



University of Arkansas at Little Rock Law Review

Volume 6 | Issue 2

Article 9

1983

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Recommended Citation

William A. Waddell Jr., *Property—Court of Equity Has the Power to Order a Sale for Reinvestment Even though No Member of the Class Having a Contingent Future Interest Is Yet in Existence*, 6 U. ARK. LITTLE ROCK L. REV. 357 (1983).

Available at: <https://lawrepository.ualr.edu/lawreview/vol6/iss2/9>

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PROPERTY—COURT OF EQUITY HAS THE POWER TO ORDER A SALE FOR REINVESTMENT EVEN THOUGH NO MEMBER OF THE CLASS HAVING A CONTINGENT FUTURE INTEREST IS YET IN EXISTENCE. *Ball v. Curtis*, 276 Ark. 498, 637 S.W.2d 571 (1982).

Sheila Ball Curtis, Orbin Joe Ball and Mary Ann Ball Franklin each received separate tracts of land under the will of their father, Orbin Ball, who died in 1968. The will granted the property to each for life, with a remainder to his or her bodily heirs.¹

Sheila Ball Curtis and her husband brought suit in the Woodruff County Chancery Court seeking a sale of the land and reinvestment of the proceeds. Orbin Joe Ball, Mary Ann Ball Franklin and the two minor children of Mrs. Franklin were named as defendants to the suit. Sheila and her husband presented evidence indicating that the property was not productive and that they had negotiated a favorable price for the sale of the land.² Sheila acknowledged that it was possible for her to have bodily heirs in the future and that the proceeds of a sale for reinvestment would be placed in a trust to protect the interests of any potential contingent remaindermen.³

The Woodruff County Chancery Court approved the sale. On appeal, the Arkansas Supreme Court affirmed the lower court and held that a court of equity may order a sale for reinvestment even though no persons having a contingent interest in the property are *in esse*.⁴ In addition, the court held that the life tenant, Sheila, was a proper representative of her unborn descendants since no other members of the class of contingent remaindermen were in existence. *Ball v. Curtis*, 276 Ark. 498, 637 S.W.2d 571 (1982).

Ball v. Curtis dealt with two distinct issues. The first was whether a court of equity has the power to order a sale for reinvestment of property in which unborn contingent remaindermen have an interest. The second issue decided by the court was whether the life tenant is a proper representative of her bodily heirs not in exist-

1. Abstract and Brief of Appellants at 2, *Ball v. Curtis*, 276 Ark. 498, 637 S.W.2d 571 (1982). The will reads in pertinent part: "I then give and devise this real estate as follows: . . . (b) to Sheila Paulette Ball [now Sheila Ball Curtis], for life only, with the remainder at her death to the heirs of her body begotten, *per stirpes*." [The will made similar provisions for Orbin Joe Ball and Mary Ann Ball Franklin.]

2. Abstract, *supra* note 1, at 4-5.

3. *Id.* at 5.

4. *I.e.*, "in existence."

ence who have a contingent interest in the property. These two issues are sometimes confused,⁵ but at least one leading case and one prominent treatise author have noted the distinction between the two issues.⁶

The Power of a Court of Equity to Order the Sale of Land Encumbered by Future Interests

The doctrine that a court of equity may order the sale of land in which there are future interests is a development of American law.⁷ Courts previously had held that a court of equity could authorize the sale of property in which infants had a present interest,⁸ but the first major case to recognize that a court of equity could order the sale of land affected by future interests was *Bofil v. Fisher*⁹ in 1850. Significantly, the *Bofil* court also recognized that the failure to allow a sale of property encumbered with future interests would render such interests "an intolerable evil to a growing and prosperous community."¹⁰ This same rationale still applies today.¹¹

Other early cases which recognized the judicial power to sell lands affected by contingent future interests also emphasized the hardship suffered by the life tenant when the land was unproductive.¹² *Gavin v. Curtin*,¹³ an early Illinois case, specifically addressed this problem and deserves mention as an illustration of the manner in which courts of equity concluded that a sale of land encumbered by future interests was proper. Curtin was the owner of a life estate in certain property with a contingent remainder in fee to her children. She had no issue and brought an action to have a trustee appointed to sell the property and reinvest the proceeds. She maintained that the property produced little income and that it might be lost due to taxes. The court reasoned that the life tenant

5. See L. SIMES AND A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1945 (2d ed. 1956).

6. *Gavin v. Curtin*, 171 Ill. 640, 49 N.E. 523, (1898); L. SIMES AND A. SMITH, *supra* note 5, at § 1945.

