Michigan Law Review

Volume 49 | Issue 5

1951

FUTURE INTERESTS-CONTINGENT REMAINDERS-DESTRUCTIBILITY BY MERGER

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FUTURE INTERESTS—CONTINGENT REMAINDERS—DESTRUCTIBILITY BY MERGER—*X* conveyed land to *A* for life, remainder to the heirs of *A*'s body.[1] Thereafter, *X* granted the same land by quit-claim deed to *A* in fee simple, without any conditions or restrictions whatever. The lower court upheld *A*'s claim to an absolute fee in the property. On appeal, *held,* reversed. *A* holds a life estate and the reversion, but the remainder, though contingent, is not defeated. *Whitten v. Whitten,* (Okla. 1950) 219 P. (2d) 228.

From the strict common law rule that a contingent remainder must always be supported by a particular estate of freehold,[2] it followed that destruction or natural termination of the particular estate, before the vesting of the remainders it

[1] Okla. Stat. (1941) Tit. 60, §41, abolishes the rule in Shelley's Case in this situation.
[2] 2 TIFFANY, REAL PROPERTY §326 (1939).

supported, destroyed those remainders.[3] Thus, when the particular estate and the inheritance were united in the same person, the former was destroyed by operation of the doctrine of merger[4] and any contingent remainders dependent on this estate fell with it.[5] A strict application of this rule to the principal case would obviously have defeated the contingent remainder in *A*'s heirs and *A* would have succeeded in his claim.[6] However, this so-called destructibility rule has been the subject of severe criticism from legislatures, courts and writers. Twenty states now have statutes that completely abolish the rule and the statutes of four more and the District of Columbia do not permit destruction of contingent remainders by alienation of the life estate or by merger.[7] The Kansas court avoids the doctrine by means of a statute which permits conveyances of land to be made by deed without any other ceremony whatever;[8] and Indiana reaches the same result by using a statute which allows the creation of freehold estates that are to commence at a future day.[9] The *Restatement of Property* does not recognize the existence of the destructibility rule,[10] and a few states have abrogated the rule without the aid of statutes.[11] On the other hand, the doctrine is still recognized in Florida[12] and Oregon,[13] and though there are no recent cases

[3] 23 R.C.L., Remainders §105; 31 C.J.S., Estates §91.

[4] When a greater and lesser estate coincide and meet in the same person, the lesser is immediately merged into the greater and is annihilated. 2 BL. COMM. §177.

[5] 23 R.C.L., Remainders §108; 31 C.J.S., Estates §93. Since contingent interests were not considered to be estates, their intervention did not prevent the merger. 1 SIMES, FUTURE INTERESTS §102 (1936). Contingent remainders were similarly destroyed when the particular estate was determined by forfeiture, surrender, tortious alienation, or natural termination. 23 R.C.L., Remainders §106.

[6] 7 L.R.A. (n.s.) 433 (1907); 1917A Ann. Cas. 902.

[7] For a list of these statutes, see 2 PROPERTY RESTATEMENT §240 (1948 Supp.). The rule has been abolished in England by 8-9 Vict., c. 106, §8 (1844) and 40-41 Vict., c. 33 (1877).

[8] Miller v. Miller, 91 Kan. 1, 136 P. 953 (1913).

[9] Rouse v. Paidrick, 221 Ind. 517, 49 N.E. (2d) 528 (1943). Okla. Stat. (1941) Tit. 16, §32, is similar to the Indiana statute, but it is not mentioned in the principal case.

[10] "When a remainder is subject to a condition precedent, the termination, before such condition precedent is fulfilled, of all prior interests created simultaneously therewith does not destroy the remainder." 2 PROPERTY RESTATEMENT §240.

[11] McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1905); Hayward v. Spaulding, 75 N.H. 92, 71 A. 219 (1908); Godfrey v. Rowland, 16 Hawaii 377 (1905); Evans v. Bishop Trust Co., 21 Hawaii 74 (1912). Two Missouri cases, though not discussing the destructibility rule, did not allow merger to destroy the contingent remainders. Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922); Lewis v. Lewis, 345 Mo. 816, 136 S.W. (2d) 66 (1940). Corl v. Corl, 209 N.C. 7, 182 S.E. 725 (1935) seems to repudiate the rule in North Carolina.

