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FUTURE INTERESTS-PARTIES-UNBORN PERSONS-VIRTUAL REPRESENTATION

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FUTURE INTERESTS—PARTIES—UNBORN PERSONS—VIRTUAL REPRESENTATION—Testator devised land to his six children for life with provision for a division into six equal parcels, and with remainder over to each life tenant's surviving issue. Subsequently, four of the life tenants brought an action against the other two life tenants and the three children of the life tenant then living, and obtained a decree ordering a sale of the land, and requiring each life tenant to file a bond conditioned that he safely keep such portion of his share of the proceeds as would be necessary to protect the interests of any after-born child. The vendee gave no consideration, and immediately reconveyed a separate parcel of land to each of the six life tenants in fee simple. Plaintiff's father, one of the life tenants, had no children at this time and later sold his parcel to defendant at a fair price. Several years later plaintiff was born, and she brought this action to vacate the partition decree on the ground that the court had had no jurisdiction over her interests as an unborn contingent remainderman, and for a declaration of her interest in the land held by defendant. *Held*, the partition decree is conclusive under the doctrine of virtual representation, plaintiff being represented there by the three contingent remaindermen made parties. *Garside v. Garside*, (Cal. App. 1947) 181 P. (2d) 665.

The doctrine of virtual representation rests on the principle that the party joined to represent unborn persons has a common interest with these unborn persons in defending, and can be depended on to bring forward the merits of the controversy as a protection to his own interest, whether contingent or vested subject to open, as would the unborn persons were they present. The tests of effective representation are, in general, "*privity of estate*" and "*community of interest*" between the living representative and the unborn person.[1] It is clear that the court rendering the partition decree involved in the principal case obtained jurisdiction over the subject matter under a statute.[2] The reasoning in regard to the jurisdiction over plaintiff, is, however, subject to question. Where the partition proceeding is one merely for the sale of the property and division of proceeds equally among the life tenants who are required to give a bond for the protection of contingent remaindermen, it would seem clear that any of the life tenants' children then alive and made parties could represent unborn issue of all the life tenants. This is true because they are all members of the same class, or similarly situated classes, and are not adverse in any real sense, because each share presently held by a life tenant is in money and of necessity exactly equal to every other share. Their interests are alike in that they are all interested in seeing that their contingent rights are protected either by a bond filed by each life tenant or by a setting aside of a part of the proceeds to be invested and secured until their respective interests shall vest. But where a proceeding is had to partition land by metes and bounds one owner of a future interest could never represent another owner who seeks another

[1] See 8 L.R.A. (N.S.) 56 (1907); 120 A.L.R. 876 (1939); 3 SIMES, FUTURE INTERESTS, § 672 (1936); PROPERTY RESTATEMENT, § 183 (1936).

[2] Cal. Code of Civ. Proc. (Gesford, 1909) §§ 752, 781 then provided in substance that courts could direct sales of property in which there were contingent future rights provided that the proportional value of such contingent rights be taken from the proceeds of the sale and secured so as to protect the rights of such contingent remaindermen.

share of the land because they would necessarily be adverse to each other.[3] In the principal case the lower court had granted a partition and sale of the land with full knowledge of the facts, which were that the vendee was not intending to pay any consideration but, on the contrary, was going to reconvey a one-sixth interest in fee to each life tenant. As a result the proceeding was in actuality nothing more than a partition by metes and bounds. Therefore, it would seem that the court employed fallacious reasoning in holding that the living contingent remaindermen represented the unborn issue of other life tenants. Still, the holding that there was a virtual representation can be supported on another ground. According to the weight of authority, unborn contingent remaindermen may be represented, in case there are no living members of the class, by the persons who hold estates which precede or follow theirs, provided some one or more of such persons would be adversely affected by the decree equally with the class not in being and would therefore have the same interests and be equally certain to present to the court the merits of the question on which the decree is sought.[4] Under this theory the plaintiff's father could be said to have represented plaintiff's interests in the partition proceedings because his self interest would have compelled him to have sought a parcel of land at least equal in value to that of each of the other life tenants, and any distribution adverse to him would obviously be equally adverse to any of his after-born children.

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[3] See 3 SIMES, FUTURE INTEREST, § 680, p. 103 (1936) wherein the author states: "But suppose land has been devised in three undivided shares to *A*, *B*, and *C* for the respective lives of each, with remainder, as to each share, to the children of the life tenant. If a partition into three parts is sought, one child of *A* might under some circumstances represent another child of *A*. . . . But children of *A* could not represent children of *B*, at least if the partition were to be by metes and bounds."

[4] Montgomery v. Equitable Life Assur. Soc., (C.C.A. 7th, 1936) 83 F. (2d) 758; Elmore v. Galligher, 205 Ala. 230, 87 S. 349 (1921); Gavin v. Curtin, 171 Ill. 640, 49 N.E. 523 (1898); Robinson v. Barrett, 142 Kan. 68, 45 P. (2d) 587 (1935); Reinders v. Koppelmann, 68 Mo. 482 (1878); Dunham v. Doremus, 55 N.J. Eq. 511, 37 A. 62 (1897); Cheesman v. Thorne, 1 Edw. Ch. (N.Y.) 629, (1833); Ridley C. Halliday, 106 Tenn. 607, 61 S.W. 1025 (1901); Cotton v. Bank of Cal., 145 Wash. 503, 261 P. 104 (1927); Gaskell v. Gaskell, 6 Sim. 643, 58 Eng. Rep. 735 (1836). See also 120 A.L.R. 876 at 880 (1939). *Contra:* Mennig v. Graves, 211 Iowa 758, 234 N.W. 189 (1931); but see Iowa Code (1931) § 12351-d1.