7. *Young v. Rice*, 280 Ala. 581, 196 So. 2d 698 (1967) (citing 51 AM. JUR. 2d *Life Tenants and Remaindermen* § 82 (1970)); L. SIMES AND A. SMITH, *supra* note 5, at § 1941.

8. See *Ex parte Jewett*, 16 Ala. 409 (1849); *Cochran v. Van Surlay*, 20 Wend. 884 (N.Y. Sup. Ct. 1838); *In re Salisbury*, 3 Johns. Ch. 347, 1 N.Y. Ch. Rep. 643 (1818).

9. 3 Rich. Eq. 1, 55 Am. Dec. 627 (S.C. 1850). See L. SIMES AND A. SMITH, *supra* note 5, at § 1943.

10. 3 Rich. Eq. at —, 55 Am. Dec. at 631.

11. See, e.g., Wright, *Medieval Law in the Age of Space: Some "Rules of Property" in Arkansas*, 22 ARK. L. REV. 248, 276 (1968).

12. *Reed v. Alabama & G. Iron Co.*, 107 F. 586 (C.C. N.D. Ga. 1901); *Gavin v. Curtin*, 171 Ill. 640, 49 N.E. 523 (1898).

13. 171 Ill. 640, 49 N.E. 523.

was entitled to enjoy her present life estate and that any children who might be born later were entitled to enjoy the remainder in fee. The Illinois court then characterized the right to enjoy these estates as legal rights which could not be protected if the court did not have the power to render the necessary relief. Observing that a court of equity will usually assume jurisdiction to protect a legal right when there is no remedy at law, the court concluded that it had the power to order the sale of the property.¹⁴ The decisive factors in *Gavin* appeared to be the unproductivity of the land coupled with the deprivation of the rights of those with vested interests to enjoy the use of the property. The unproductivity of the land has continued to be a factor in these cases.¹⁵

In 1936 the American Law Institute recognized the doctrine of judicial sale for reinvestment of land in which persons not *in esse* have an interest.¹⁶ Many courts had already recognized the doctrine,¹⁷ and it has been reaffirmed in subsequent cases.¹⁸ Some states have also enacted statutes which permit the sale of land encumbered with future interests in certain limited situations.¹⁹ For example, the Missouri statute²⁰ seems to concur with *Gavin v. Curtin*²¹ by providing that a court of equity may order the sale of land in which the petitioner has a life estate, on the ground that the enjoyment of the estate is burdened because the cost of taxes and

14. *Id.* at —, 49 N.E. at 526.

15. *See, e.g.*, *Ball v. Curtis*, 276 Ark. 498, 637 S.W.2d 571 (1982); *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972).

16. RESTATEMENT OF PROPERTY § 179 (1936). The RESTATEMENT provides:

When a future interest has been limited to a person not yet in existence or to a person lacking capacity and the persons not lacking capacity and having the rest of the ownership of the thing cooperate to procure a sale of such ownership and a reinvestment of the proceeds derived from such sale, and show that such sale will be beneficial to such person who either is not yet in existence or lacks capacity, then such future interest is subject to a judicial direction that such sale and reinvestment occur.

17. *Elmore v. Galligher*, 205 Ala. 230, 87 So. 349 (1921); *Ethridge v. Pitts*, 152 Ga. 1, 108 S.E. 543 (1921); *Coquillard v. Coquillard*, 62 Ind. App. 489, 113 N.E. 481 (1916); *Johnston v. Johnston*, 276 S.W. 776 (Tex. Civ. App. 1925); *Ruggles v. Tyson*, 104 Wis. 500, 79 N.W. 766, *modified*, 81 N.W. 367 (1899).

18. *Cauffiel v. Cauffiel*, 39 Del. Ch. 190, 161 A.2d 432 (1960); *Dunn v. Sanders*, 243 Ga. 684, 256 S.E.2d 366 (1979); *Beliveau v. Beliveau*, 217 Minn. 235, 14 N.W.2d 360 (1944); *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972); *Lambdin v. Lambdin*, 209 Miss. 672, 48 So. 2d 341 (1950).

19. *See, e.g.*, MINN. STAT. ANN. § 501.22 (West 1947); MO. ANN. STAT. § 528.010 (Vernon 1953); N.Y. REAL PROP. ACTS. LAW §§ 1602-1615 (McKinney 1979); N.C. GEN. STAT. §§ 41-11 to 11.1 (1976); VA. CODE § 8.01-68 (1977).

