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JOINT TENANCIES AND TENANCIES BY THE ENTIRETY—WORDS OF SURVIVORSHIP—JOINT TENANCY OR TENANCY BY THE ENTIRETY IN FEE, OR "JOINT" LIFE ESTATE WITH CONTINGENT REMAINDER IN FEE IN SURVIVOR—HUNTER V. HUNTER REVISITED

Hunter v. Hunter[1] and its ramifications were discussed at length by the present writer in a previous issue of the Missouri Law Review.[2] There appear to be no other law review comments to date, but a useful A.L.R. annotation on the problem has been published.[3] The present writer in section 10 of his discussion of the *Hunter* case raised the question whether the doctrine of the case would be confined by the court to the limitation there considered. One might have expected many years to pass before a related case would reach the appellate courts, but fortunately for the guidance of title examiners *McClendon v. Johnson*[4] followed hard on the heels of the *Hunter* case.

In *McClendon v. Johnson,* Father was the original owner of the property. Following several intra-family transfers, the property was conveyed in 1949 through a straw to Father and Daughter [plaintiff]

> as joint tenants and not as tenants in common, *with right of survivorship,* . . . to have and to hold the same, . . . as joint tenants and not as tenants in common, *with right of survivorship, and to their heirs and assigns forever.* [Emphasis added.]

[The exact form of the deed is not set out by the court, and except for the italics the above is quoted from the opinion. It is probable that the

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*This Article contains a discussion of selected 1959 and 1960 Missouri Supreme Court decisions.

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1. 320 S.W.2d 529 (Mo. 1959); see Annot., 69 A.L.R.2d 1048 (1960).
2. Eckhardt, *Property Law in Missouri,* 24 Mo. L. REV. 456-469 (1959).
3. Annot.: Construction of devise to persons as joint tenants and expressly to the survivor of them, or to them "with right of survivorship," 69 A.L.R.2d 1058-1062 (1960).
4. 337 S.W.2d 77 (Mo. 1960).

first recital followed the names of the parties of the second part in the premises, and that the second recital was interlined. It should be noted that the above form is not the same as the next form; the present writer dealt with the above form and its variants in section 9 of his discussion of *Hunter v. Hunter.*]

Six years later, in 1955 and two years before Father's death, Father made a direct conveyance to Father and Nephew [defendant]

> as joint tenants, and not as tenants in common, . . . all my right, title and interest in and to [the property] to have and to hold the same, . . . unto [Father and Nephew], and *to the survivor of them, and to the heirs and assigns of such survivor forever.* [Emphasis added.]

[The exact form of the deed is not set out by the court, and except for the italics the above is quoted from the opinion. It is probable that the first recital followed the names of the parties of the second part in the premises, and that the second recital was interlined. It should be noted that the form next above is not the same as the form second above; the present writer dealt with the form next above and its variants in sections 7 and 8 of his discussion of *Hunter v. Hunter.*]

Father died two years later, and Daughter as plaintiff claimed the fee in the whole on the theory (not very explicit) that under the *Hunter* case the 1949 limitation created concurrent life estates for the life of the shorter liver with a contingent remainder in the whole in the survivor. Nephew as defendant claimed that the 1949 limitation created a joint tenancy in fee; that it was severed in 1955 and became a tenancy in common; that thereafter Daughter held one-half in fee as a tenant in common with the other one-half held by Father and Nephew as joint tenants in fee; and that Nephew survived to all of the one-half when Father died in 1957.

The court held that the 1949 limitation created a joint tenancy in fee because the words "heirs and assigns" in the habendum limited an estate of inheritance. The court said: "Note also that the habendum clause, by the use of legal terminology of well defined and long accepted meaning, removes all doubt as to the deed conveying title in joint tenancy in fee."[5] The *Hunter* case is distinguished and held not to control.

The court states[6] that the 1955 deed also created a joint tenancy in

5. *Id.* at 81.
6. *Id.* at 82.

fee in Father and Nephew. Strictly speaking, this is dictum because insofar as Nephew was concerned he would take the one-half under either construction: if there was a joint tenancy in fee, he would take as surviving joint tenant, there having been no severance; or if there were concurrent life estates followed by a contingent remainder in fee in the survivor, he would take as the survivor.

Although the present writer hereinabove and in his previous discussion of the *Hunter* case distinguished a limitation "to B and C with right of survivorship and their heirs" from a limitation "to B and C, the survivor of them, and his heirs," the court in the *McClendon* case equates the two, stating that "in substance [they are] identical in terminology."[7] The court expressly approves the effectiveness of McCune Gill's earlier form for creating a joint tenancy in fee.[8] The distinction between the two forms is too nice to be practical, and the court did well to lump them together.

