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Extinguishment of the Interests of Unborn Contingent Remaindermen by Judicial Process

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NOTES

EXTINGUISHMENT OF THE INTERESTS OF UNBORN CONTINGENT REMAINDERMEN BY JUDICIAL PROCESS

It is a rule of common law that a contingent remainder is destroyed by the destruction or determination of the particular estate before the vesting of the remainder.[1] However, in England by a series of statutes, the last of which was enacted in 1877, the destructibility rule has been completely abolished.[2] In the United States, a considerable number of states have abolished it in whole or in part,[3] but a few jurisdictions still recognize this rule.[4]

This note is guided by the Restatement[5] and examines the present status of the destructibility rule, with particular reference to the termination of rights in unborn remaindermen.

I. THE EQUITABLE DOCTRINE OF REPRESENTATION

The courts of equity have long recognized the right of one or a few persons to sue for themselves and others so situated.[6] This is the doctrine of representation[7] or "virtual representation," as it is often referred to,[8] and represents an exception to the general rule that no person is bound by a judgment or decree, except parties

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1. For general statements of this rule and explanations, see CHALLIS, REAL PROPERTY 119-151 (3d ed. 1911); 1 SIMES, FUTURE INTERESTS §§ 193-197 (2d ed. 1956). A careful analysis is given in FEARNE, CONTINGENT REMAINDERS 316-350 (1831).

2. 7 & 8 Vict. c. 76 (1844); 8 & 9 Vict. c. 106 (1845); 40 & 41 Vict. c. 33 (1877).

3. 1 SIMES, FUTURE INTERESTS § 207 nn. 90-99, 1-11 (2d ed. 1956) gives a list as to states wholly abolishing the destructibility rule; 1 SIMES, *op. cit. supra* at nn. 12-15 wherein states having statutes designed to eliminate destruction by merger or forfeiture, but which do not prevent contingent remainders from failure by reason of the natural termination of the preceding estate before the remainder vests, are given. N.D. Rev. Code §§ 47-0230, 47-0232 (1943) wholly abolishing the rule provide: "No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise. . . ." and "No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect, but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period."

4. Popp v. Bond, 158 Fla. 185, 28 So2d 259 (1946); Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931); Love v. Lindstedt, 76 Ore. 66, 147 Pac. 935 (1915); Ryan v. Monaghan, 99 Tenn. 338, 42 S.W. 144 (1897).

5. RESTATEMENT, PROPERTY § 182 (1936).

6. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); POMEROY, REMEDIES AND REMEDIAL RIGHTS §§ 388-390 (2d ed. 1883); STORY, EQUITY PLEADING §§ 97-99, 103, 107, 110, 111, 116, 120 (8th ed. 1870).

7. Montgomery v. Equitable Life Assur. Soc., 83 F.2d 758 (7th Cir. 1936).

8. In Groves v. Burton, 125 Ind. App. 302, 123 N.E.2d 204, 209 (1954) the court stated: "It is generally referred to as the doctrine of virtual representation."

or those who stand in privity with parties.[9] Under this doctrine, those not in esse may be bound by decree if they are represented by those who have interests so closely similar to the interest of the unborn persons that effective protection is certain to be extended.[10] This doctrine makes a judgment conclusive upon unborn remaindermen if any party to the proceedings had an equal incentive to produce the same evidence and argue the same rules of law as the person not in being.[11] The persons not parties are held to be parties or "virtually" so.[12]

Adequate presentation of the legal position of the unborn person is sustained if the representative and the unborn person share as members of a class[13] or the representative is the living owner of the first estate of inheritance.[14] The decree must operate with equal regard for the interests of the unborn person and the representative,[15] and their interests cannot be adverse.[16]

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9. See Garside v. Garside, 80 Cal.App.2d 318, 181 P.2d 665, 671 (1947); Fahrenwald v. Spokane Savings Bank, 179 Wash. 61, 35 P.2d 1117,1118 (1934).

10. Gavin v. Curtin, 171 Ill. 640, 49 N.E. 523 (1898); Hale v. Hale, 146 Ill. 227, 33 N.E. 858 (1893); Bofil v. Fisher, 3 Rich.Eq. 1 (S.C. 1850). In Groves v. Burton, *supra* note 8, the court stated: "The doctrine may be generally stated in this wise: Persons having a remote, contingent, or expectant interest in realty are bound by the judgment rendered in proper circumstances in an action concerning property, although not made parties to the suit, if their interests are properly represented, as by the holder of the first estate of inheritance, or by persons who have the same interests and are equally certain to bring forward the entire merits of the question, so as to give the contingent interest effective protection."

