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VIRTUAL REPRESENTATION OF HOLDERS OF FUTURE INTERESTS IN ACTIONS INVOLVING TITLES IN KENTUCKY

The rule that ordinarily an adjudication has no binding effect on persons not parties or privies to the judgment is of such general acceptance that it is usually considered axiomatic.¹ It is equally well established that even though a particular party is not before the court, if he is so far represented by others that his interests will receive full and complete consideration, a binding decree may, in certain situations, be rendered for or against him even though he is not actually joined as a party. It is the function of this note to examine the application of this doctrine of virtual representation in Kentucky with respect to the rights of holders of future interests.³

1. Life Estate, Vested Remainder in a Class.

A vested remainder subject to being partly divested by the admission of additional remaindermen presents one of the most common situations for the application of the doctrine of virtual representation. Where property is conveyed or devised to A for life with remainder to A's children, as soon as a child is born the remainder becomes vested subject to partial divestment to let in

¹ 1 FREEMAN, JUDGMENTS (5th ed. 1925) sec. 407. RESTATEMENT, JUDGMENTS (1942) sec. 93.

One phase of this rule of representation has been incorporated into the KENTUCKY CIVIL CODE OF PRACTICE which states that, "If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." Ky. CIV. CODE PRAC. (Carroll, 1938) sec. 25. Under the new rules of federal procedure when the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. Rule 23, FED. RULES CIV. PROC., 28 U.S.C.A. (1941) foll. sec. 723c. Similar statutory provisions are found in most of the states. For instance, the California statute provides that, "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." CALIF. CODE CIV. PROC. (Deering, 1941) sec. 382.

See generally, Roberts, *Virtual Representation in Actions Affecting Future Interests* (1936) 30 ILL. L. REV. 580.

³The doctrine of representation applies to both legal and equitable actions. However, due to the nature of the interests usually involved, future interests and title in unborn or unascertained persons, the judicial proceedings in which the question arises are usually of equitable origin. See RESTATEMENT, PROPERTY (1936) sec. 180, comment b.

possible after-born children.⁴ So long as A continues to live there exists the possibility of additional remaindermen. If it were necessary that all these contingent remaindermen be made parties to an action involving title to the property the litigation would have to be postponed until they were all ascertained, viz., until the death of A. The courts have met the situation by holding that all the contingent remaindermen are virtually represented by the living children. Since the unborn remaindermen will take, if at all, merely as members of a class, some members of which are before the court, it is entirely reasonable to suppose that their interests will be properly presented and they will not be prejudiced by a decree rendered before their birth. Furthermore, if the delay should be required, a holder of a lien or other adverse claim against the estate might be forced to wait until all possibility of issue became extinct before asserting his interest.⁵

In *Brown v. Ferrell*⁶ land was held by a life tenant with remainder to his heirs. The life tenant had one child. An action was brought to enforce a lien against the land, and the life tenant and the child were made defendants. The land was ordered sold and it was held that the decree of sale was sufficient to divest the unborn contingent remaindermen of their interest. In *Wayne v. Brumley*⁷ a father of two living children held a life estate with remainder to his children. The life tenant brought an action against the two living re-

⁴ 1 SIMES, FUTURE INTERESTS (1936) sec. 61, 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 340; RESTATEMENT, PROPERTY (1936) sec. 157.

Some states have solved the problem in a different way by making provision that in certain situations, particularly proceedings to compromise the effect of a will, unborn contingent remaindermen may be represented by a guardian ad litem.

"If it appears to the satisfaction of the court that the interests of persons unknown or the future contingent interests of persons not in being are or may be affected by the compromise, the court must appoint some suitable person or persons to represent such interests

" 1 LAWS OF N. Y. (Thompson, 1939) c. 18, sec. 19 (d).

" if there shall be any future contingent estate or interest which might be taken by any person not then in being, which may be limited or diminished as aforesaid, the court to which such agreement shall have been so submitted shall appoint a guardian ad litem to represent such person, contingent estate or interests. " COMP. LAWS MICH. (1929) sec. 15582.

"If the court finds that any future contingent interest which would arise under said will if admitted to probate would be affected by the arbitration or compromise, it shall appoint some person to represent such interests in such controversy, and the court shall have like power as to any bequests made in the will for charitable purposes, if no trustees have been appointed in such will; in both cases with such conditions as to costs as the court orders." GEN. LAWS MASS. (1932) c. 204, sec. 16.

⁶ 83 Ky. 417 (1885).

