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Contingent Remainders in Pennsylvania

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IMMORAL ACTS DONE UNDER A MISTAKE OF FACT

If a man is engaged in the commission of an immoral act, even though it may not be indictable, and unintentionally commits a crime, it is generally no defense for him to show that he was ignorant of the existence of the circumstances rendering his act criminal. Thus a man who has unlawful sexual intercourse with a woman cannot defend against a charge of adultery on the ground that he did not know that the woman was married.[24] A man who has intercourse with a girl below the age of consent, with her consent, cannot defend against a charge of rape, on the ground that he reasonably believed her to be above the age of consent[25].

—Paul A. Koontz.

CONTINGENT REMAINDERS IN PENNSYLVANIA

The Pennsylvania Legislature in 1935 passed an act to limit the operation of the rule in Shelley's Case[1]. This act so far as it will operate[2] to limit the rule in Shelley's Case creates contingent remainders and thus may make applicable another rule in Pennsylvania which operates to defeat the intention of the testator. The rule which may now become more noticeable is that contingent remainders are destructible. The new act which purports to prevent the life tenant from taking the remainder as he would under the rule in Shelley's Case makes these remainders into contingent remainders.[3] That is, where land is devised to A for life, remainder to A's heirs, the heirs of A now have contingent remainders and the heirs of the testator a vested reversion. This gives rise to the question whether A by his act can destroy these contingent remainders.

In answering this question the first factor to be determined is: Are contingent remainders destructible in Pennsylvania? From the earliest case in Pennsylvania to the last the answer seems to be in the affirmative. From *Dunwoodie v. Reed*[4] in 1817 to *Gunning's Estate*[5] in 1912 the rules of the common law have been followed in all of their details to destroy the contingent remainders. It seems

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[24]State v. Anderson, 140 Iowa 445, 118 N. W. 772; Commonwealth v. Elwell, 2 Metc. (Mass.) 190; State v. Cody, 111 N. C. 725, 16 S. E. 408; Fox v. State, 3 Tex App. 329.

[25]Commonwealth v. Murphy, 165 Mass. 66, 42 N. E. 504.

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[1]Act of June 19, 1935, P. L. 1013.

[2]See: Irwin, Legislative Limiting of the Rule in Shelly's Case in Pennsylvania, Dickinson Law Review, October 1935, p. 27.

[3]See footnote 2.

[4]3 S. & R. 435 (1817).

[5]234 Pa. 144 (1912).

desirable then to give a brief resume of the cases in Pennsylvania that support such a conclusion.

In *Dunwoodie v. Reed*[6] the court split evenly on the question whether the contingent remainder should be destroyed by a common recovery suffered by the life tenant. Therefore the lower court's decision holding that it did was affirmed. In the next case, *Lyle v. Richards*,[7] in 1823, the same court held that the common recovery did destroy the contingent remainders. The same year the court decided in *Abbott v. Jenkins*[8] that a common recovery destroyed the contingent remainders. Justice Tilghman in his decision does not question the rule but considers only the question whether the remainders were vested or contingent and in concluding they were contingent held they were destroyed. In 1828 the court[9] strengthened these cases by holding a recovery suffered by a life tenant destroyed the contingent remainders even though the recovery itself was void for want of a good tenant in the praecipe. Five years later the court[10] held that where A is devised a life estate and on the death of A to go to the children of T, that the children of T had contingent remainders which were destroyed on A's death, T then having no children. Here the court held that a natural termination destroyed the contingent remainders there being no estate of freehold to support them. In *Waddell v. Rattew*[11] the court only discusses the point whether an executory devise or a contingent remainder had been created by the will and stating that if it is the former, as at common law,[12] is not destructible but if the latter, it is destructible. A case[13] decided the same year held that a bargain and sale by the life tenant of a fee defeated the contingent remainder. Justice Kennedy in his decision said, "I do not consider it a sufficient objection to this conclusion, that the intention of the testator as regards the contingent remainder may be thus indirectly frustrated by it; because it must be presumed that he was acquainted with the law on this subject, ... and that unless he introduced trustees into his will for the purpose of preserving the contingent remainder he left it in the power of the devisee of the particular estate, to defeat the contingent remainder." In *Stewart v. Kenower*[14] the court followed the common law rule[15] of merger as affecting contingent remainders by holding that where the life estate and reversion come together in the

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[6]See footnote 4.

[7]9 S. & R. 322 (1823).

[8]10 S. &. R. 296 (1823).

[9]Stump v. Findlay, 2 Rawle 167 (1828).

[10]Stehman v. Stehman, 1 Watts 466 (1833).

[11]5 Rawle 231 (1835).

[12]Cases & Materials on Future Interests, W. Barton Leach (1935) p. 69; Real Property, H. T. Tiffany, (1912) p. 329.

[13]Bennett v. Morris, 5 Rawle 9 (1835).

[14]7 W. & S. 288 (1844).