11. Webster v. State Mut. Life Assur. Co., 50 F.Supp. 11 (S.D. Cal. 1943); Los Angeles County v. Winans, 13 Cal.App. 234, 109 Pac. 640 (1910); Hale v. Hale, *supra* note 10.

12. As to the doctrine of virtual representation, RESTATEMENT, PROPERTY § 183 (1936) Provides: "PREREQUISITES FOR REPRESENTATION OF UNBORN PERSON.

"A person unborn at the time of the commencement of a judicial proceeding is duly represented therein by a person duly joined as a party thereto when

"(a) the person so joined as a party, and the unborn person, sustain to each other such a relationship that an adequate preesntation of the legal position of the party would be an adequate presentation of the legal position of the unborn person; and

"(b) the judgment, decree or other result of such proceeding operates with equal regard for the possible interests of the person joined as a party and of the unborn person; and

"(c) the conduct of the person so joined as a party constitutes a sufficient protection under the rule stated in § 185."

As to what is *sufficient protection*, RESTATEMENT, *op. cit. supra* § 185 lays down the following:

"The conduct of the person joined as a party constitutes the 'sufficient protection' required in. . .§ 183(c) for the representation of living or unborn persons whenever it does not appear affirmatively that such person acted in hostility to the interest of the person claimed to have been represented by him."

See Webster v. State Mut. Life Assur. Co., 50 F.Supp. 11, 15 (S.D. Cal. 1943) where the court sets forth these requirements. See also Marby v. Scott, 51 Cal.App.2d 245, 124 P.2d 659,663 (1942) wherein the court in discussing the doctrine of representation gave approval to the Restatement presentation.

13. Graff v. Rankin, 250 Fed. 150 (7th Cir. 1918); Wolf v. Uhlemann, 325 Ill. 165, 156 N.E. 334 (1927); John Hancock Mut Life Ins. Co. v. Dower, 222 Iowa 1377, 271 N.W. 193 (1937); Johnson v. Johnson, 276 S.W. 776 (Tex. Civ. App. 1925).

14. Knotts v. Stearns, 91 U.S. 638 (1875); Gray v. Smith, 76 Fed. 525 (N.D. Cal. 1896); Doremus v. Danham, 55 N.J.Eq. 511, 37 Atl. 62 (1897).

15. See Webster v. State Mut. Life Assur. Co., 50 F.Supp. 11,16 (S.D. Cal. 1943); 2 POWELL, REAL PROPERTY § 296 at 574 (1950).

16. Mortimore v. Bashore, 317 Ill. 535, 148 N.E. 317 (1925); Bowen v. Gent, 54

In *Rasmusson v. Schmalenberger*[17] the plaintiff held a life estate with remainder to the lawful issue of his body, share and share alike. Plaintiff brought action in the District Court making his children defendants, and received authorization to convey and sell the property. Subsequently he entered into a contract for sale with the defendant. The defendant refused to perform on the ground plaintiff did not have marketable title because the owners of the remainder were undetermined, the decree of the District Court could not bind them, and they were wholly unaffected by the judgment. The Supreme Court of North Dakota held that the judgment was binding, not only upon all living chillren who were made parties to the action, but also upon all children having contingent interests in the property who might be born thereafter. The court stated: "The general rule that no person shall be bound by an adjudication in an action to which he is in no way a party has some exceptions and does not inexorably apply to a case where at the time of the adjudication persons are not in esse who may be affected thereby. If an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, represent the whole estate and stand not only for themselves, but also for the persons unborn, and a judgment entered in such litigation binds their interests . . . ."[18]

There are various reasons advanced for the application of this doctrine, but necessity and expediency would seem sufficient.[19]

In some cases, it may happen that lack of adequate representation is not called to the court's attention in the original suit, since it is not truly an adversary proceeding. Any settlement in such a case can be attacked at a subsequent time after the remaindermen come into being.[20]

Md. 555 (1880); Downey v. Seib, 185 N.Y. 427, 78 N.E. 66 (1906); Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907).

17. 60 N.D. 527, 235 N.W. 496 (1931).

18. See Robinson v. Barrett, 142 Kan. 68, 45 P.2d 587,591 (1935) wherein the court quotes Rasmusson v. Schmalenberger with approval.