⁷ 190 Ky. 488, 227 S.W. 996 (1921).

maundermen for the sale of the land. A decree of sale was granted. After the sale the life tenant became the father of another child, and this third child, on the theory that he was not bound by the prior decree, claimed his share in the property and brought an action against the purchaser to quiet his title. It was held that the after-born child had been virtually represented by the two living children who were before the court, and that the sale made under the decree rendered had divested him of his interest. The same rule that unborn contingent remaindermen may be represented by the living members of their class in actions for the sale of land, applies in actions brought by the holder of an estate *pur autre vie*⁸ and in actions brought by one living remainderman against a life tenant and other remaindermen.⁹ The rule of representation also applies to actions brought to construe a will,¹⁰ and in *Kendall v. Crawford*¹¹ it was recognized in an action to reform a deed. In the latter case it was held that the grantee of a deed, conveying a life estate to the grantee with remainder to the grantee's heirs, could successfully maintain an action against an adopted child, as sole heir apparent, to have the deed reformed to give a fee simple to the grantee. The case is significant in that it recognizes the right of an adopted child to represent possible natural children, and that it applies the doctrine of virtual representation to an action brought by the holder of the particular estate to divest the contingent remaindermen of their interest.

In each of the cases mentioned above the contingent remaindermen were members of a specifically designated class. In each case some members of the class were in being and in each case all those in being were made parties to the action. The contingency consisted merely in the possibility that the class would later be opened to let in new members. In such a situation the interests of those before the court exactly coincide with the interests of the unborn remaindermen and this identity of interest, together with the necessity for a present adjudication of the dispute, provides a clear ground for applying the doctrine of virtual representation.¹²

⁸ *Tierney Coal Co. v Bailey*, 172 Ky 362, 189 S.W 241 (1916). In this case the court seemed to rely heavily upon Ky. Civ. CODE PRAC. (Carroll, 1938) sec. 491a-1, which states that, "Remainder and contingent interests in real estate may be sold upon petition of any person having a present or vested interest, all persons in being having any interest in such estate being made parties to the action"

⁹ *Harris v. Anderson*, 3 KY. LAW REP. 237 (1881).

¹⁰ *Masonic Widows' & Orphans' Home & Infirmary v Hieatt Bros.*, 197 Ky 301, 247 S.W 34 (1923)

¹¹ 25 Ky Law Rep. 1224, 77 S.W 364 (1903).

¹² These two elements, the necessities of the case and the assumption that identity of interest will result in adequate protection of the parties represented, seem to be the basis of the doctrine. 1 FREEMAN, *op. cit. supra* note 1, sec. 489. Some cases have sug-

2. Life Estate, Contingent Remainder in a Class, None of Whom Are in Being.

Where no members of the class entitled to take are in being a more difficult question is raised. The view that unborn contingent remaindermen could never be bound by a judgment rendered before any of their class were in being found support in the early cases of some of the states, particularly in North Carolina.¹³ The situation has since been changed in that state by a statutory provision for the appointment of a guardian ad litem,¹⁴ and it is doubtful if any state at the present time would go so far as to hold that unborn contingent remaindermen cannot be represented under any circumstances unless some members of their class are in being. Kentucky has apparently solved the problem without the necessity for a guardian ad litem and without the aid of a statute. It seems to be sufficient in Kentucky that there be in existence and before the court such parties as will insure an adequate protection of the interests of the unborn remaindermen. If there is such an identity

gested that motives of affection resulting from the close relationship (often parent and child) of the parties is a factor but it is doubtful if such relationship has much weight in the decisions. See 1 FREEMAN, *op. cit.*, *supra* note 1, sec. 490. The Kentucky court has stated that, "the doctrine is planted squarely on the ground of identity of interest between the parties to the action and the persons they are held to represent." *Lowe v. Taylor*, 222 Ky. 846, 850, 2 S.W. 2d 1042, 1044 (1928).

See RESTATEMENT, PROPERTY (1936) sec. 183.

¹³The view taken in North Carolina is well illustrated by *Watson v. Watson*, 56 N.C. (3 Jones Eq.) 400 (1857) In that case land was devised to A for life, remainder to such of his children as might be living at his death or to the living issue of such of his children as might have died. In default of issue the remainder was to go to certain third persons. Before A had any children he brought an action against the named third persons for a decree of sale and re-investment. It was held that these alternative contingent remaindermen were incapable of representing the unborn children of A and that no decree could be rendered concerning the sale of the land until some such children were *in esse*.

¹⁴"In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remaindermen. " 2 GEN. STAT. N.C. (1943) sec. 41-11.

of interests as will result in adequate protection of their rights, an adjudication may be had which will be binding upon an entire class even though no member of the class is in being when the suit is brought or judgment is rendered.