[15]Future Interests, Leach p. 64, 65; Law of Future Interests, Simes (1936) Vol. 1, p. 174.

same person at the same time and by the same instrument they do not destroy the contingent remainder but will open to let in the contingent remainder. Here the life tenant, in a devise, by the rule in Shelley's Case was vested with the two estates subject to be opened to let in contingent remainders to his children, but since he died without children the natural termination of the life estate destroyed the contingent remainders and he died seised of an estate in fee. In *Harris v. McElroy*[16] the court held that the life tenant could not destroy the contingent remainders by following the common law rule[17] that where trustees are appointed to preserve the contingent remainders the equitable life tenant cannot destroy them.

In *Jordan v. McClure*[18] the court held that merger did destroy the contingent remainders where the two estates were obtained through different instruments. Justice Paxson in *McCay v. Clayton*[19] held that where a will, which created a life estate with remainders to unborn children, was held invalid the contingent remainders to the unborn children also fell since the estate on which they depend was never created. Justice Paxson states the following in his decision which has often been quoted in discussions of this subject, "It would be as easy to support a house by its roof, as to support a contingent remainder without a particular estate." The lower court in *Stewart v. Neely*[20] gives an able discussion of this subject and also a good review of the cases. The court strongly criticizes the rule but follows the common law rule[21] that where a life tenant purchases the contingent remainders they are not destroyed. In *Eby v. Shank*[22] the court follows the case of *Stewart v. Kenower*[23] set out above. In the last case[24] on point Justice Potter held that the contingent remainders were destroyed where the will set out a condition necessary for the life tenant to take and since this condition was not met the devisee of the life estate took nothing and the contingent remainders were destroyed.

From these cases it follows that contingent remainders are destroyed by (1) life tenant suffering a common recovery[25], (2) merger of the life estate and reversion obtained by different instruments[26], (3) commission of treason by the life tenant[27], (4) natural termination of the life estate before the contingency has

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[16]45 Pa. 216 (1863).

[17]Future Interests, Leach p. 59; Restatement of Property, Sec. 240, p. 719; Future Interests, Simes p. 180.

[18]85 Pa. 495 (1877); See Simes, Future Interests p. 175.

[19]119 Pa. 133 (1888).

[20]139 Pa. 309 (1891).

[21]Future Interests, Simes p. 177.

[22]196 Pa. 426 (1900).

[23]See footnote 14.

[24]Gunnings Estate (No. 2), 234 Pa. 144 (1912).

[25]Dunwoodie v. Reed,3 S. &. R. 435; Lyle v. Richards, 9 S. & R. 322; Abbott v. Jenkins, 10 S. & R. 296; Stump v Findlay, 2 Rawle 167; Waddell v. Rattew, 5 Rawle 231.

[26]Jordan v. McClure, 85 Pa 495.

[27]Evan's Lessee v. Davis, 1 Yeates 330, (dictum).

been fulfilled[28], and (5) where the life estate fails for some condition not fulfilled[29].

The law today would seem to be the same as has been decided in these cases. There is nothing to indicate any change. A recent law review article[30], discussing this point, states that the judges today would hold differently but admits there is nothing to indicate that they would. As seen by the cases, the question has not risen very recently, but as stated in the beginning of this article, the statutory change in the rule in Shelley's Case creates more situations where the life tenant is likely to try to destroy these remainders to obtain a fee. The reason for the statute to change the rule in Shelley's Case was to carry out the testator's intention. It is clear that the testator only intended the life tenant to have a life estate and not more. This statute will be easily circumvented if the life tenant can destroy the contingent remainders. Today the main route open to the life tenant is through merger[31] since common recoveries are no longer available[32] and since he cannot convey a greater estate[33] than he has, as he could at common law. In all these cases there is retained by the testator a reversion[34] after his creation of the life estate. If the contingent remainders are destroyed the land reverts back to the heirs of the testator. As was seen in some of these cases the life tenant was also the heir of the testator and thus took the reversion by descent. However in this situation at common law[35] these estates would not merge to destroy the contingent remainders. However if the life tenant obtained the reversion by a different instrument or bought the reversion from the heirs of the testator then the two estates would merge to destroy the contingent remainders[36]. This is the situation which should be guarded against today. Thus if A obtained a life estate with remainder to his heirs and under the act abolishing the rule in Shelley's Case the heirs would have contingent remainders which A could destroy by purchasing the reversion. By so doing the life estate and reversion would merge and destroy the contingent remainders and A secure a fee which was the very thing that the act was passed to prevent. This point alone would seem sufficient basis for a statute to prevent the destruction of contingent remainders.

The rule that contingent remainders were destructible originated around 1597 when *Archer's Case*[37] was decided. The court held that seisin must be some-

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[28]Stehman v. Stehman, 1 Watts 466; Stewart v. Kenower, 7 W. &. S. 288.

[29]Stewart v. Neely, 139 Pa. 309; Gunning's Estate, 234 Pa 144.

[30]Brown, "Problems, etc., in Law of Future Interests," 79 U. of Pa. L. Rev. 385, 414-422 (1931).

[31]Simes, Future Interests, p. 173.

[32]Harris v. McElroy, 45 Pa. 221 (1863).

[33]Simes, Future Interests p. 169.

[34]Real Property, Tiffany p. 271; Simes, Future Interests Vol. 1, p. 63.

[35]See footnote 15.