20. MO. ANN. STAT. § 528.010 (Vernon 1953).

21. 171 Ill. 640, 49 N.E. 523 (1898).

maintenance exceeds the profits from the land. Minnesota requires the person seeking a judicial sale to show that the sale is necessary or at least beneficial to the person who possesses a present estate and that no substantial injury will be done to the interests of potential remaindermen or the holders of other future interests.²² In contrast, the New York statute does not require any showing that the sale will be beneficial to the parties or that it will not harm the interests of the holders of future interests.²³

The Doctrine of Virtual Representation

In addition to the power of a court of equity to order a judicial sale of property, the power of the court to bind persons not before the court was another issue in *Ball v. Curtis*.²⁴ The principle that a court may bind persons not before the court if otherwise properly represented is known as the doctrine of virtual representation.²⁵ This doctrine is an exception to the general rule of equity that all persons having an interest in the subject matter of a suit should be made parties to the suit.²⁶ Simply stated, the doctrine is that persons not in being, unknown persons or persons too numerous to be joined may be represented in a judicial proceeding by some other person who is a party to the suit and who will adequately protect the interests of those parties not before the court.²⁷

The doctrine of virtual representation has been traced back as far as 1701²⁸ and the English case of *City of London v. Richmond*.²⁹ In *City of London v. Richmond* the number of shareholders who had an interest in the suit made it impractical to bring them all before

22. MINN. STAT. ANN. § 501.22 (West 1947).

23. See N.Y. REAL PROP. ACTS. LAW §§ 1602-1615 (McKinney 1979). Section 1602 provides:

When the ownership of real property is divided into one or more possessory interests and one or more future interests, the owner of any interest in such real property or in the proceeds to be derived therefrom on a directed sale thereof, except the owner of a possessory estate in fee simple absolute therein, may apply to the court designated in section 1603 for an order directing that said real property, or a part thereof, be mortgaged, leased or sold. If any such owner is an infant or otherwise under disability, the application can be made on behalf of such person, by the person duly authorized by law to care for his property interests.

24. 276 Ark. 498, 637 S.W.2d 571 (1982).

25. *Blocker v. Blocker*, 103 Fla. 285, 137 So. 249 (1931); *Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 (1893).

26. *Blocker*, 103 Fla. at 290, 137 So. at 252.

27. *Id.*

28. Annot., 1913C ANNOT. CASES 654, 655.

29. 2 Vern. 421, 23 Eng. Rep. 870 (1701).

the court, and the court allowed one shareholder to represent the interests of all the others.³⁰ The doctrine of virtual representation was first applied to cases in which future interests in property were held by persons not in being in *Hopkins v. Hopkins*.³¹ The court in *Hopkins* held that it was sufficient to bring the person with the first vested estate and certain trustees of the property before the court, and, absent fraud or collusion, all those who later came into existence would be bound by the decision.³² The most widely cited³³ of the early cases is *Giffard v. Hort*,³⁴ the case which established the general rule of the doctrine of virtual representation:

[C]ourts of equity have determined, on grounds of high expediency, that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life [W]here all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive.³⁵

Early American cases recited the English rule that allowed the rights of persons not *in esse* at the time of the suit to be represented by one of the parties before the court.³⁶ *Bofil v. Fisher*³⁷ is particularly significant because the tenant for life was allowed to represent those unborn persons who might succeed the life tenant in tail.³⁸ However, as the doctrine of virtual representation has developed in the United States it has taken different forms.³⁹ While some states have passed statutes which permit the appointment of a guardian *ad*

30. *Id.* at 422, 23 Eng. Rep. at 871.

31. 1 Atk. 581, 26 Eng. Rep. 365 (1738).

32. *Id.* at 590, 26 Eng. Rep. at 371.

33. Those cases which cite *Giffard* as authority include: *Garside v. Garside*, 80 Cal. App. 2d 318, 181 P.2d 665 (1947); *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659, *cert. denied*, 317 U.S. 670 (1942); *Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 (1893); *Evangel Baptist Church v. Chambers*, 96 N.J. Super. 367, 233 A.2d 82 (1967); *Dunham v. Doremus*, 55 N.J. Eq. 511, 37 A. 62 (1897); *Bofil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627 (S.C. 1850); *Ridley v. Halliday*, 106 Tenn. 607, 61 S.W. 1025 (1901); *Faulkner v. Davis*, 59 Va. (18 Gratt.) 651, 98 Am. Dec. 698 (1868); *Baylor's Lessee v. Dejarnette*, 54 Va. (13 Gratt.) 152 (1856).

34. 1 Sch. & Lef. 386 (1804).

35. *Id.* at 408.

36. *See, e.g.*, *Bofil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627 (S.C. 1850); *Cheesman v. Thorne*, 1 Edw. Ch. 629 (N.Y. Ch. 1833).

