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Estoppel - Effect, as against Heir, Devisee, or Donee, of Covenant of Ancestor or Donor - Grantee by Warranty Deed Estopped from Destroying Contingent Remainders through MergerEstoppel - Effect, as against Heir, Devisee, or Donee, of Covenant of Ancestor or Donor - Grantee by Warranty Deed Estopped from Destroying Contingent Remainders through Merger

Alber M. Christopher

ESTOPPEL — EFFECT, AS AGAINST HEIR, DEVISEE, OR DONEE, OF COVENANT OF ANCESTOR OR DONOR — GRANTEE BY WARRANTY DEED ESTOPPED FROM DESTROYING CONTINGENT REMAINDERS THROUGH MERGER. — A was the father of B, C, and D. In 1911, he conveyed Blackacre by general warranty deed to B and the heirs of her body; but if no heirs of B's body should survive her, then to the heirs of the body of C. Under Illinois law,[1] this deed vested a life estate in B with a contingent remainder in B's unborn issue and an alternative contingent remainder over to the issue of C. A died intestate. Since he had not provided for the possibility that there would be no heirs of the body of B or C, A left a reversion which passed to his three children in equal shares. B executed a warranty deed, purporting to convey a fee, to X in 1917 and immediately accepted a reconveyance, attempting to destroy the contingent remainders. The Supreme Court of Illinois *held* that B's attempted joinder of her one-third reversionary interest with her life estate did not effect a destruction, since when A conveyed to B by general warranty deed, he warranted the indestructibility of the contingent remainders, and the obligation of this warranty descended to B when the reversion descended to her. Hence B was estopped to destroy the contingent remainders by her father's deed. Th court further *held* that, although the contingent remainder of C's issue would have been defeated at common law, the 1921 Illinois statute on the indestructibility of future interests preserved that remainder.[2] *Spicer v. Moss*, 100 N.E.2d 761 (Ill. 1951).

A contingent remainder is a remainder which is subject to a condition precedent or is created in favor of an unknown or unascertained person.[3] An early postulate of the common law was that there must be an immediate transfer of all interests created by a conveyance.[4] Since such a "remainder," pending the contingency, was a mere potentiality as contrasted with a full actuality, there could be no immediate transfer of the interest. Originally, this metaphysical concept prevented the creation of contingent remainders, and it was not until the fifteenth century that the legal validity of these interests was finally established.[5]

Another principle actually hastened the destruction of the contingent interests that were allowed to be created. This principle was that seisin must never be in abeyance.[6] Supplemented by the postulate in the preceding paragraph, this doctrine necessitated the creation of a supporting particular estate of freehold at the same time that the freehold contingent remainder was created. To prevent its destruction, the contingent remainder must necessarily vest at the very instant the particular estate determined.[7] Moreover, the particular estate might be terminated before its natural ex-

1. Ill. Rev. Stat. c. 30, §5 (1949). See Aetna Life Insurance Co. v. Hoppin, 249 Ill. 406, 94 N.E. 669, 671 (1911), where it was pointed out that the rule in Shelley's Case applies in Illinois only to fees simple, estates tail having been abolished by this statute. The statute also abolished the rule in Shelley's Case as applied to such estates.

2. Ill. Rev. Stat. c 30, §40 (1949) ("That no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect." Passed in 1921).

3. Casner and Leach, Cases and Text on Property 353 (1st stand. ed. 1951).

4. Moynihan, Preliminary Survey of the Law of Real Property 65 (1940).

5. Simes, Future Interests 13 (1951).

6. Moyhihan, *op. cit. supra* note 4, at 43.

7. Simes, Future Interests 13 (1951).

piration by forfeiture or by merger, which would destroy the contingent remainder just as effectively as when the latter interest did not vest upon the natural termination of the particular estate.[8]

The last two ramifications of the general doctrine that seisin must never be in abeyance are both involved in the instant case. B attempted the fractional destruction of the contingent remainder by merger. The common law doctrine of fractional vesting is upheld by several Illinois decisions.[9] The other aspect of the case turns on the fact that the "heirs" of C, a living person, are necessarily unascertained; their interests do not vest immediately upon the determination of the supporting freehold estate.