[36]See footnote 15.

[37]Court of Queen's Bench, (1599) 1 Coke 66b.

where and that there could not be a period when it would be in the air between the termination of the life estate and the vesting of the contingent remainder. Even this was an unsatisfactory reason since the Statute of Uses had been passed in 1536 which made unnecessary the use of the seisin concept. The rule might have been beneficial before the rule against perpetuities was formed by making estates more alienable, but after 1800 even this support was no longer true. This was felt in England by 1845[38] when Parliament passed an act to prevent the life tenant from destroying the remainders. In 1877[39] Parliament passed another act to cover all situations which would otherwise destroy these remainders. In the United States most of the states have passed acts to remedy the situation or have refused to follow the common law rule of destructibility[40]. The Restatement of Property[40] also has adopted the majority view in stating that they should not be destroyed. There seem to be only five states squarely supporting the common law rule[41]. Among these five Pennsylvania is the outstanding state. Pennsylvania should be brought into line with the majority of states and England in setting aside this rule based on feudal tenure and discarded by the country of its origin since 1845.

As has been said there is no valid argument in favor of the rule; it overrides the testator's intentions,[42] and the majority view strongly opposes it. Pennsylvania's legislature should pass a statute to correct this doctrine. The following is a good example of a properly worded statute: "A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise[43]." This statute would prevent destruction of a contingent remainder by any means, in addition to covering destruction by the act of the life tenant. The reasons for saying that they shall take effect as executory devises are twofold. The first is: That since the famous case of *Pells v. Brown*[44], decided in 1620, executory devises have been held indestructible. Executory devises were made possible by the Statute of Uses (1536) and Statute of Wills (1540)[45]. An executory devise, for example, is where land is devised to A for life and one year after A's death to B's heirs. It is not easy to justify today the indestructibility of an executory devise and the destructibility of a contingent remainder. At their origin both were considered

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38 8 & 9 Vict. c. 106 (1845).

39 40 & 41 Vict. c. 33 (1877).

40 Restatement of Property, Secs 239 and 240; see note to section 240. See also "Inroads on Rule of Destructibility," 11 Corn. L. Q. 408 (1926); Simes, Future Interests Vol. 1, pp. 191-5.

41 Restatement of Property, p. 721.

42 Simes, Future Interests Vol. 1, p. 167.

43 Massachusetts General Laws (1921) Chapter 184, Section 3.

44 Courts of King's Bench, (1620) Cro. Jac. 590; See Simes, Future Interests p. 39.

45 Future Interests, Leach, p. 54; Simes, Future Interests Vol. 1 p. 164.

destructible[46] but *Pells v. Brown*[47] ended any such conception as to executory interests. The cases in Pennsylvania[48] do not question the indestructibility of executory devises. The other reason is that executory devises must vest within the time allowed by the rule against perpetuities[49] or they are void, which is not true of contingent remainders[50]. This latter reason brings these interests within the general public policy for freer alienation of real property. Therefore the proposed statute would cover the existing need in Pennsylvania of a rule to prevent destruction of contingent remainders and the frustration of the testator's intention.

There is another question to be considered, as suggested in the case of *Gunning's Appeal*[51], where the testator devised land to A for life on condition that A was not married to B, and if he remarries and dies without children then the estate to go to the children of W. Would the proposed statute prevent these contingent interests from being destroyed? The answer is that it would not where A was married to B at time of testator's death. This condition would prevent A from taking his life estate and the contingent remainders would never come into existence. This follows the intention of the testator as he never intended these contingent remainders to take effect if A was married to B. A clearer case of this situation is where A is given a life estate on condition that he support the grantor in his old age, with remainder to A's children, and the grantee breaks the condition for which entry is made and his estate forfeited. Here the contingent remainders have been held[52] to be also destroyed altho a statute had been passed to preserve contingent remainders. This is as it should be as here the testator would not desire the remainders to be valid if he was not supported. Therefore the act will not in these cases frustrate the testator's intentions, but will, after the conditions have been fulfilled, prevent the life tenant from destroying them.

It has been attempted to point out the need of such a statute as is proposed in Pennsylvania. There seems no valid reason why one should not be passed. There are no interests which would be injured and therefore there should be no opposition to it. If passed it should be liberally construed by the courts to fulfill its purpose since it follows the criticism the court[53] itself gave to the rule of destructibility of contingent remainders in Pennsylvania.

—Richard C. Davis.

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[46]Gray, Nature & Sources of the Law, Second Edition, 1927, pp 238-9.

[47]See footnote 43.

[48]Abbott v. Jenkins, 10 S. & R. 296; Waddell v. Rattew, 5 Rawle 231; Johnson v. Currin, 10 Pa. 498 (1848).

[49]Law of Future Interests, Simes, (1936) Vol. 1, Section 34.

[50]Ibid. Vol. 2, Section 505.

[51]See footnote 24.

[52]Lowe v. Stapp, 132 Ky. 75 (1909); Crumpton v. Dumumbrum, 148 Ky. 498 (1912); See In Re Merrigan's Estate, 34 S. D. 644 (1914).

[53]Stewart v. Neely, 139 Pa. 309 (1891).