37. 3 Rich. Eq. 1, 55 Am. Dec. 627 (S.C. 1850).

38. *Id.* at —, 55 Am. Dec. at 632.

39. *See* R. POWELL, *THE LAW OF REAL PROPERTY* § 296 (1981); L. SIMES AND A. SMITH, *supra* note 5, at §§ 1941-1946.

litem to protect the interests of persons not *in esse*,⁴⁰ other states have developed the doctrine by case law. American decisions now recognize six different situations which provide adequate representation of unborn persons in proceedings before courts of equity:⁴¹

1. The representative is a member of the class having a future interest in property and the class is subject to being opened.⁴²
2. The representative has the first vested estate in remainder and the unborn person will only acquire an estate if the prior estate is defeated.⁴³
3. The estate of the representative is subject to a condition precedent and the person not in being may take instead of the representative.⁴⁴
4. The representative is the life tenant and the representative's unborn children have contingent interests.⁴⁵

40. See, e.g., MINN. STAT. ANN. § 508.18 (West 1947); MO. ANN. STAT. § 528.020 (Vernon 1953); N.H. REV. STAT. ANN. § 477.41 (1968); N.Y. REAL PROP. ACTS. LAW § 1608 (McKinney 1979); N.C. GEN. STAT. § 46-14 (1976); VA. CODE § 8.01-94 (1977). The Missouri statute is typical of such statutes. It reads in part:

2. In any case provided in this chapter to be brought if the petition shall allege or it shall appear to the court at any time pending the suit that an interest or estate in the land constituting the subject matter of the suit might vest in a person or persons not in being and who may not be so representable by persons in being of the same class or related estate, then the court shall appoint some disinterested attorney, member of its bar, to represent and protect as a friend of the court the interests of such possible persons, and all such shall be bound by the result of the suit.

41. R. POWELL, *supra* note 39, at § 296; RESTATEMENT OF PROPERTY §§ 182-186.

42. See *Groves v. Burton*, 125 Ind. App. 302, 123 N.E.2d 204 (1954) (after-born son was in the same class as the living children and bound by the judgment); *Kent v. Church of St. Michael*, 136 N.Y. 10, 32 N.E. 704, (1892) (vested remainder in living grandchildren subject to opening the class of remaindermen); *Ex parte Dodd*, 62 N.C. (Phil. Eq.) 101 (1867) (to D for life and at his death in fee simple to his child or children; living children as representatives).

43. See *Dunham v. Doremus*, 55 N.J. Eq. 511, 37 A. 62 (1897) (testator to daughter with limitation over by way of executory devise or contingent remainder to her children if she had any in the future); *McDavid v. McDavid*, 187 S.C. 127, 197 S.E. 204 (1938) (to father for life, contingent remainder to X in case father died without living issue); L. SIMES AND A. SMITH, *supra* note 5, at § 1813; J. STORY, EQUITY PLEADINGS § 146 (10th ed. 1892).

44. *John Hancock Mut. Life Ins. Co. v. Dower*, 222 Iowa 1377, 271 N.W. 193 (1937) (to husband and wife for their lives and then to children of the husband; if husband dies without issue, then to the legal heirs of the grantor. The children in being represented all other potential remaindermen); *Carroll v. First Nat'l Bank & Trust Co.*, 312 Ky. 380, 227 S.W.2d 410 (1950) (A to wife for life, then to daughter for life, with remainder to her heirs; in event daughter dies without heirs, to A's brother if living, then to brother's heirs).

45. *Montgomery v. Equitable Life Assurance Soc'y*, 83 F.2d 758 (7th Cir. 1936) (to daughter for life with remainder to her children; unborn represented by the daughter); *Elmore v. Galligher*, 205 Ala. 230, 87 So. 349 (1921) (to daughters for life, and to their children, if any, at their death); *Baker v. Baker*, 284 Ill. 537, 120 N.E. 525 (1918) (testator to daughter and her bodily heirs); *Sparks v. Clay*, 185 Mo. 393, 84 S.W. 40 (1904) (to A for life remainder to the heirs of A's body; heirs of the body were properly represented by A);

5. The representative holds a power of appointment, and the unborn person is one who may be appointed by the representative.⁴⁶
6. The representative and the unborn person have an interest in something other than land, and one of the above five relationships exists.⁴⁷

Professor Richard Powell adds two other factors which the courts in the United States have examined to determine whether the interests of unborn persons are adequately represented.⁴⁸ These are the absence of hostility of interests between the representative and the person whose interests are represented and the identity of their claims.⁴⁹ Section 185 of the *Restatement of the Law of Property* also recognizes the possibility that the interests of the representative and the person who is represented might be hostile.⁵⁰ However, it provides that there must be an affirmative showing of hostility of interests before the representation will be considered inadequate.⁵¹ In its varied forms the doctrine of virtual representation has been reaf-

Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905) (Mrs. C. represented the contingent remainder in favor of her unborn children); Schneider v. Wolf, 120 Ohio St. 524, 166 N.E. 679 (1929) (to son for life with remainder to begotten sons who survive him, if none then remainder to other sons of the testator); Ridley v. Halliday, 106 Tenn. 607, 61 S.W. 1025 (1901) (interests of the unborn children and grandchildren of the testator's daughter were adequately represented by the daughter); Geary v. Butts, 84 W. Va. 348, 99 S.E. 492 (1919) (in addition to representation by the life tenant, the unborn were also represented by a trustee and the living remaindermen); See also RESTATEMENT OF PROPERTY § 184(d) (1936); Roberts, *Virtual Representation In Actions Affecting Future Interests*, 30 ILL. L. REV. 580, 585 (1936); J. STORY, *supra* note 43, at § 145.

46. Brown v. Fidelity Union Trust Co., 126 N.J. Eq. 406, 9 A.2d 311 (1939) (A to such persons as B might appoint by her will); L. SIMES AND A. SMITH, *supra* note 5, at § 1812; RESTATEMENT OF PROPERTY § 184(dd) and Comment ff (1936).

47. Mabry v. Scott, 51 Cal. App. 2d 245, 124 P.2d 659, *cert. denied* 317 U.S. 670 (1942) (the class of unborn contingent remaindermen to a trust was represented by the children of the living beneficiaries of the trust); RESTATEMENT OF PROPERTY § 184(e) (1936).

48. R. POWELL, *supra* note 39, at 580-81. The following cases dealt with the doctrine of virtual representation and also considered Professor Powell's additional factors of identity of claim or hostility of interests between the representative and the person who was represented: United States v. 122,000 Acres of Land, 57 F. Supp. 421 (N.D. Tex. 1944) (identity of claim); Weberpals v. Jenny, 300 Ill. 145, 133 N.E. 62 (1921) (hostility of interests); Groves v. Burton, 125 Ind. App. 302, 123 N.E.2d 204, *reh'g denied*, 125 Ind. App. 317, 123 N.E.2d 705 (1954) (hostility of interests); Carroll v. First Nat'l Bank & Trust Co., 312 Ky. 380, 227 S.W.2d 410 (1950) (hostility of interests); Lowe v. Taylor, 222 Ky. 846, 2 S.W.2d 1042 (1928) (hostility of interests); Downey v. Seib, 185 N.Y. 427, 78 N.E. 66, (1906) (hostility of interests); Greene v. Stadiem, 198 N.C. 445, 152 S.E. 398 (1930) (hostility of interests); Rodgers v. Unborn Child or Children of Rodgers, 204 Tenn. 96, 315 S.W.2d 521 (1958) (hostility of interests); Brown v. Wood, 239 S.W.2d 195 (Tex. Civ. App. 1951) (hostility of interests).

49. R. POWELL, *supra* note 39, at 580-81.

50. RESTATEMENT OF PROPERTY § 185 and comments b-c (1936).

51. *Id.*

firmed in the decisions of many states.⁵²

The Arkansas Case Law

Arkansas case law has not clearly distinguished the doctrine of virtual representation and the power of a court of equity to order the sale of land affected by contingent future interests.⁵³ The first Arkansas case to hold that a court of equity had the power to order a sale for reinvestment of property in which persons held future interests was *Bedford v. Bedford*.⁵⁴ *Bedford* dealt with the court's power to order a sale when the minor daughter of the petitioner had a contingent interest in the property, and the court held that it could order a sale relying on *Gavin v. Curtin*.⁵⁵ The Arkansas court also held that the living contingent remaindermen could represent those who were not in being.⁵⁶

The *Bedford* holding that a court of equity has the power to order a sale for reinvestment has been followed in four cases prior to *Ball v. Curtis*.⁵⁷ In each of these cases there was a person in being who belonged to the class of potential remaindermen, but the court did not mention the doctrine of virtual representation⁵⁸ even though