19. In Rasmusson v. Schmalenburger, *supra* note 17, the court citing Mayall v. Mayall, 63 Minn. 511, 65 N.W. 942 (1896) said: "A contingent interest in real estate is bound by judicial proceedings affecting the property, where the court had before it all the parties that can be brought before it, and the court acts upon the property according to the rights that appear, wihout fraud. These powers are inherent in a court of equity, and rest upon considerations of necessity and expediency." See Johnson v. Johnson, 276 S.W. 776 (Tex. Civ. App. 1925) wherein the court reasoned: "The interest in preserving this estate is just as strong on those who are living as it could be on those who may be after born, and their interests in law just as much protected through such representation as they would be were they actually in being and parties to the suit."

20. See, *e.g.*, Townshend v. Frommer, 125 N.Y. 446, 26 N.E. 805 (1891) (suit 51 years after).

In *MacArthur v. Scott*,[21] a prior suit setting aside a will was declared invalid 46 years afterwards because of adverse interests in the persons chosen to represent the contingent remaindermen. The court stated: "[I]n every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all." In this state such action may be barred after twenty years through the operation of the North Dakota Marketable Record Title Act.[22]

II. REPRESENTATION BY GUARDIAN AD LITEM OR TRUSTEE

In the Restatement of Property is the following:

"PREREQUISITES FOR BINDING EFFECT AS AGAINST INTEREST LIMITED IN FAVOR OF AN UNBORN PERSON.

"A judicial proceeding has binding effect as against the future interest limited in favor of a person who was unborn at the time of the commencement of such proceeding . . . .

[if]

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"(b) such person was duly represented by a guardian ad litem appointed to protect the interest limited in favor of unborn persons."[23]

A guardian ad litem is one appointed by a court in which particular litigation is pending, as representative for a ward or an unborn person in that particular litigation.[24] He occupies the position that the "next friend" did under common law.[25] Statutes authorizing the appointment of a guardian ad litem to protect interests limited in favor of unborn persons are common,[26] but many provide for only a specific type of judicial proceeding.[27] Such appointment under statute is sufficient representation to bind the unborn persons in a judicial proceeding.[28]

These statutes apply to cases in which no virtual representation

21. 113 U. S. 340 (1885).

22. N.D. Rev. Code c. 47-19A (Supp. 1957) which in effect provides for a statute of limitation to run against old claims to real estate, recorded or not. The claim holder can record notice within twenty years under which title is claimed by the record title owner, and so preserve his claim. For a careful analysis of this legislation, see Leahy, *The North Dakota Marketable Record Title Act*, 29 N. Dak. Law Rev. 265 (1953). It should be noted that this article deals with a thirty year period under N.D. Laws 1951, c. 280 which was amended by N.D. Laws 1957, c. 312.

23. RESTATEMENT, PROPERTY § 182 (1936).

24. See State v. Bingham, 233 Ind. 504, 121 N.E.2d 727,730 (1954); *In re* Hallstead's Estate, 338 Pa. 257, 12 A.2d 912 (1940).

25. See Shuck v. Shuck, 77 N.D. 628,631, 44 N.W.2d 767,770 (1950).

26. For listing of such statutes and the type of judicial proceeding to which they apply, see 2 POWELL, REAL PROPERTY § 296 n.79 (1950).

27. See, *e.g.*, Minn. Stat. Ann. § 508.18 (West 1948) which as to Registration of Title provides: "[T]he court shall appoint a disinterested person to act as guardian ad litem for minors, and other persons under disability, and for all persons not in being who may appear to have interest or lien upon the land . . . ."

28. Copeland v. Wheelwright, 230 Mass. 131, 119 N.E. 667 (1918); Fisher v. Fisher, 253 N.Y. 260, 170 N.E. 912 (1930).

is possible and may provide a procedural alternative to such representation.[29] In *Mennig v. Howard*[30] the court pointed out that the rule of virtual representation was not sufficient to meet the circumstances and conditions of a case as to an unborn child of a cotenant in real property. A guardian ad litem was appointed in compliance with statute.[31] The court held that the unborn child's property was not being taken without due process.[32] The court further stated: "The possible injury to owners . . . is small in comparison to the indisputable benefit resulting from the sale, both to the owner of the present estate and also to society at large. The interest of society in free alienation of land has received recommendations in many ways for centuries past."