[12] Blocker v. Blocker, 103 Fla. 285, 137 S. 249 (1931); Tankersley v. Davis, 128 Fla. 507, 175 S. 501 (1937); Lewis v. City of Orlando, 145 Fla. 285, 199 S. 49 (1940); Popp v. Bond, 158 Fla. 185, 28 S. (2d) 259 (1946). The Florida rule is criticized in 15 FLA. B.J. 334 (1941).

[13] Love v. Lindstedt, 76 Ore. 66, 147 P. 935 (1915); Hawkins and Roberts v. Jerman, 147 Ore. 657, 35 P. (2d) 248 (1939). In the latter case, however, though the court expressly recognized the destructibility rule, it did not allow merger to destroy the contingent remainders in a situation where the strict common law would have done so. Possibly the case is authority for the proposition that remainders will fall only when the probability of their vesting is very remote as was the situation in the Love case, though in

involving the question, it appears to be operative in a few other states.[14] The reasons on which the rule is based—the common law requirements of continuity of seisin and livery of seisin in conveyancing[15]—have been obsolete for centuries,[16] and as Justice Holmes said, "It is revolting to have no better reason for a rule of law than that so it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."[17] True, the rule tends to increase the alienability of land, but this is done arbitrarily at the expense of testator's or grantor's intention;[18] and since operation of the principle can be avoided by use of a trust to support the contingent remainder should the particular estate terminate,[19] it places a premium on the skill of the lawyer. In those states where the question has not yet arisen, it could well be said that the destructibility rule never became a part of their common law for the so-called reception statutes purported to adopt only those common law rules that were appropriate to the new world.[20] Thus, although *A*'s contention in the principal case was dismissed rather summarily, it is submitted that the court, in view of modern legislation and legal thought, took a most logical and practical stand in saying that the *only* effect of the quit-claim deed "was to carry to the grantees the reversion theretofore vested in the grantor."[21]

Douglass L. Mann, S. Ed.

view of the court's express recognition of the rule, this is not at all certain. For a thorough discussion of the two cases, see 23 ORE. L. REV. 138 (1944).

[14] Lumsden v. Payne, 120 Tenn. 407, 114 S.W. 483 (1908); In re Gunning's Estate (No. 2), 234 Pa. 144, 83 A. 61 (1912).

[15] 2 TIFFANY, REAL PROPERTY §326 (1939).

[16] 1 SIMES, FUTURE INTERESTS §98 (1936).

[17] Holmes, "The Path of the Law," 10 HARV. L. REV. 457 at 469 (1897).

[18] 1 SIMES, FUTURE INTERESTS §98 (1936). But note the situation in the principal case, where it is the grantor himself who now seeks to destroy the remainder, but who is prevented from doing so by the non-application of the destructibility rule.

[19] See 1917A Ann. Cas. 902 at 913 on use of the trust device to support contingent remainders.

[20] 2 PROPERTY RESTATEMENT §240, comment *c*. The Hawaiian court was evidently thinking along these lines. Godfrey v. Rowland, 16 Hawaii 377 (1905). "Complexity, confusion, unpredictability and frustration of manifested intent have been demonstrated to be the consequences," if there is not a complete abolition of the destructibility rule. 2 PROPERTY RESTATEMENT §240, comment *d*.

[21] Principal case at 232. Law review writers are unanimous in their denunciation of the rule. See, for example: Eckhardt, "The Destructibility of Contingent Remainders in Missouri," 6 Mo. L. REV. 268 (1941); Foster, "Does the Doctrine of Destructibility of Contingent Remainders Exist in Nebraska?" 6 NEB. L. BUL. 390 (1928); McCall, "The Destructibility of Contingent Remainders in North Carolina," 16 N.C. L. REV. 87 (1937), where the writer suggests at page 118 "that North Carolina, by statutory enactment, visit a merciful death upon the doctrine of Destructibility and forever put an end to its crippled and confused wanderings through our real property law."