52. See, e.g., *Young v. Rice*, 280 Ala. 581, 196 So. 2d 698 (1967); *Garside v. Garside*, 80 Cal. App. 2d 318, 181 P.2d 665 (1947); *In re Campbell's Estate*, 46 Hawaii 475, 382 P.2d 920 (1963); *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938); *Longworth v. Duff*, 297 Ill. 479, 130 N.E. 690 (1921); *Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 (1893); *Coquillard v. Coquillard*, 62 Ind. App. 489, 113 N.E. 481 (1916); *Robinson v. Barrett*, 142 Kan. 68, 45 P.2d 587 (1935); *Foreman v. Taylor*, 239 S.W.2d 260 (Ky. 1951); *Smith v. Fowler*, 301 Ky. 96, 190 S.W.2d 1015 (1945); *Middleton v. Graves*, 229 Ky. 640, 17 S.W.2d 741 (1929); *Mathews v. Lightner*, 85 Minn. 333, 88 N.W. 992, 89 Am. St. Rep. 558 (1902); *Copeland v. West*, 202 Miss. 106, 30 So. 2d 610 (1947); *Brown v. Bibb*, 201 S.W.2d 370 (Mo. 1947); *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802 (1878); *Evangel Baptist Church v. Chambers*, 96 N.J. Super. 367, 233 A.2d 82 (1967); *Mead v. Mitchell*, 17 N.Y. 210, 72 Am. Dec. 455 (1858); *Yarborough v. Moore*, 151 N.C. 116, 65 S.E. 763 (1909); *Springs v. Scott*, 132 N.C. 548, 44 S.E. 116 (1903); *Peoples Nat'l Bank v. Barlow*, 235 S.C. 488, 112 S.E.2d 396 (1960); *Bernard v. Bernard*, 79 S.C. 364, 60 S.E. 700, (1908); *Rutledge v. Fishburne*, 66 S.C. 155, 44 S.E. 564, (1903); *Rodgers v. Unborn Child or Children of Rodgers*, 204 Tenn. 96, 315 S.W.2d 521 (1958); *Bransford Realty Co. v. Andrews*, 128 Tenn. 725, 164 S.W. 1175 (1914); *Bradley v. Henry*, 239 S.W.2d 404 (Tex. Civ. App. 1951); *Faulkner v. Davis*, 59 Va. (18 Gratt.) 651, 98 Am. Dec. 698 (1868); *Baylor's Lessee v. Dejarnette*, 54 Va. (13 Gratt.) 152 (1856); *Cotton v. Bank of Cal.*, 145 Wash. 503, 261 P. 104 (1927).

53. See, e.g., *Bedford v. Bedford*, 105 Ark. 587, 152 S.W. 129 (1912).

54. *Id.*

55. 171 Ill. 640, 49 N.E. 523 (1898).

56. 105 Ark. at 591, 152 S.W. at 131.

57. *Walker v. Blaney*, 225 Ark. 918, 286 S.W.2d 479 (1956); *Wigal v. Hensley*, 214 Ark. 409, 216 S.W.2d 792 (1949); *Wing v. Wing*, 212 Ark. 960, 208 S.W.2d 776 (1948); *Hardy v. Hilton*, 211 Ark. 991, 204 S.W.2d 163 (1947).

58. See, e.g., *Wing v. Wing*, 212 Ark. 960, 208 S.W.2d 776 (1948).

the doctrine had been recognized in Arkansas.⁵⁹

One other case deserves mention in relation to the discussion of Arkansas law. In *Causey v. Wolfe*⁶⁰ the Arkansas Supreme Court recognized that a life tenant could represent contingent remaindermen who were not in being in a suit to enjoin other claimants to the estate from committing waste. As authority, the court cited *J. Story, Equity Pleadings*⁶¹ and *Ridley v. Halliday*,⁶² both of which are recognized as authority for the doctrine of virtual representation.⁶³ *Causey* appears to give the same rule as *Ball v. Curtis*, but the case has not been cited as authority for that proposition.⁶⁴ However, it should be noted that *Causey v. Wolfe* has been cited in two prominent sources for the proposition that a life tenant may represent unborn contingent remaindermen.⁶⁵

Ball v. Curtis

In *Ball v. Curtis*⁶⁶ Justice George Rose Smith began by citing precedent that, upon a proper showing, a court of equity could order a sale for reinvestment of land held by a life tenant with contingent remainders that will not vest until the death of the life tenant.⁶⁷ The court noted that in all the earlier cases there was a member of the

59. See *Lightle v. Kirby*, 194 Ark. 535, 108 S.W.2d 896 (1937). Note, however, that in *Wing v. Wing*, 212 Ark. 960, 208 S.W.2d 776 (1948), and *Wigal v. Hensley*, 214 Ark. 409, 216 S.W.2d 792 (1949), the court specifically mentioned that the minor contingent remaindermen were represented by guardians *ad litem*. Presumably, the court appointed the guardians pursuant to ARK. STAT. ANN. § 34-1803 (1962) which provides that a guardian may appear at partition proceedings to protect the interests of infants, and the court may appoint a guardian if one does not appear on behalf of the infant.