North Dakota provides for a statutory guardian ad litem for infants[33] and incompetents,[34] but no provision is made for unborn children. Whether such appointment can be made under the general power of equity, apart from statute, is questionable.[35] The American Law Institute takes no position on this problem.[36] In *Mabry v. Scott*[37] the court had under consideration a proposed compromise of a trust involving unborn issue. In that case a guardian ad litem had been appointed by the trial court to represent and defend the interests of the unborn (and unconceived)issue. The appellate court expressed approval of the action, saying: "Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians ad litem," and cited cases, in each of which however, there were *living persons* for whom such appointment was made.[38]

When the unborn person is the prospective beneficiary of a trust, it has been held the trustee can so represent the unborn person as to make the result of the procedure binding on the interest limited

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29. RESTATEMENT, PROPERTY § 182 comment b (1936).
30. 213 Iowa 936, 240 N.W. 473 (1932).
31. Iowa Code § 12351-dl (1931). Today Iowa R. Civ. P. 298 provides: "When a person not in being may have a contingent or prospective vested interest as a cotenant of real estate, the court shall have jurisdiction over the interest of such person, and shall appoint a suitable guardian ad litem, to act for him in such proceeding. . . . ."
32. A discussion of the constitutionality of such appointments is also given in Loring v. Hildreth, 170 Mass. 328, 49 N.E. 652 (1898).
33. N.D. Rev. Code §§ 28-0301, 28-0302 and 28-0303 (1943).
34. N.D. Rev. Code § 28-0304 (1943).
35. Since the statutes do not so provide, if such an appointment were made in North Dakota, it would come under the general power of equity. However the adjudication of our statutory provisions give no indication which way the court would go, if such problem arose.
36. RESTATEMENT, PROPERTY § 182, comment b (1936).
37. 51 Cal.App.2d 245 124 P.2d 569 (1942).
38. One of the cases cited by the court was Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905) wherein the court called a guardian ad litem, an "officer of the court."

to such unborn person.[39] In *Lewis v. McConclue*[40] a guardian ad litem was appointed (in accord with statute) for minor defendants and a trustee (without statutory authority) for unborn remaindermen. The court upheld the appointment of such trustee under general rules of equity.

Appointment of either a guardian ad litem or a trustee by the court, when the facts prerequisite for virtual representation are not present, to act for the unborn remaindermen permits prompt adjudication and eliminates the delay such future interest may cause.

III. PROCEEDINGS WITHOUT REPRESENTATION

A. PROCEEDING IN REM

As to proceedings having binding effect as against the thing, the Restatement reads as follows:

"(c) the proceeding, duly followed, was one binding the affected thing itself, thus binding both present and future interests limited therein, without either joinder or representation of the persons in favor of whom such interests were limited."[41]

This represents another exception to the general rule that a judgment or decree binds only parties and privities. It is called a proceeding "in rem",[42] and is typified by action in admiralty.[43] Proceedings are in rem when they are directly against the property and terminate in an adjudication against all mankind equally binding upon everyone.[44] Future interests are rarely, if ever, found in cases which involve in rem proceedings.[45]

In *Drake v. Frazier*[46] the question arose whether the decree in an in rem registration proceeding rendered against remaindermen before they came into being was conclusive upon them, so as to bar them from asserting their claims in future litigation. The court held that they were bound, but applied the doctrine of virtual rep-

39. Temple v. Scott, 143 Ill. 290, 32 N.E. 366 (1892); Mayall v. Mayall, 63 Minn. 511, 65 N.W. 942 (1896). See Gunnell v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1938) wherein a statute was applied.

40. 151 Kan. 778, 100 P.2d 752 (1940).

41. RESTATEMENT, PROPERTY § 182 (1936).

42. "The distinguishing characteristic of judgments in rem is, that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against all persons." 3 FREEMAN, JUDGMENTS § 1519 (5th ed. 1925).

43. See, *e.g.*, The J.E. Rumbell, 148 U.S. 1 (1892); U.S. v. Malek Adhel, 43 U.S. (2 How.) 209 (1844).

44. See Linn County v. Rozelle, 177 Ore. 245, 162 P.2d 150 (1945) wherein the court also said: "They are quasi in rem when, although they deal with specific property they adjudicate a controversy between the particular parties to the proceeding."

45. 2 POWELL, REAL PROPERTY § 295 at 556 (1950).

46. 105 Neb. 162, 179 N.W. 393 (1920).

resentation, since remaindermen in being with identical interests were joined. Such application of this doctrine by the court, and the fact that the statute governing the proceeding required publication and service, clearly take it outside the provisions of the Restatement.[47] This case indicates the reluctance by the courts to bind the unborn by in rem proceedings.

