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Real Property

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REAL PROPERTY

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Transmissibility of Contingent Remainders

Jones v. Holland,[1] the sole future interest case decided during the survey period, deals with the always vexing problem of whether or not a requirement that a remainderman or an executory devisee survive until some period subsequent to the testator's death is to be implied from the existence of some other condition precedent annexed to the interest of such remainderman or executory devisee. For example, *A* devises Blackacre to *B* for life, remainder in fee to the children of *B* who shall survive him, but if *B* dies leaving no children him surviving, remainder in fee to *C*. During *B's* life the interests of *B's* children and of *C* are contingent remainders,[2] the interests of *B's* children being subject to the condition precedent that they survive *B* and the interest of *C* being subject to the expressed condition precedent that *B* die unsurvived by children. As regards *C's* interest, is a further condition precedent that *C* survive *B* to be implied, so that if during *B's* life *C* dies intestate, *C's* heir will not be entitled to possession of Blackacre upon *B's* subsequent death without surviving children?

The proper answer to this question would seem to be that the interest of *C* not expressly being subject to the requirement that he survive *B*, no such requirement is to be implied, and, therefore, that *C's* heir is entitled.[3]

However, suppose that in the above illustration the alternative contingent remainder is to *C's* children instead of to *C*, so that the devise reads to *B* for life, remainder in fee to *B's* children who shall survive him, but if *B* dies leaving no children him surviving remainder in fee to *C's* children. At the testator's death *C* is alive and has three living children, *C-1*, *C-2*, and *C-3*. Thereafter *C-1* predeceases *B*, who subsequently

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1. 223 S.C. 500, 77 S.E. 2d 202 (1953).
2. Faber v. Police, 10 S.C. 376 (1878). 2 Tiffany, REAL PROPERTY § 321, 333 (3rd ed. 1939).
3. Dickson v. Dickson, 23 S.C. 216 (1885); Black v. Todd, 121 S.C. 243, 113 S.E. 793 (1922). Simes, HANDBOOK OF THE LAW OF FUTURE INTERESTS 275 (1951); 5 AMERICAN LAW OF PROPERTY § 21.25 (1952).

dies without children living at his death. Do *C's* then living children, *C-2* and *C-3*, each take a one-half interest in Blackacre, or is the estate of *C-1* also entitled? In other words, although there is no implied requirement of survival where the remainder is to an individual devisee, is such a requirement to be implied when the remainder is to a class?

Although the authorities in general agree that where a remainder to a class is vested a member of the class need not survive the life tenant,[4] where the remainder is on a contingency other than survivorship of the life tenant there is far less accord. The American Law Institute[5] and certain text writers[6] have taken the position that the same rule applicable to a contingent remainder to an individual should be applied where the remainder is to a class, and, therefore, that in the above illustration the interest of *C-3* is transmissible. The cases,[7] however, are far from uniform in support of *C-3*.

In *Jones v. Holland*[8] the devise was "to my grandson, Johnnie . . . during the lifetime of the said Johnnie and at his death to go to his children in fee simple, and in case he . . . has no children to revert back to my estate and be equally divided among my grandchildren . . . ." The testator was survived by seven grandchildren, only one of whom survived the life tenant, who died without ever having had a child. In a con-

4. Crossby v. Smith, 3 Rich. Eq. 244 (1851); Bannister v. Bull, 16 S.C. 220 (1881). 2 Simes, FUTURE INTERESTS § 390 (1936); 5 AMERICAN LAW OF PROPERTY § 21.11 (1952).

5. RESTATEMENT, PROPERTY § 261 (1940). Comment a. thus rationalizes the Institute's position:

"The fact that a limitation contains language creating one condition precedent as to a remainder or executory interest, is in no way helpful in deciding whether other language in the same limitation creates another condition precedent based upon a separate and unrelated future occurrence. Similarly, the existence of one defeasibility affords no help in determining the existence of another defeasibility. The rule stated in this Section would be almost too obvious for statement if it were not for the erroneous view, often expressed in cases concerning class gifts, that the members of the class necessarily remain subject to the condition precedent of survival so long as the ultimate ascertainment of the class is postponed by another defeasibility or condition precedent of such gift . . . ."

6. 5 AMERICAN LAW OF PROPERTY § 21.25 (1952); Simes, HANDBOOK OF THE LAW OF FUTURE INTERESTS 275, 301 (1951). However, cf. 2 Simes, FUTURE INTERESTS § 391 (1936).