60. 135 Ark. 9, 204 S.W. 977 (1918).

61. J. STORY, EQUITY PLEADINGS (10th ed. 1892).

62. 106 Tenn. 607, 61 S.W. 1025 (1901).

63. 135 Ark. 9, 19, 204 S.W. 977, 980. See *supra* note 45.

64. The following cases cited *Causey*: *Hobbs v. Lenon*, 191 Ark. 509, 519, 87 S.W.2d 6, 11 (1935) (a person acquiring property *pendente lite* is bound by the judgment whether a party to the litigation or not); *Graves v. Simms Oil Co.*, 189 Ark. 910, 913, 75 S.W.2d 809, 811 (1934) (cites *Causey* for the rule that an oral gift of land is not enforceable unless there is actual possession delivered followed by the making of valuable improvements); *Lumpkin v. Askins*, 187 Ark. 1009, 1013, 63 S.W.2d 984, 986 (1933) (cites *Causey* for the same rule as *Graves v. Simms Oil Co.*); *Murphy v. Graves*, 170 Ark. 180, 184, 279 S.W. 359, 361 (1926) (cites *Causey* for the same rule as *Graves v. Simms Oil Co.*); *Russell v. Pagan*, 167 Ark. 143, 150, 267 S.W. 573, 575 (1925) (cites *Causey* for the rule that a life tenant may dispose of timber for the purpose of cultivating the land he holds as life tenant).

65. L. SIMES AND A. SMITH, *supra* note 5, at § 1824; Annot., 120 A.L.R. 876, 885 (1939).

66. 276 Ark. 498, 627 S.W.2d 571 (1982).

67. *Id.* at 498, 637 S.W.2d at 572. The court based the statement on the cases of *Walker v. Blaney*, 225 Ark. 918, 286 S.W.2d 479 (1956); *Wing v. Wing*, 212 Ark. 960, 208 S.W.2d 776 (1948); *Hardy v. Hilton*, 211 Ark. 991, 204 S.W.2d 163 (1947) and *Bedford v. Bedford*, 105 Ark. 587, 152 S.W. 129 (1912).

class of potential remaindermen in being at the time the action was brought. The living members of the class could be said to represent the interests of the remaindermen not in being.⁶⁸ In *Ball*, however, there was no contingent remaindermen in existence who could represent the potential bodily heirs of Sheila Ball Curtis. The court then defined the issue to be whether a court of equity could order a sale for reinvestment in the absence of a living member of the potential class of contingent remaindermen.⁶⁹ The court held that a court does have the power to order a sale for reinvestment even though no member of the class of potential remaindermen was in being at the time of the proceeding.⁷⁰ The court then held, without further discussion, that a life tenant is a proper representative of her unborn descendants when she does not have any bodily heirs in being.⁷¹

In *Ball v. Curtis* the Arkansas Supreme Court has taken a step toward modernizing the law of future interests in Arkansas by bringing it into agreement with the American Law Institute,⁷² prominent treatises⁷³ and the law of many other jurisdictions.⁷⁴ Perhaps the most significant aspect of the decision is that the case should have the effect of creating greater marketability of title to lands encumbered with contingent future interests. The trend in the United States has been toward greater marketability of land,⁷⁵ and legal scholars have long recognized the harmful consequences to individual owners and society in general when the alienation of contingent future interests is restricted.⁷⁶

68. 276 Ark. at 498, 637 S.W.2d at 572.

69. *Id.*

70. *Id.* at 499, 637 S.W.2d at 572. In support of the holding the opinion cited the RESTATEMENT OF PROPERTY § 179 (1936), R. POWELL, THE LAW OF REAL PROPERTY § 292 and Comment, *Alienability of Contingent Remainders*, 2 ARK. L. REV. 87 (1948).

71. 276 Ark. at 499, 637 S.W.2d at 572. The court cited the RESTATEMENT OF PROPERTY § 184(d) (1936) in support of the statement that a life tenant is a proper representative of unborn bodily heirs.

72. RESTATEMENT OF PROPERTY § 184(d) (1936).

73. R. POWELL, *supra* note 39; J. STORY, *supra* note 43.

74. *See, e.g.*, cases cited *supra* note 45.