B. PROCEEDINGS UNDER UNKNOWN OWNER STATUTES

As to statutes making unnecessary the representation of an unborn person, the Restatement reads as follows:

"(d) the proceeding, duly followed, was one which by statute binds such future interest without either joinder or representation of the person in favor of whom it was limited."[48]

The "unknown owners" statutes,[49] when not in terms made applicable to unborn persons, have been construed to be inapplicable to them.[50] Some expressly provide for the case of unborn persons,[51] but North Dakota does not.[52]

Absence of adjudication of these statutes, as to unborn persons, indicates that neither in rem nor unknown owner proceedings are too important in the field of contingent remainders at the present time.

CONCLUSION

As to prerequisites for binding effect as against interest limited in favor of an unborn person, North Dakota adopts the Restatement view only with respect to virtual representation. Where the prerequisite facts necessary for the application of this doctrine are not present, it is doubtful that a guardian ad litem would be ap-

47. RESTATEMENT, PROOPERTY § 182, comment c (1936) where it is said: "When the proceeding is said to operate against the thing itself, but the owners of interests therein are required to be served either by publication or by some variety of substituted service, then such proceeding is not within the rule stated in Clause (c)."

48. RESTATEMENT, PROPERTY § 182 (1936).

49. For a listing of these statutes, see 2 POWELL, REAL PROPERTY § 295 n.38 (1950). Note the usage of the term "unknown owner" in RESTATEMENT, PROPERTY § 182, comment d (1936).

50. Mortimore v. Bashore, 317 Ill. 535, 148 N.E. 317 (1925).

51. See, *e.g.*, Mont. Rev. Code Ann. § 93-2820 (1947) where it is stated: "When in any action or proceeding persons are made defendants by the designation of unknown devisees. . .the judgment or decree. . .shall be conclusive as against the world, including all contingent interests in the controversy and persons not in being who may have an interest or contingent interest therein."

The Ga. Code Ann. § 36-310 (1947) as to proceedings in eminent domain, provides: "If the owner or owners of such property . . . are unknown, or there is a possibility of unborn remaindermen having an interest, notice shall be served upon the person in actual possession of the property, and also upon the ordinary, who shall act for said unknown owner as provided for in the case of minors. . . ."

52. See N.D. Rev. Code §§ 32-1705 (Joinder of Defendants) and 32-1706 (Who joined as Unknown Persons) and 32-1707 (Service on Unknown Defendant; How Made; affidavit for Publication) (1943); N.D. Rules Civ. Proc. 4(g) (Service by Publication; When Permitted).

pointed to represent such unborn interest in the absence of an express statutory provision, which is lacking here at the present time. It would seem, however, that appointment of either a guardian ad litem or a trustee could be made through powers inherent in a court of justice in a proper case.

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JURISDICTION OVER INDIAN COUNTRY IN NORTH DAKOTA

INDIANS

There is no definition of an Indian applicable to all situations, consequently, each jurisdiction has its own definition for its own purposes. The decisions on this question have been so diverse that on occasion a white man has been considered an Indian[1] and an Indian not an Indian[2] for legal purposes.

The federal government has defined who is an Indian by legislation[3] for various purposes and there have been judicial definitions by the United States Supreme Court.[4] The definitions by the federal government, which has been dealing with Indians longer than most states, have not been consistent and perhaps necessarily so because of treaty obligations[5] and policy reasons.[6]

The North Dakota Supreme Court in *State v. Kuntz held* that one who is of the half-blood, a member of an Indian tribe, lives on the tribal reservation, and is treated by the Bureau of Indian affairs of the United States government as an Indian is an Indian. It is doubted that the court meant this to be a definition to be followed by North Dakota courts since to do so would exclude those of less than half-blood even though he met the other criteria stated. More persuasive and decisive would be whether or not a person is treated as an Indian by the federal government since if he were treated as an Indian his real property and some of his personal

1. Nofire v. United States, 164 U.S. 657 (1897).
2. United States *ex rel.* Standing Bear v. Crook, 25 Fed. Cas. 695, No. 14891 (C.C. Neb. 1879).
3. 48 Stat. 988 (1934), 25 U.S.C. 479 (1958); 40 Stat. 564 (1918, 25 U.S.C. 297 (1928).
4. United States v. Higgins, 103 Fed. 348 (1900); see Sully v. United States, 195 Fed. 113, 129 (1912) where one-eighth bloods were "of sufficient Indian blood to substantially handicap them in the struggle for existence" and therefore Indians.
5. See treaty obligations recognizing mixed-bloods listed in Cohen, Handbook of Federal Indian Law, 3, n.14 (1945).
6. 68 Stat. 868 (1954), 25 U.S.C. 677-677aa (1958) (termination of federal supervision over the property of mixed-bloods).
7. 66 N.W.2d 531, 533 (N.D. 1954).