmere and Lloyd*,[8] where the court construed a devise to *A* for life, with a limitation over to such of *B's* children living as attained the age of twenty-one, either before or after *B's* death, to be an executory devise. Although this case is credited as being the first departure, Ohio seems to have taken the lead about thirty years earlier.[9] In *Simonds v. Simonds*,[10] the Massachusetts court logically extended the decision of *Lechmere & Lloyd*, and construed a limitation to *A* for life, remainder to such of *A's* children as attained twenty-one to be an executory interest. The principal case carries the *Simonds* case to its ultimate conclusion and is a striking demonstration of what a court can do in the way of abolishing the destructibility rule without the aid of a statute, if so moved. Aside from the outmoded rules of feudal tenure, there seems to be no logical reason, since the statute of uses, for distinguishing between contingent remainders and executory interests in the manner in which they take effect. There is strong argument for the position that this doctrine never became a part of the common law of this country. Only that part of the law of England as was appropriate was to be adopted as common law here, and as the doctrines of feudal seisin never existed, there is no reason why this judicial mistake should survive in this country. In all, at least six jurisdictions have by decision rejected the destructibility rule by the use of various devices.[11] About one-half of the states have

[8] 18 Ch. Div. 524 at 529 (1881). *X* devised to *A* for life, remainder to such of *A's* children living "as either before or after her decease" should attain the age of twenty-one. Jessel, M.R., said: "The result is, in my opinion, that the devise in this case could not take effect as a remainder in respect of those children who survived the tenant for life, but had not attained twenty-one at her death, and must, therefore, in order to let in those children, be construed as an executory devise."

[9] Lessee of Thompson v. Hoop, 6 Ohio St. 480 (1856). *A* devised to his widow for life, from and after her death to *B*. The descent and distribution statute required that the widow elect to take under or against the will; she did neither. *B* predeceased the widow. *B's* heirs were held to take. The court avoided the question whether the widow's life estate, and *B's* remainder dependent thereon, failed because of her failure to elect by holding *B's* interest an executory devise (p. 487): "Hence, where the limitations carved out of an estate by will, falling strictly within the denomination of contingent remainders, have been defeated as remainders by the lapse of the preceding estate, they have been construed to be executory devises, and upheld as such, in order to effectuate the intention of the testator." This recognized, and at the same time avoided, the destructibility rule.

[10] 199 Mass. 552, 85 N. E. 860 (1908). Conveyance to *A* for life, "remainder to such children as should attain the age of twenty-one." The court said the addition of "before or after" only expressed what would be ordinarily understood by the language used. The rule of the Purefoy case that a limitation must be construed as a remainder when possible was treated as a rule of construction, not a rule of law; and was said not to apply where it would defeat the intent of the parties.

[11] *Massachusetts*: Simonds v. Simonds, 199 Mass. 552, 85 N. E. 860 (1908); and principal case. *Ohio*: Lessee of Thompson v. Hoop, 6 Ohio St. 480 (1856). *Hawaii*: Godfrey v. Rowland, 16 Haw. 377 (1905); Evans v. Bishop Trust Co., 21 Haw. 74 (1912), expressly rejecting these doctrines as part of its common law. *New Hampshire*: Hayward v. Spaulding, 75 N. H. 92 at 93, 71 A. 219 (1908), holding the personal representative of the life tenant to be a trustee to preserve the contingent remainders. The dicta would entirely abolish it. "It is immaterial whether the doctrine

statutes either entirely abolishing it, or at least denying the power of the life tenant to destroy.[12] No more than five states indicate by their decisions that they still retain the doctrine.[13] In those jurisdictions in which the question has not been passed upon or is not governed by statute, a thorough analysis of the basis for the rule, a consideration for the logic of those cases which have rejected it, the confusion resulting from its adoption, and a reasonable application of the maxim *cessante ratione legis cessat et ipsa lex* should lead to a rejection of the doctrine of destructibility of contingent remainders in its entirety.[14]

of remainders is correctly or incorrectly applied. . . . If it upholds the intent disclosed . . . it is useless; if it does not uphold it, it is equally useless, as it cannot break the will." *Kansas*: By using as a peg a statute to the effect that any estate or interest in land may be conveyed by deed, the Kansas court has held that any estate, present or future, vested or contingent, may be passed or created by deed. Miller v. Miller, 91 Kan. 1, 136 P. 953 (1913); Brown v. Paul, 100 Kan. 319, 164 P. 288 (1917); Purcell v. Baskett, 121 Kan. 678, 249 P. 671 (1926); Kan. Gen. Stat. (1935) § 67-205. For statutes similar to that of Kansas, see PROPERTY RESTATEMENT (Tentative Draft No. 6, 1935), p. 194 (explanatory note to § 282). *South Carolina*: Though not expressly rejected, the results of two cases would seem to indicate a practical abolition. In Folk v. Hughes, 100 S. C. 220, 84 S. E. 713 (1915), *A* conveyed to *B* by warranty deed for his use and benefit for life, to *B's* children after *B's* death, *B* then being childless. While still childless, *B* conveyed to *A* and *A* reconveyed to *B* in an attempt to destroy the interests of after-born children. Holding that no merger took place which would destroy the contingent remainders, the court said *B* held his life estate "partially in trust" for his after-born children, and as a trustee cannot destroy his own trust, the remainders were not affected. In Burkhalter v. Breeden, 162 S. C. 64, 160 S. E. 165 (1931), there was a devise to *A* for life, on an express condition that if *A* attempt to convey it, it was to end *eo instanti*, with a contingent remainder with a double aspect. *A* conveyed to the only living remainderman of the first class. Holding that *A's* life estate was not destroyed and that there was no merger, the court said the effect was to put the title in the remainderman; if he died the title would go to remaindermen of the second class, but always there would be a life estate in someone to support the remainders. *North Carolina*: This state must be classed as doubtful. After a line of cases recognizing the rule, the court preserved contingent remainders in Corl v. Corl, 209 N. C. 7, 182 S. E. 725 (1935). *X* devised to *A* in trust for *B* for life, with contingent remainders with a double aspect in fee. The will provided if the will was contested, the contestant's share should be forfeited and go to *G*. *B* contested. The court held *B's* interest was forfeited and went to *G*, but the contingent remainders were not affected. No reasons were given, and the true meaning of the decision is not clear. The case is discussed by McCall "The Destructibility of Contingent Remainders in North Carolina," 16 N. C. L. REV. 87 (1938) and in 4 DUKE B. A. J. 108 (1936).

[12] Listed in 2 PROPERTY RESTATEMENT 1032 (1936).

[13] Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1930); Love v. Lindstedt, 76 Ore. 66, 147 P. 935 (1915); Ryan v. Monaghan, 99 Tenn. 338 (1897); Jorden v. McClure, 85 Pa. St. 495 (1878) [but compare Stewart v. Neely, 139 Pa. St. 309 (1891), indicating rule would no longer be followed]; Irvine v. Newlin, 63 Miss. 192 (1885), natural termination, statute not denying power of life tenant to destroy.

[14] For an excellent discussion of the history and present status of the rule, see PROPERTY RESTATEMENT (Tentative Draft No. 6, 1935), p. 186 (explanatory note to § 282); 2 PROPERTY RESTATEMENT 505 ff. (1936); 2 ibid., § 240.