7. The leading cases to the effect that a class member must survive until the time of the vesting of the contingent remainder to the class are Drury v. Drury, 271 Ill. 336, 111 N.E. 140 (1915), and *In re* Coots Estate, 253 Mich. 208, 234 N.W. 141 (1931), *cert. den. sub nom.* Delbridge v. Oldfield, 284 U.S. 665 (1931). For other cases see 5 AMERICAN LAW OF PROPERTY § 21.25 (1952), note 3, and 2 Simes, FUTURE INTERESTS § 391 (1936).

8. See note 1, *supra*.

test between the heirs of the deceased grandchildren and the surviving grandchild the Court held that the contingent interests[9] of the grandchildren were nontransmissible, and, therefore, that the surviving grandchild took the entire property.

While several of the South Carolina cases[10] referred to in the opinion of the Court seem readily distinguishable because of the presence in the limitations construed in those cases of an expressed requirement of survival, one case, *Jeffords v. Thornal,*[11] appears squarely to support the conclusion of the Court. One other cited case, *Black v. Todd,*[12] needs further comment. There the devise in substance was to *B* for life, remainder in fee to the children of *B* who shall survive her, but if *B* dies leaving no children her surviving, then to *C* for life, remainder in fee to her children. *C* outlived the testatrix but died in *B's* lifetime, survived by two children. These children also predeceased *B,* who then died without surviving children. It was held that the contingent interest of *C's* children were not defeated by their failure to survive *B,* apparently on the theory that the death of the parent having ended the possibility of any further increase in the class membership, the interests of then living class members had become transmissible just as though these members had been individually designated.

It does not appear in *Jones v. Holland*[13] (as it did not in the *Jeffords* case[14]) whether or not a similar impossibility of an increase in the class membership had occurred prior to the termination of the life estate. If in these cases such impossibility of an increase in the class membership could have been established, in view of *Black v. Todd*[15] it appears that the interest of all then living class members would at that time become transmissible. Thus in *Jones v. Holland,*[16] assuming

9. The circuit judge had ruled that the grandchildren took a vested remainder subject to being divested by the birth of a child to the life tenant. The Supreme Court held the interests of the grandchildren to be contingent remainders, a conclusion which seems inescapable in view of the authorities cited in the opinion.

10. Roundtree v. Roundtree, 26 S.C. 450, 2 S.E. 474 (1887); *In re* Warren's Will, 176 S.C. 455, 180 S.E. 458 (1935); Dukes v. Shuler, 185 S.C. 303, 194 S.E. 817 (1938). Dickson v. Dickson, 23 S.C. 216 (1885), also cited by the Court, involved a contingent remainder to an individual rather than one to a class.

11. 204 S.C. 257, 29 S.E. 2d 116 (1944).

12. 121 S.C. 243, 113 S.E. 793 (1922).

13. See note 1, *supra.*

14. See note 11, *supra.*

15. See note 12, *supra.*

16. See note 1, *supra.*

that all the testator's children predeceased the life tenant, it would seem that all grandchildren living at the death of the last child had transmissible interests which did not require their surviving the life tenant. Whether or not this factual situation existed is not apparent from the opinion in the case.

Adverse Possession

While an unexplained exclusive possession of land by a stranger to the title ordinarily will be presumed to be adverse,[17] the existence of certain legal relations between the adverse claimant and the true owner rebuts such presumption of hostility. Two such problems were considered during the period of the survey.

In *Watson v. Little*[18] the Court affirmed the position taken in previous cases[19] that adverse possession by a tenant in common against his cotenants does not commence to run until there has been an ouster of the cotenants by the tenant in possession. While such an ouster may be presumed from an exclusive enjoyment of the property for twenty years, no such presumption will arise from a mere exclusive enjoyment for a shorter period, and where the claimant's occupancy has been for less than twenty years, proof of an actual ouster of which the cotenants out of possession knew or in the exercise of reasonable diligence should have known is necessary. In the instant case the claimant could not establish adverse possession because his exclusive occupancy having been for less than twenty years, no ouster could be presumed. The Court found it unnecessary to decide whether the taking and recording of a tax deed by one tenant amounts to an ouster of his cotenants, since less than ten years had elapsed since the execution of the deed.