The present writer heartily commends the court for doing as much as is possible in one opinion to clear up the doubts as to construction created by the *Hunter* case. Nevertheless, the writer still recommends, as he did last year, that draftsmen of deeds or wills creating joint tenancies or tenancies by the entirety should omit completely the words "to the survivor" and "with right of survivorship," or the substantial equivalent of either.[9]

Destructibility of Contingent Remainders

Eighty-eight years ago the Missouri Supreme Court stated in *Green v. Sutton*,[10] by way of dictum, that a contingent remainder which has not vested on the termination of the particular or supporting estate is destroyed. The conveyance in question ran to a trustee for the sole and separate use of Wife, giving her absolute power of disposal of the fee by deed or will, but provided that if she died intestate [still owning the property], it should go to the then living issue of Husband and Wife, and in default of such issue to the heirs of Husband. Wife died in 1868, never having had issue, and Husband died in 1870, at which time his heirs were ascertained.

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7. *Id.* at 82.

8. 1 Gill, Real Property Law in Missouri 272 (1949).

9. See Peterson & Eckhardt, Missouri Legal Forms §§ 721-731 (1960), for forms for creating concurrent estates.

In January 1960 Mr. Gill revised his forms in view of the Hunter case. His revised forms have been distributed in pamphlet form and are reprinted in 53 Mo. Titlegram 7-9 (May 1960).

10. 50 Mo. 186, 193 (1872).

The court construed the deed as giving Wife a fee simple absolute in the first instance, the gift over being repugnant and void.[11] Another possible construction, a life estate in Wife with power over the fee, and alternative contingent remainders in fee, was dealt with in the briefs; and the issue of destructibility of contingent remainders was well briefed on both sides.

Under a life estate and remainder construction, there would have been a two year gap between the termination of the particular estate and the vesting of the contingent remainder in the heirs of Husband. At common law the contingent remainder would have been destroyed on Wife's death. The court states this view as follows: "At the determination of what is called the particular estate there was no one who could take. The title must vest somewhere, and if the plaintiff's claim be correct, it vested nowhere—was in abeyance until [Husband's] death. This could not be. Did it then revert? If so, the plaintiffs are out of court, and the remainder would be gone even if it had been created."[12] It should be noticed again that this was dictum because the limitation was construed by the court to create a fee simple absolute in Wife, and not a life estate and contingent remainders.

When the present writer prepared his article, *The Destructibility of Contingent Remainders in Missouri*,[13] he did not notice the dictum on destructibility in *Green v. Sutton*, just as Hudson, Ely, and others who had previously written on the problem of destructibility had not noticed it. This is not surprising in view of the fact that destructibility of contingent remainders is dealt with in only one headnote, and then vaguely, and this headnote is digested in such a way that it can be found only by accident where destructibility is being searched.[14] Later the present writer stumbled on the destructibility dictum in *Green v. Sutton* when he was reading the case on another point, and he attempted to rectify matters by calling attention to the case in another publication.[15]

Subsequent Missouri cases have held in fact that contingent remainders

11. This problem of construction is considered in Moore, *Executory Limitations Following Power of Disposal*, 17 Mo. L. Rev. 177-184 (1952). See also the authorities cited in Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri* § 59, notes 94-95, 23 V.A.M.S. 54-55 (1952). Consult the exhaustive 220 page annotation, 17 A.L.R.2d 7-227 (1951).

12. Green v. Sutton, *supra* note 10, at 193.

13. 6 Mo. L. Rev. 268-296 (1941).

14. Headnote 4 vaguely refers to destructibility in terms of "lapse," but that headnote is keyed only to *Deeds*, § 124(1), Necessity and sufficiency of words of inheritance or perpetuity, and to *Deeds*, § 129(1), [Life estates] In General.

15. Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri* § 59, note 77, 23 V.A.M.S. 48 (1952).

are not destructible,[16] but until 1960 no case since *Green v. Sutton* expressly considered the problem. Eighty-eight years after *Green v. Sutton,* the Missouri Supreme Court in *Hughes v. Neely*[17] expressly considered and deliberately spoke on the problem of destructibility, this time clearly indicating that contingent remainders are not destructible.