Under the common law, where the particular estate and the next vested estate in reversion or remainder are joined in the same person, the particular estate is "swallowed" by the larger interest, and all contingent remainders dependent upon the particular estate for their support are destroyed.[10] The only logical explanation of this rule seems to be as follows: the reversion, existing alone, is an abstraction but is nevertheless in being; it is really an incorporeal interest. When it is joined to a possessory estate, it becomes an estate in possession—a concrete actuality—and since it then comprehends the entire fee, the life estate has no further function to perform. This doctrine of merger was in constant use under the common law, even though the original conveyances creating the contingent remainder were subject to implied warranties of quiet enjoyment and general warranty.[11] The covenants of warranty in a deed today are construed in the same way as the implied warranties at common law.[12]

Before the common law rule of destructibility by merger was abolished by statute [13] in Illinois, the courts of that state utilized a singularly illogical doctrine to limit the application of the rule. As in the instant case, the Illinois courts have held that if a grantor conveys by a warranty deed which creates a life estate and one or more contingent remainders, he and his heirs are estopped from transferring their reversions in such a way as to destroy the contingent remainders.[14]

Undoubtedly the scope of the destructibility rule should be narrowed as much as possible, but this result may be achieved by legislative enactment.[15] Commenting on the peculiar rule in Illinois, Professor Simes has pointed out that if the grantor has created a destructible contingent remainder, it is difficult to see how he warrants that it is indestructible. "And if he subsequently destroys it by bringing about a merger, it is difficult to see how he has done anything inconsistent with his warranty." [16]

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8. *Id.* at 50.

9. Martin v. Karr, 343 Ill. 296, 175 N.E. 376 (1931); Fuller v. Fuller, 315 Ill. 214, 146 N.E. 174 (1924); Lewin v. Bell, 285 Ill. 227, 120 N.E. 633 (1918).

10. *See* Biwer v. Martin, 294 Ill. 488, 128 N.E. 518, 522 (1920).

11. 2 Bl. Comm. *300.

12. *See* Biwer v. Martin, 294 Ill. 488, 128 N.E. 518, 523 (1920).

13. *See* note 2 *supra.*

14. Marvin v. Donaldson, 329 Ill. 30, 160 N.E. 179 (1928); Biwer v. Martin, 294 Ill. 488, 128 N.E. 518 (1920). *Contra*: Martin v. Karr, 343 Ill. 296, 175 N.E. 376 (1931); Hull v. Beals, 23 Ind. 25 (1864).

15. *See* Simes, Future Interests 61 (1951) for jurisdictions in the United States where the destructibility rule has been wholly or partially abolished by statute.

16. Simes, Future Interests 59 (1951). Perhaps Professor Simes' line of reasoning may be illustrated with more clarity by the following syllogism: A contingent remainder is by its very nature destructible; but the creating grantor warranted the indestructibility of a contingent remainder. Therefore, the creating grantor warranted the indestructibility

Of course, after the passage of the 1921 Statute for the preservation of contingent remainders,[17] the remainder would not be naturally destructible because the law has made it, in effect, indestructible. However, one must remember that the attempted destruction in the instant case was made in 1917, when the common law doctrine of destruction by merger had not been abolished. The 1921 Statute was not retroactive.[18] It appears, therefore, that B should have been fractionally vested in fee of one-third of the entire estate. The contingent remainder would thus be destroyed to that extent.

The 1921 Statute made ineffectual the old common law doctrine that "nemo est haeres viventis." By virtue of this statute, it was not necessary that the remainder must vest at the very instant the particular estate determined. Therefore, despite the fact that C was still living and could have no heirs, the contingent remainder in his issue was not destroyed, but would vest upon his death.

North Dakota has a statute for the preservation of future interests,[19] but a thorough search has revealed no North Dakota case law in point. However, the statutes of California,[20] Montana,[21] and South Dakota,[22] for all practical purposes, are identical to the North Dakota statute. In these jurisdictions, there have been no cases directly in point, but their statutes have been construed and applied upon several occasions.[23]

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of that which is by its very nature destructible. *But cf.* the language of Mr. Justice Holmes in Ayers v. Philadelphia and Boston Face Brick Company, 159 Mass 84, 86, 34 N.E. 177, 178 (1893); "Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description. But this is not necessarily so; and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unencumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for the fact being true. In short, if a man by a deed says, I hereby estop myself to deny a fact, it does not matter that he recites as a preliminary that the fact is not true."

17. *See* note 2 *supra.*

18. Hauser v. Power, 356 Ill. 521, 191 N.E. 64 (1934); Danberg v. Langman, 318 Ill. 266, 149 N.E. 245 (1925); Edmiston v. Donovan, 300 Ill. 521, 133 N.E. 237 (1921).

