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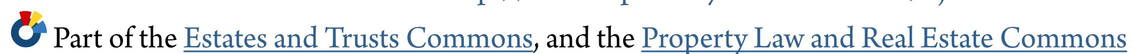
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REAL PROPERTY—FUTURE INTERESTS—RIGHTS OF UNBORN CHILD—On January 23, 1869, Henry Pierce, owner of certain land, conveyed by a quit claim deed (his wife joining therein) the land to his wife, Telitha Pierce, for life, then to his daughter, Adeline Pierce, during her life, and then to her children. At the time of the conveyance Adeline Pierce was unmarried and without children, but she subsequently married with one Alvah Evans and had born to her a son, George A. Evans. After a divorce Adeline Evans was remarried to Frank G. Bearss and shortly afterwards brought suit to quiet title to the land alleging a fee simple in herself. All living parties having an interest in the land were made defendants in the action including the infant son, George Evans, who upon defaulting was represented by a guardian *ad litem*. The circuit court decreed a fee simple title in Adeline Bearss (née Pierce) and that same be forever quieted in her.

On May 9, 1892, some eleven years after the rendition of that decree, Eva Bearss, the present appellant, was born to Adeline and Frank G. Bearss. Eva Bearss brought an action alleging ownership in fee simple of an undivided one-half interest in remainder, subject to her mother's life estate and asked that title thereto be quieted in her. A demurrer to the complaint was sustained and an appeal taken to the Supreme Court of Indiana. *Held*, in accordance with the law as it existed at time of the original conveyance and suit to quiet title a fee simple title vested in the daughter and hence there could be no remainder over to any child of Adeline, then in existence or thereafter born. *Bearss v. Corbett*, Supreme Court of Indiana, 177 N. E. 59.

The Supreme Court holding is summarized in the following quotation from the opinion:

"Under the law as it exists in Indiana at the present time a grant to A during her life, then to B during her life and then to her children gives B (upon the death of A) a life estate, with a remainder over to her children after her death."

An investigation into the cited authority establishes beyond reasonable doubt the truth and validity of that statement. *Hackleman v. Hackleman* (1925) 88 Ind. App. 204; *Alsman v. Walters* (1914) 184 Ind. 565; *Burrell v. Jean* (1925) 196 Ind. 187; *Coquillard v. Coquillard* (1916) 62 Ind. App. 489. The rule deduced from a consideration of these and other authorities is that if a testator or grantor, by unambiguous language, creates a contingent remainder, it is the duty of the courts to uphold it. It is clear that in the instant case there is no ambiguity as the grant simply states "to my daughter, Adeline Pierce, during her life and then to her children." The only possible construction afforded by that language seems to be that B

took a life estate with a contingent remainder to her children. *Tiffany* (2 Ed.), Sec. 136 at 484.

Continuing in his summarizing the Chief Justice says: "But (strange as it may seem to us now), under the law at the time the quiet title suit of Adeline Bearss was decided and up until the case of *McIlhinny v. McIlhinny* (1894), 137 Ind. 411, overruled the case of *Fletcher v. Fletcher* (1882), 88 Ind. 418, such a grant gave B (i. e. Adeline Bearss) upon the death of A (i. e. Telitha Pierce) and upon the birth of children to B, a title in fee simple."

The case of *Fletcher v. Fletcher, supra,* considered the following conveyance: X to A and B during their lives and then to their children respectively in fee simple. In the decision of that case the court decreed that by the original grant A and B were given a conditional fee which ripened into a fee simple upon the birth of children. Only three cases are cited in that opinion as supporting such an interpretation. Two of these may be disposed of briefly by showing that they decided no issue pertinent to the case under consideration. *Glass v. Glass,* 71 Ind. 392, concerning a present grant to A and his children. There was no question as to the remainder and the opinion concerns only the grant of a present estate to a person not in existence. *Biggs v. McCarter,* 86 Ind. 352, also was concerned with a present grant to a person not in *esse* and is not concerned with a remainder after a particular estate. It is to be assumed therefore that the Fletcher case is based upon the only other cited authority, *King v. Rea,* 56 Ind. 1.

In the case of *King v. Rea, supra,* there was a conveyance to A for life, remainder to the issue of her body in fee. The court construed *issue* in its technical sense and after noting that such a conveyance would create a fee tail which in turn would be adjudged a fee simple under our statute (Sec. 13412, Burns Ann. Ind. Stat. 1926), decreed that the words "issue of her body" were words of limitation and not of purchase so that A took a fee simple estate by operation of the rule in Shelley's Case, 1 Coke. 88 and The Indiana Statute (now sec. 13412 Burns Ann. Ind. Stat. 1926). As supporting their interpretation the court refers to the following cases: *Ganzales v. Barton,* 45 Ind. 295; *Small v. Howland,* 14 Ind. 592; *Hall v. Beals,* 23 Ind. 25; *Siceloff v. Redman,* 26 Ind. 251; *Tipton v. LaRose,* 27 Ind. 484; and *Andrews v. Spurlin,* 35 Ind. 262. In each of these cases either the words "heirs of the body," "lawful issue," or "lawful heirs" are used in the conveyance and in none of the decisions has the word "children" been construed to mean "issue."

It appears therefore that the case of *Fletcher v. Fletcher, supra,* stands alone in the position that a life estate with a remainder to children may be construed as a remainder to "issue" or "heirs of the body" and thereby permit the application of the Rule in Shelley's case.