Two trusts, one created by deed and the other by will, were involved in *Hughes v. Neely* and a companion case considered together. The facts are fully stated by William F. Fratcher elsewhere in this issue[18] where he considers the trusts problems in the cases. The 1919 inter vivos trust ran to Trustee for the benefit of Daughter during her natural life, "and at her death to go direct to the heirs of her body." In 1930 a judgment purported to terminate the trust, vest the fee in Daughter, and extinguish the contingent remainder in the heirs of her body. The instant action was to cancel the judgment. The court held that the 1930 judgment purporting to extinguish the contingent remainder was void on its face and that the remainder was still a valid interest in the property.

The narrow holding is as follows: "Under all the authorities, we must and do hold in this case that a court of equity has no power to destroy contingent remainders, by a decree of termination of the trusts involved, upon the facts stated in the 1930 petition and found in the 1930 judgment and decree therein."[19] This holding is sound. Historically, the basic attitude of equity was that contingent remainders should be protected, and legal contingent remainders supported by trusts and equitable contingent remainders were not destructible.

Beyond the narrow holding of the case, the court's discussion of destructibility is the strongest type of dictum that a contingent remainder

16. Lewis v. Lewis, 345 Mo. 816, 136 S.W.2d 66 (1940), analyzed in 6 Mo. L. REV. 268, 294-295 (1941), is typical. Where a life estate and reversion in fee following a contingent remainder came into the same person, the court held in fact that the contingent remainder was not destroyed by merger, but the destructibility problem was neither briefed nor discussed by the court.

Jones v. Arnold, 359 Mo. 161, 221 S.W.2d 187 (1949), is another case in which the court in fact held a contingent remainder not destructible by merger, but where the destructibility problem was not noticed. See Eckhardt, *Work of Missouri Supreme Court for 1949—Property,* 15 Mo. L. REV. 376, 397, notes 35-37 (1950).

Hunter v. Hunter, 320 S.W.2d 529 (Mo. 1959), also involved the problem of merger and destructibility of contingent remainders, but the problem was neither briefed nor discussed in the opinion. This phase of the case is analyzed in Eckhardt, *Property Law in Missouri,* 24 Mo. L. REV. 456, 457, note 5 (1959).

17. 332 S.W.2d 1, 10 (Mo. 1960).

18. Page 435 of this issue.

19. 332 S.W.2d at 10.

is not destructible by merger; the court says of *Lewis v. Lewis:*[20] "This was a ruling that a contingent remainder cannot be destroyed by common law merger."[21] It is to be presumed that a contingent remainder would not be destructible by failure to vest at or before the natural ending of the particular estate, the problem considered in *Green v. Sutton.*[22]

The only real virtue of the destructibility doctrine was that, as a practical matter, it made land more freely alienable in the case of unborn or unascertained contingent remaindermen. With a specialized conveyancing bar in England, destructibility of contingent remainders was avoided easily and as a routine matter by adopting an appropriate technique. In this country, the destructibility doctrine has been simply a trap for the unwary.

In Missouri, most of the legal contingent remainders have resulted from the operation of the fee tail statute on fee tail limitations, but similar limitations have been expressly created as in the principal case. In either case as a practical matter the existence of the contingent remainder has operated to suspend the power of alienation during the lifetime of the first taker. If Missouri accepted the destructibility doctrine it would help increase alienability temporarily, but lawyers immediately would adopt conveyancing techniques which would prevent destructibility in the case of limitations drawn thereafter. For a state to adopt the destructibility doctrine simply to increase alienability is a harsh and capricious method, subverts intent, and at best only partially answers the much broader problem of free alienability.

What is needed in Missouri is a direct attack on practical restraints on alienation caused by legal future interests, or by equitable future interests where trustees are not given adequate powers. Sections 528.010 and 528.020, Revised Statutes of Missouri (1949), providing for the sale of the fee where there is a non-productive life estate but preserving all beneficial interests, present and future, is available in some cases. One feasible remedy would be to broaden the scope of this statute to permit the sale of the fee in every case where the best interests of all concerned would be served by the sale of the fee.[23] The problem of free alienability has been

20. 345 Mo. 816, 136 S.W.2d 66 (1940).
21. 332 S.W.2d at 10.
22. 50 Mo. 186 (1872).
23. 23 V.A.M.S. § 442.035 (p.p. supp. 1960), on conveyances, etc., of property held by entireties where one or both spouses are incompetent or minors, should be considered in this connection as a possible pattern for broader legislation.

solved in England by legislation culminating in the Settled Land Act, 1925, and the Law of Property Act, 1925.[24] The English statutes on this problem would not be adaptable to Missouri, but they do indicate that the problem can be solved.