75. L. SIMES AND A. SMITH, *supra* note 5, at § 1941.

76. *See Roberts, Virtual Representation In Actions Affecting Future Interests*, 30 ILL. L. REV. 580 (1936); Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process*, 42 HARV. L. REV. 30 (1928). Schnebly, at page 55, says the following:

Where the remainder is contingent, or vested in some of a class subject to opening to admit later-born members, it is obvious that alienation is materially restricted, if not practically impossible. The injurious consequences in such a case may be far reaching. The life tenant fails to realize the maximum possible benefit from his

Although the court has taken a step toward modernizing the law of future interests in Arkansas, the court's opinion is inadequate for several reasons. First, the court states that Sheila Ball Curtis, as the life tenant, is a proper representative of the unborn contingent remaindermen, but the court does not state the standard to be applied in determining when the life tenant is a proper representative. The court relied on section 184(d) of the *Restatement of the Law of Property* in holding that the life tenant was a proper representative, and a comment⁷⁷ to that section recognizes that the protection of the interests of persons not *in esse* is "less substantial" when represented by the life tenant than in the other situations approved by the *Restatement*. The comment also notes, however, that the diminished protection accorded by the life tenant is normally offset since the life tenant, who also has an interest in the estate, will usually defend the interests of his unborn issue adequately.⁷⁸ The Arkansas Supreme Court may have been aware of the questions and potential problems raised by this comment to section 184 in relation to the adequacy of the life tenant's representation, but the opinion does not indicate this. Although the possibility that the interests of the representative and remaindermen might be hostile has proven to be a significant factor in the decisions of other states,⁷⁹ the court does not even recognize this factor.

Another factor which the court should have mentioned was that the proceeds of the sale for reinvestment were to go into a trust to protect the interests of the potential remaindermen.⁸⁰ The inclusion of this fact in the opinion would have been evidence that the interests of the unborn remaindermen were properly protected. The court also could have relied upon authority in other jurisdictions and clearly stated the standard to be applied in order to avoid uncertainty on this point.

In addition, the court failed to analyze the applicable Arkansas law completely. The court does not mention the case of *Causey v.*

interest; there is an injury to society at large by reason of the reduction in the quantity of marketable land; the particular locality may lose an increase in taxable values; and if the income yielded by the land is not sufficient to pay the taxes and assessments, it is even possible that the interests of all persons, remaindermen as well as life tenant, may be destroyed.

77. RESTATEMENT OF PROPERTY § 184 Comment f (1936).

78. *Id.*

79. *Supra* note 49.

80. Abstract and Brief of Appellants at 5, *Ball v. Curtis*, 276 Ark. 498, 637 S.W.2d 571 (1982).

*Wolfe*⁸¹ which, as previously noted,⁸² recognized that a life tenant could represent contingent remaindermen who were not in being at the time of the suit. The failure to discuss *Causey* is especially notable since the case is cited by at least two prominent legal sources⁸³ for the proposition that a life tenant may represent the unborn contingent remaindermen having an interest in the estate. Finally, the court failed to reconcile the holding in *Ball v. Curtis* with other Arkansas cases which hold that the wishes of the testator should be given effect whenever possible.⁸⁴ The failure to discuss the intention of the testator is also puzzling since the issue was raised by the appellants.⁸⁵

In conclusion, *Ball v. Curtis* is an important step toward the modernization of the future interest law in Arkansas. The decision may also have the effect of creating greater marketability of title in land limited by contingent future interests. However, the opinion may be too narrow, and subsequent cases may be necessary to fully develop the rule that a life tenant is the proper representative of unborn issue who have contingent future interests.

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81. 135 Ark. 9, 204 S.W. 977 (1918).

82. See *supra* text accompanying note 60.

83. *Supra* note 65.

84. See *Bakos v. Kryder*, 260 Ark. 621, 624, 543 S.W.2d 216, 218 (1976); *Carroll v. Robinson*, 248 Ark. 904, 906, 454 S.W.2d 329, 330 (1970); *Graves v. Bean*, 200 Ark. 863, 865, 141 S.W.2d 50, 52 (1940). See also *Fetters, The Entailed Estate: Ferment for Reform in Arkansas*, 19 ARK. L. REV. 275, 277 (1966). *Fetters* acknowledges the rule that the intention of the testator should prevail whenever possible, but he also notes that the rule is difficult to apply.

85. Abstract and Brief of Appellants at 16, *Ball v. Curtis*, 276 Ark. 498, 637 S.W.2d 571 (1982). The Arkansas Supreme Court also did not address ARK. STAT. ANN. § 50-405.1 (1971) which provides for the dissolution of estates tail. The Arkansas fee tail statute (ARK. STAT. ANN. § 50-405 (1971)) applies to devises by will; but the language of § 50-405.1 is ambiguous and it is not clear whether a fee tail created by a devise may be dissolved under the statute. This ambiguity could have been clarified here but must now await consideration in the future.