The case of *McIlhinny v. McIlhinny, supra,* which the court relied upon as changing the law as respects conveyances of the kind under discussion goes further than merely disregarding the interpretation in *Fletcher v. Fletcher.* In that case there was a conveyance to A for life and then to her issue born alive with remainder over in case A die without issue born alive.

The court refused to give to the word "issue" its technical meaning and construed it as meaning children. Under such a conveyance A took a life

estate with a contingent remainder created in favor of her children born alive. This decision does not stand alone insofar as it substitutes the word "children" for "issues" but the contrary interpretation is rarely made and only then in cases construing wills wherein the context of the instrument as a whole shows clearly the intent of the testator to be that such meaning was intended. L. R. A. 1917B, 49-74.

The early Indiana cases always held the word "children" as used in a deed, to be a word of purchase and not of limitation. *Sorden v. Gatewood,* 1 Ind. 107; *Doe v. Jackman,* 5 Ind. 283. This result was reached not only by an application of natural meaning and import but was based on the English Common Law precedents. *Am. and Eng. Encyc. of Law,* 229-233, and authorities there cited.

It is apparent from these cases that the Indiana law has always been that a grant to A for life remainder to her children creates a life estate in A with a contingent remainder in her unborn children. The case of *Fletcher v. Fletcher, supra,* since it rests on neither authority nor sound interpretation must be considered both inconsistent and erroneous. In truth the language of that decision is indefensible. The court there said that a deed to A for life with remainder to his children operated to give A a "conditional fee." But a "conditional fee" has been unknown to the Common Law since 1285 (1 Tiffany, *Real Property,* 2nd Ed., Sec. 23); it being changed by the Statute *De Donis* into a fee tail. The court thus construed the word "children" in a deed as meaning "heirs of the body" or "issues," and called the result a "conditional fee" instead of a fee tail.

The grant with which we are concerned in the particular case should be treated as giving Adeline Pierce Bearss a life estate with a contingent remainder to her children such remainder becoming vested upon the birth of George A. Evans. The gift vested in him subject to being partially divested by opening up to let in after-born children, a category which included the present appellant.

The case may be supported, however, upon different grounds. In the Appellate Court hearing of the same case the Circuit Court's decree was affirmed for the reason that the appellant, having a contingent interest under the deed, was bound by an adverse decree rendered before she was born against the guardian of an infant brother having similar interest, and so virtually representing her, notwithstanding the fact that the decree was erroneous. *Bearss v. Corbett,* 158 N. E. 299.

This decision amounts to an application of the doctrine of *res judicata.* That doctrine is briefly this. When there is a complete and final adjudication of a cause of action the judgment in the case will act as a bar to a subsequent suit between the same parties or their privies upon the same issues. There can be no question that the issues in the present suit are identical to those raised and decided on the quiet title suit brought by Adeline Bearss (1881). The suits were both brought to quiet title to the same strip of land and the plaintiffs in both suits relied upon the same instrument as the source of their title.

The only possible difficulty is in determining whether or not the privity in parties is sufficient to satisfy the doctrine's requirements. It is apparent that the appellant was not a party to the quiet title suit brought by her mother since she was unborn at the time. If the judgment rendered therein

was binding upon her it must be shown that her interests were in good faith represented in the proceedings. The interests of the present appellant and of George A. Evans were identical. Both were members of a class to whom an individual remainder in fee simple was given. In accordance with the doctrine of "virtual representation," unborn remaindermen may be bound by a judgment when the remaindermen in *esse* are made parties. *Coquillard v. Coquillard,* 62 Ind. App. 489, 15 R. C. L. 1025.

There are two principles advanced as the basis for such a rule. It is at once apparent that if the remaindermen have identical interests the same issues will be raised by the one as the other and if it is impossible for both to be made parties to an action one of the remaindermen can be depended upon to bring forward the entire merits of the controversy as a protection to his own interests. The other reason advanced as making the application of the doctrine desirable is one of necessity and expediency. Cases arise in which, if it be held necessary to bring before the court every person having a present or future interest in the property, the suit could never be brought to a conclusion or at least a resulting inequitable delay would prevent the adjustment of present rights because of the contingency of an interested party, not yet in being. *Kent v. Church of St. Michael,* 18 L. R. A. 331.

The courts in Indiana have previously decided the immediate point under consideration (*Coquillard v. Coquillard, supra*) and a review of the other authorities supports the Appellate Court in its decision. *Wayne v. Bunmley,* 227 S. W. 996; *Doroney v. Sub,* 185 N. Y. 427; and note 8 L. R. A. (n. s.) 49; *Mathew v. Lightner,* 85 Minn. 333.

The doctrine of "virtual representation" will not be applied when fraud or collusion is alleged and proved but in this case there was no such allegation so that for the purpose of appeal, the absence of fraud is admitted and need not be considered as an issue in the case.

It appears from the discussion that the appellant was attempting a suit upon the same issues and between the same parties (or those in privety therewith) as that already decided in a former proceeding wherein the appellant was represented and bound by the judgment. Such an action involves the doctrine of *res judicata* and was correctly decided below on that basis. The decision of the Supreme Court, however, perpetuates the error of *Fletcher v. Fletcher.*

H. W. S.