Another possible solution of the problem, without benefit of statute, would be for the Missouri Supreme Court in an appropriate case to hold that a court of equity has the inherent power to order the sale of a fee with reinvestment of the proceeds, where such sale and reinvestment would be for the best interests of all concerned.

Increasing the free alienability of land and the marketability of title is the major challenge in the property field for lawyers and legislators. It is to be hoped that lawyers will find the time to do the necessary work to draft the legislation and to see it through the General Assembly.[25]

Decree or Judgment Void on Its Face, or Set Aside for Fraud—Mene, Mene, Tekel, Upharsin[26]

Hughes v. Neely,[27] discussed above from the point of view of destructibility of contingent remainders, held that the 1930 "judgments purporting to wipe out and destroy the contingent remainders were absolutely void, showing on the face of the record (the facts stated in the pleadings and found in the decree) that the court had no authority, power or jurisdiction to render such judgments because the facts stated conclusively showed that the plaintiffs therein had no cause of action for such judgments and had no right thereto whatever. Therefore these judgments could not bind anyone or protect anyone. This is entirely different from cancellation or rescission for fraud or failure to comply with procedural requirements which would only make a judgment voidable."[28]

It is beyond the scope of this brief notice of the case to explore the problem as to when a judgment or decree is void on its face. The tax title

24. Megarry & Wade, The Law of Real Property, Chap. 6, *Settled Land and Trusts for Sale*, 274-389 (2d ed. 1959), is a reasonably brief and very lucid exposition of the English solution.

25. Simes & Taylor, Improvement of Conveyancing by Legislation (1960), contains many "model" acts, running the gamut from a comprehensive marketable title act to acts covering narrow problems. Some of the acts are very well done and could be easily adapted for local adoption, but others appear not to have had the touch of the master but rather to be the product of staff work; considerable redrafting would be necessary in some cases for an acceptable local act.

26. *Daniel* 5:25.

27. 332 S.W.2d 1 (Mo. 1960).

28. *Id.* at 11.

cases clearly indicate that the concept of "void on its face" is a scythe which can cut a wide swath where justice will be furthered.[29] It is not to be expected that decrees and judgments will be struck down with the same abandon that tax titles are struck down, but lawyers attempting to clear titles and title examiners should take warning.

The writing was on the wall for those who could read it in *Jones v. Arnold*,[30] where a 1915 deed was reformed by a 1927 decree, and twenty years thereafter the decree was set aside for fraud in the procurement of the decree. The 1915 deed had a typical fee tail limitation, and the 1927 decree of reformation changed it to a fee simple limitation.

In a current case, *Picadura v. Humphrey*,[31] it was held that a 1936 judgment reforming a fee tail limitation into a fee simple limitation could be set aside for fraud nineteen years later, thereby restoring the plaintiff's contingent remainder. *Hughes v. Neely*,[32] was held controlling on the timeliness of the suit.

These three cases may indicate a trend toward a much freer upsetting of decrees and judgments purporting to extinguish interests in property, and title examiners should not pass such a decree or judgment as a matter of course but should carefully evaluate each such decree or judgment. The present writer on several occasions in recent years has advised against friendly suits for reformation or construction where the basic purpose was to get rid of inconvenient contingent future interests. While one cannot recommend that a point be stretched in any case, it has seemed to the writer that where the main object is to make it possible to sell the fee, a much less vulnerable course is to proceed under Section 528.010, Revised Statutes of Missouri (1949), on non-productive life estates, fully safeguarding the future interests by having the present and future interests attach to the proceeds of the sale. It is one thing to strech a point by an unwarranted construction or reformation in order to extinguish a future interest; it is quite another thing to stretch a point by findings as to income and expenses in order to permit reinvestment which is in the best interests of all concerned and at the same time fully preserves and protects the future interests.

29. Beihl, *Tax Deeds Void On Their Face and Three Year Statute of Limitations*, 20 Mo. L. REV. 87-98 (1955), lists thirteen separate types of defects as well as certain miscellaneous defects which make tax deeds void on their face.

30. 359 Mo. 161, 221 S.W.2d 187 (1949), discussed in Eckhardt, *Work of Missouri Supreme Court for 1949—Property*, 15 Mo. L. REV. 376, 395-397 (1950).

31. 335 S.W.2d 6 (Mo. 1960).

32. *Supra* note 27.