In *Knight v. Hilton*[20] the Court applied the settled rule[21] that adverse possession by a mortgagee against the mortgagor does not commence to run until there has been a distinct dis-

17. Knotts v. Joiner, 217 S.C. 99, 59 S.E. 2d 850 (1950); Knight v. Hilton, 224 S.C. 452, 79 S.E. 2d 871 (1954).
18. 224 S.C. 359, 79 S.E. 2d 384 (1953).
19. Among the many S. C. cases to this effect see Gray v. Givens, 2 Hill Eq. 511, Riley Eq. 41; Weston v. Morgan, 162 S.C. 177, 160 S.E. 436 (1931); Wells v. Coursey, 197 S.C. 483, 15 S.E. 2d 752 (1941); Knotts v. Joiner, 217 S.C. 99, 59 S.E. 2d 850 (1950).
20. 224 S.C. 452, 79 S.E. 2d 871 (1954).
21. Frady v. Ivester, 129 S.C. 536, 125 S.E. 134 (1924); Ham v. Flowers, 214 S.C. 212, 51 S.E. 2d 753, 7 A.L.R. 2d 1124 (1949); Fogle v. Void, 223 S.C. 83, 74 S.E. 2d 358 (1953).

avowal and repudiation of the mortgage relationship and notice thereof brought home to the mortgagor. The plea of adverse possession was held to fail because there was no evidence of the adverse character of the mortgagee's possession.

Problems Incident to Real Estate Subdivisions

The rule that owners of lots in a subdivision have a special property interest in areas designated on the subdivision plat as streets or parks which interest is not affected by a failure of the public to acquire rights therein because of an incomplete dedication was applied in *Newton v. Batson.*[22] The Court held proper an order enjoining a nonconforming use granted against a purchaser with notice of a lot designated as a park on the subdivision plat.

Where changed conditions have made impossible the accomplishment of the purpose of restrictive covenants imposed upon the lots in a subdivision, the enforcement of such covenants may be denied in equity.[23] What constitutes such a change in the character of the neighborhood as to destroy the effect of the covenants is a question on which the cases are not in accord. Some courts have taken the position that if a change in the character of the area outside the subdivision makes impossible the enjoyment of border lots in the subdivision in accordance with the purpose of the restrictions, then there is sufficient change of condition to warrant a refusal to enforce the restrictions against the border lots.[24] Other courts have enforced the covenants against the owners of border

22. 223 S.C. 545, 77 S.E. 2d 212 (1953). Prior cases include Billings v. McDaniel, 217 S.C. 261, 60 S.E. 2d 592 (1950); Cason v. Gibson, 217 S.C. 500, 61 S.E. 2d 58 (1950); Outlaw v. Moise, 222 S.C. 24, 71 S.E. 2d 509 (1952).

23. See Pitts v. Brown, 215 S.C. 122, 133, 54 S.E. 2d 538 (1949), Martin v. Cantrell, 81 S.E. 2d 37, 40 (S.C. 1954). 2 AMERICAN LAW OF PROPERTY § 9.39 (1952). It has been held in a few cases that even though a nonconforming use of a restricted lot will not be enjoined because of changed conditions, the lot owner cannot maintain an affirmative action to quiet title against the restrictive covenant since the agreement is still enforceable in an action at law. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1919), and other cases cited in 5 AMERICAN LAW OF PROPERTY § 9.39 (1952), p. 445, note 3. Other cases have held that such affirmative relief may be granted. Hess v. Country Club Park, 213 Cal. 613, 2 P. 2d 782 (1931), and other cases cited in 5 AMERICAN LAW OF PROPERTY § 9.39 (1952), p. 445, notes 1, 2. See notes 88 A.L.R. 405 (1934), 103 A.L.R. 734 (1936). The opinion of the Court in Martin v. Cantrell, 81 S.E. 2d 34 (S.C. 1954), expresses no doubt as to the propriety of such affirmative relief by way of a declaratory judgment.

24. Downs v. Kroeger, 200 Cal. 743, 254 Pac. 1101 (1927); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930). 5 AMERICAN LAW OF PROPERTY § 9.39 (1952).

lots on the theory that such lots are designed as buffers for the protection of interior lots, and that unless the change in conditions has taken place within the subdivision, or if outside the subdivision is so extensive as to affect the entire subdivision, the covenants have not lost their validity.[25]

In *Martin v. Cantrell*[26] the Court affirmed the refusal by the circuit judge of a declaratory judgment that certain residential restrictive covenants were no longer enforceable because of changed conditions. The record in the case was held to show no radical changes in the surrounding area, and no changes within the subdivision which would make inequitable the enforcement of the covenants. The authorities cited by the Court are to the effect that a change of conditions outside the restricted area does not affect the validity of the restrictions.

Municipal Liability for Injuries to Private Property From Surface Water

A neat question of statutory construction, one well illustrative of the difficulties of proper legislative draftsmanship, was presented the Court in *Hill v. City of Greenville.*[27]

A statute[28] provides "Whenever within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street . . . over . . . private lands . . . upon demand from the owner . . . thereof . . . such municipality shall provide sufficient drainage for such water through . . . drains except where the formation of the street renders it impracticable, along . . . such streets . . . in such manner as to prevent the passage of such water over such private lands . . . provided . . . if such drains cannot be had along . . . such streets . . . the municipal authorities shall have the power [of] condemnation . . . on payment of damages to the landowner. . . . If any municipal corporation . . . fail or refuse to carry out the provisions of this section, any person injured thereby may . . . maintain an action against such municipality for . . . actual damages. . . ."

25. Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931), and other cases cited in 5 AMERICAN LAW OF PROPERTY § 9.39 (1952), note 11. See notes 54 A.L.R. 812 (1928), 85 A.L.R. 985 (1933), 103 A.L.R. 734 (1936).

26. 81 S.E. 2d 37 (S.C. 1954).

27. 223 S.C. 392, 76 S.E. 2d 294 (1953).

28. § 7301, S. C. CODE OF LAWS (1942), enacted in 1902 (23 STAT. 1038). The text of the statute as contained in § 59-224, CODE OF LAWS OF S. C., 1952, is somewhat altered. For judicial comment upon this textual alteration, see Holliday v. City of Greenville, 224 S.C. 207, 215, 78 S.E. 2d 279 (1953).

Does the statute impose an affirmative duty to protect private lands adjoining the street, or does it impose liability only in the event some positive action by the municipality has occasioned the injury? Contrary to the construction placed on the statute by the circuit judge, the Court found the statute applicable only where the municipality had acted to alter existing drainage, and, therefore, that the City of Greenville was not liable to a landowner for the continuance of the drainage system created by the State Highway Department prior to the annexation of the area to the city.

A later case, *Holliday v. City of Greenville*,[29] further clarified the meaning of the statute by affirming judgment on a verdict for the plaintiff where the damage resulted from the city's alteration of existing drainage by the installation of curbs and gutters. The Court pointed out that since the action was brought under the statute quoted above it was unnecessary to consider whether the city might not also be liable on the theory of the taking of private property for public use without compensation.

Adjudication of Title in Trespass Quare Clausum Fregit

In *Little v. Little*[30] the Court had occasion to consider the effect, in an action of trespass *quare clausum fregit*, of a denial by defendant of plaintiff's right to possession by reason of a plea of *liberum tenementum* (that the *locus in quo* is defendant's freehold, or that of a third person under whom he acted[31]). In line with earlier South Carolina cases cited in the opinion it was held that while possession and not title normally is involved in trespass *quare clausum fregit*, yet where the defendant denies plaintiff's title and pleads *liberum tenementum*, the judgment on a verdict is conclusive between the parties on the issue of title. Here the judgment on a verdict for the plaintiff was held determinative of the location of a disputed boundary since under the pleading and proof such verdict necessarily was an adjudication in plaintiff's favor of the boundary location.

Reformation and Cancellation of Deeds

In a suit by the grantors against a purchaser from their grantee for a reformation of the description in a deed on the

29. Holliday v. City of Greenville, 224 S.C. 207, 78 S.E. 2d 279 (1953).
30. 223 S.C. 332, 75 S.E. 2d 871 (1953).
31. BLACK'S LAW DICTIONARY 1066 (4 ed. 1951).

ground of mutual mistake, the Court applied the principle that even if there were a mutual mistake (of which the court found insufficient evidence) which would warrant a reformation between the parties to the deed, such reformation cannot be had as against a subsequent purchaser for value without notice of the equity of reformation.[32]

Where more than six years after discovery of the facts suit was brought for the cancellation of certain deeds alleged to be forgeries, the Court held the action to be barred by the six year statute of limitations for relief on the ground of fraud.[33]

Boundaries

In *Rushing v. Sellers*[34] the Court was concerned with an unusual application of the general rule that in a conveyance of land calling for a highway as a boundary it is presumed that the grantor intended a conveyance to the center of the highway. Where the description in a deed calls for a conveyance out of a larger tract of one acre of land situate in the fork of the junction of two highways, does the grantee take one acre free of the area subject to the highway easements, or is the land to the center of each of the two highways to be included in the calculation of the one acre conveyed? Answering this question, the Court held that the parties must be presumed to have intended the conveyance of one acre suitable for private use, and, therefore, that the computation of the one acre area must be made from the edge rather than from the center of each of the two highways. However, despite this method of computing the land conveyed, the fee to the centers of the highways passed to the grantee, so that upon an abandonment of one of the highways by the public authorities the grantee's successor was held entitled to possession to the center of the abandoned highway as against the assignee of the balance of the tract.

32. Ives v. Ives, 223 S.C. 461, 76 S.E. 2d 471 (1953).
33. McKinnon v. Summers, 224 S.C. 331, 79 S.E. 2d 146 (1953).
34. 81 S.E. 2d 281 (S.C. 1954).