19. N.D. Rev. Code §§47-0230, 47-0232 (1943): "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 iinterest by forfeiture, surrender, merger, or otherwise, except as provided by §47-0232, or when a forfeiture is imposed by statute as a penalty for the violation thereof." "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."

20. Calif. Civ. Code §§741, 742 (Deering, 1949).

21. Mont. Rev. Codes Ann. §§67-419, 67-420 (1947).

22. S.D. Code §51-0230 (1939).

23. Women's Home and Foreign Missionary Soc. v. Bank of America, 15 Cal. App. 2d 682, 59 P.2d 1060 (1936), (Where grantor deeded realty reserving life estate, grantor could not regain fee simple by adverse possession); *In Re* Griggs Estate, 98 Cal. App. 119, 276 Pac. 394 (1929) (Where will left income from a certain sum to A for life, and on death of principal, to B, death of A before testatrix did not defeat the right of B); *In Re* McCurdy's Estate, 197 Cal. 276, 240 Pac. 498 (1925) (Testatrix devised property to niece, in trust, with power to dispose of remainder as she chose to exercise it, and in default thereof to her heirs at law. That the whole trust scheme was defeated on death of niece prior to testatrix, *held* not to defeat interest of niece's heir at law as remainderman); Newport v. Hatton, 195 Cal. 132, 231 Pac. 987 (1924); Hall v. Brittain, 171 Cal. 424, 153 Pac. 906 (1915) (§§741, 742 of the Civ. Code, which provide that future estates will not be defeated or barred by alienation, will have no application to a devise which, by the express terms of a will, is to be defeated upon the happening of a certain contingency); Pryor v. Winter, 147 Cal. 554, 82 Pac. 202 (1915); *In Re*

A comparison of the Illinois Statute [24] with the North Dakota Statute [25] would seem to indicate that the decision in the instant case would have been the same in North Dakota—all other things being equal—if it were not for the peculiar doctrine of estoppel advocated by the Illinois Court. If the attempted destruction of one-third of the contingent remainder had occurred in this state prior to the passing of the statute, the plaintiff would have had a good fee-simple title to one-third of the land.

ALBERT M. CHRISTOPHER

TORTS — RIGHT OF PRIVACY — RECOVERY FOR WOUNDED FEELINGS AND MARITAL DIFFICULTIES. — Plaintiff and his wife bought an inexpensive radio from defendant on the installment plan. When only a small balance remained unpaid, defendant sent to plaintiff a post card stating: "Dear Milford, I'll be in LaGrange next week. Call me at 9693. Love, Mary." Plaintiff's wife read the card and, being convinced of plaintiff's infidelity, left him. Plaintiff eventually effected a reconciliation with his wife, but the original relationship of trust and affection between them was never restored. Plaintiff sued for $25,000 damages for wounded feelings and marital difficulties. In allowing him to recover $5,000, the court *held* that the defendant had committed an actionable tort; that defendant was at least guilty of a great degree of negligence. The court found it unnecessary to label the action either as one for libel or invasion of plaintiff's right of privacy. Nevertheless, the opinion discussed the nature of libel and also stated that defendant had injured plaintiff in what plaintiff alleged in his petition as "the legal right to personal security in his home, including the right of enjoyment of life, and the enjoyment of the happiness of home and the love and confidence of his wife." *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951).

The general rule has recently changed to allow recovery for injury without physical hurt.[1] Among other things, one may recover for mental injury. The old theory underlying recovery for mental injury was that the plaintiff had to show his mental suffering to be an incident of an established cause of action [2] or had to have a physical impact accompanying it.[3] Now, however, it is an independent cause of action and there need not be an impact.[4]

Merrigan's Estate, 34 S. D. 644, 150 N.W. 285 (1914) (under code, remainder after conditional life estate is not, as at common law, defeated upon forfeiture of life estate before life tenant's death).

24. *See* note 2 *supra*.

25. *See* note 19 *supra*.

1. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193, 207 (1944).

2. Young v. Gormley, 120 Iowa 327, 94 N.W. 922 (1903) (illegal arrest); Parkhurst v. Mastellar, 57 Iowa 474, 10 N.W. 864 (1881) (malicious prosecution); Spade v. Lynn & B.R.R., 172 Mass. 488, 52 N.E. 747 (1899).

3. Wyman v. Leavitt, 71 Me. 227 (1880); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 355 (1899).

4. Broda, *One's Right to Enjoy Mental Peace and Tranquility*, 28 Geo. L.J. 55 (1940); 22 Minn. L. Rev. 1070 (1938). The turning point seems to have been Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).