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Nancy J. Ringland S. Ed.
University of Michigan Law School

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**FUTURE INTERESTS—POWER OF REMAINDERMAN TO COMPEL PARTITION OF
FUTURE INTERESTS—**A remainderman in fee of an undivided interest in real
estate brought a suit to compel partition of the remainder. The whole of the

premises was subject to a life estate, but the life tenant made no objection to this action. The applicable Nebraska statute provided that "all tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed."¹ Demurrers to the petition were sustained on the ground that an estate in remainder could not be the subject of involuntary or compulsory partition. On appeal, *held*, reversed, three judges dissenting. The statute was construed as changing the common law to permit such a suit for partition among the remaindermen prior to the death of the life tenant. *Baskins v. Krepcik*, (Neb. 1950) 43 N.W. (2d) 624.

At common law a suit for partition could not be maintained by one whose undivided interest was in remainder only.² However, statutes can and have changed this common law rule.³ The question in this case is whether the Nebraska statute⁴ did change this rule and, if so, to what extent. There have been no previous cases in Nebraska directly on this point. It is clear that a claimant whose future interests are contingent can never effect a partition.⁵ In two earlier cases the court held that a remainderman could not force partition of the whole estate on the life tenant, since a life tenant and a remainderman were not joint tenants or tenants in common under the terms of the statute.⁶ Although the petitioner-remainderman in these cases held in co-tenancy with others, the court did not consider the question of an action between them for partition of the remainder alone,⁷ or the question of an action between them for partition where the life tenant did not object. Dicta in several cases, such as "it is the general rule that the present right of possession is a prerequisite to the right to maintain partition,"⁸ indicate that the court thought a possessory interest was necessary to maintain such an action. And there have been indications that the courts of that state thought the Nebraska statute differed from those which permitted such an action by remaindermen.⁹ On the other hand, there have been contrary statements which indicate that the court thought the statutes similar.¹⁰ It is difficult to determine what the legislature intended to be accomplished by this statute. The dissenting opinion argues that it was never the legislative intent to permit actions

¹ Neb. Rev. Stat. (1943) §25-2170.

² 3 SIMES, FUTURE INTERESTS §657 (1936); *Shillinglaw v. Peterson*, 184 Iowa 276, 167 N.W. 709 (1918); *Sullivan v. Sullivan*, 66 N.Y. 37 (1876).

³ 2 PROPERTY RESTATEMENT, c. 11, Topic 1 (1936). See also 28 L.R.A. (n.s.) 125 (1910) for annotation of common law rule and statutory exceptions.

⁴ Neb. Rev. Stat. (1943) §25-2170.

⁵ *Wicker v. Moore*, 79 Neb. 755, 113 N.W. 148 (1907).

⁶ *Weddingfeld v. Weddingfeld*, 109 Neb. 729, 192 N.W. 227 (1923); *Bartels v. Seefus*, 132 Neb. 841, 273 N.W. 485 (1937).

⁷ Under the Illinois statute, Ill. Rev. Stat. (1949) c. 106, §1, which the majority relies on as similar to the Nebraska statute, such a proceeding is permitted over the objections of the life tenant where the life estate is left intact. *Scoville v. Hilliard*, 48 Ill. 453 (1868) and *Hilliard v. Scoville*, 52 Ill. 449 (1869).

⁸ *Mathews v. Glockel*, 82 Neb. 207, 210, 117 N.W. 404 (1908). See also *Nitz v. Widman*, 106 Neb. 736, 184 N.W. 172 (1921); *Weddingfeld v. Weddingfeld*, supra note 6; *Oliver v. Lansing*, 50 Neb. 828, 70 N.W. 369 (1897).

⁹ *Wicker v. Moore*, supra note 5.

¹⁰ *Oliver v. Lansing*, supra note 8.

for partition among remaindermen. It points out that possession, or a right to possession, is inherent in the meaning of the terms "joint tenants" or "tenants in common."¹¹ The authorities cited by the dissent, to sustain its position that possession is an essential element in joint tenancies or tenancies in common, seem to refer to simultaneous possession by both owners at any time, rather than necessarily present possession by these owners.¹² The dissent also attempts to show that the present statute was enacted merely to comply with the constitutional provisions of the state and that there was no intent to change the substance of the former provisions under which a possessory interest was necessary.¹³ On the other hand, the majority holds that the controlling words are "any estate in land," and that the absence of any technical words, such as "hold" or "held," shows an intent to change the common law rule.¹⁴ The *Restatement of the Law of Property* suggests that the Nebraska statute is similar to those which permit "any joint tenants or tenants in common in an unconditional and indefeasible future interest to compel partition of the future interest thus held in co-ownership. . . ."¹⁵ A similarity to some of these other statutes can be observed,¹⁶ but some of the statutes construed as permitting such an action are quite different from that of Nebraska.¹⁷ Although the original purpose of partition statutes was to avoid the inconvenience and dissent arising from the co-occupancy of land,¹⁸ and such reason has no application to those holding only future interests, the result of a partition of future interests, an increase in the alienability of the land, is so desirable that the construction placed on the Nebraska statute is to be considered sound, despite the fact that courts have recognized possible hardships on the holders of the future interests.¹⁹

Nancy J. Ringland, S. Ed.

¹¹ Principal case at 632. However, it cannot be denied that a future interest may be held in co-ownership. FREEMAN, *COTENANCY AND PARTITION*, 2d ed., §16 (1886).

¹² 62 C.J., *Tenancy in Common*, §5 (1933); 48 C.J.S., "Joint Tenancies," §1 (1947); *Anson v. Murphy*, 149 Neb. 716, 32 N.W. (2d) 271 (1948).

¹³ Principal case at 632-634.

¹⁴ *Id.* at 627.

¹⁵ 2 *PROPERTY RESTATEMENT*, c. 11, Topic I, at 656 (1936).

¹⁶ Ill. Rev. Stat. (1949) c. 106, §1; Minn. Stat. Ann. (1947) §558.01.

¹⁷ Ariz. Code Ann. (1939) §27-1301; N.M. Stat. Ann. (1941) §25-1201.

¹⁸ 3 *SIMES, FUTURE INTERESTS* §657 (1936); FREEMAN, *COTENANCY AND PARTITION*, 2d ed., §439-40 (1886).

¹⁹ *Sullivan v. Sullivan*, supra note 2; Principal case at 624.