In *McClure v. Crume*¹⁵ an estate was held by a life tenant with remainder to his issue, and, in default of issue, remainder over to certain third persons. The life tenant, while without issue, brought an action under section 491 of the *Kentucky Civil Code of Practice* for the sale and reinvestment of the proceeds. The third persons, the secondary remaindermen, were made parties. In that case there was a decree for sale and reinvestment,¹⁶ and it was held that the issue of the life tenant were virtually represented by the secondary remaindermen. The decision appears sound since the court had before it the persons in whom the estate would have vested if the contingency had happened prior to the bringing of the action. Such persons had the same interest in the preservation of the estate as the issue of the life tenant would have had and could be relied upon to properly represent their interests in the litigation.

3. Defeasible Fees.

Another situation where unborn contingent remaindermen may be represented, although no members of their class are in being, arises in the case of defeasible fees. Where the holder of a defeasible fee is a party to an action for the sale of property he is deemed to be the virtual representative of the unborn contingent remaindermen who will take in the event of defeasance. Thus in *Middleton v. Graves*¹⁷ property was left to A for life with remainder to B and C equally or to the survivor of them if either should die without issue. Both B and C had a defeasible fee subject to defeasance in the event of their death without issue. B and C each were executory devisees of the interest of the other and if either of them should die leaving issue the issue would become entitled to the decedent's share. While B and C were both living but without children the life tenant brought an action against them for a decree of sale of the property. The decree was granted and was binding on the afterborn children of B and C, such children being virtually represented by their parents who were before the court and who had interests identical with theirs.

¹⁵ 141 Ky. 361, 132 S.W. 433 (1910).

¹⁶ An interesting feature of the case, though not dealt with in this note, was the fact that the reinvestment granted here was in real estate located outside the commonwealth. The decision of the court on the virtual representation point was unanimous but Judge Nunn dissented in the holding that the court had authority to order reinvestment in lands outside Kentucky. *McClure v. Crume*, 141 Ky. 361, 366, 132 S.W. 433, 434-435 (1910).

¹⁷ 229 Ky. 640, 17 S.W. 2d 741 (1929).

4. Representation by a Trustee.

A recent case, *Smith v Fowler*,¹⁸ held that in the absence of fraud or collusion a trustee could represent unborn contingent remaindermen of a class, none of whom were *in esse*, where the trustee and the first takers were both before the court. In that case a testator left his estate to a trustee with income to his widow for life or widowhood, then to his children for life, then to the lineal descendants of such children for their lives, and after the death of the widow, the children, their spouses, and all lineal descendants of the children, the income was to be paid to a named charity. Before any of the children had issue the trustee of the estate brought an action for the construction of the will and named as defendants the testator's widow, his children and their spouses, and the trustees of the named charity. It was decided that the limitations in the will constituted a violation of the rule against perpetuities and that after the death or re-marriage of the widow the children took possession in fee simple. In a subsequent action for specific performance of a contract for the sale of the land it was contended that the unborn lineal descendants were not bound by the decree and could not be divested of their interest. Obviously these unborn contingent remaindermen could not have been represented by the life tenants, since the interest of the life tenants was in direct opposition to that of the remaindermen. The court held, however, that the contingent remaindermen were properly represented by the trustee who had the legal title to the property. This is apparently the first time Kentucky has recognized the right of a trustee to represent contingent remaindermen¹⁹ although the doctrine seems to be of general acceptance where the problem has been raised,²⁰ and is, in many respects, analogous to the guardian ad litem situation.

¹⁸ 301 Ky. 96, 190 S.W. 2d 1015 (1945)

¹⁹ "Counsel for the appellees state that they have found no case in this jurisdiction directly in point, nor have we; but it seems to be rather generally held that a trustee may represent unborn contingent remaindermen where the first takers are before the court." *Smith v Fowler*, 301 Ky. 96, 190 S.W. 2d 1015, 1017 (1945)

²⁰ "The doctrine of virtual representation is thoroughly established in Tennessee. It is well settled that contingent limitations and executory devises to persons not in being, or uncertain and undeterminable at the time of the proceedings, may be bound by a decree against the person then claiming the vested estate. In suits to enforce a trust, or with reference to trust property, so limited in remainder, if the holder of the legal title, the life tenant, and the persons in being in whom the remainder would become a vested estate if the life estate then fell in—if all these are parties, a valid decree may be pronounced." *Bransford Realty Co. v Andrews*, 128 Tenn. 725, 164 S.W. 1175, 1178 (1914).

"As we have already indicated, the equitable doctrine of representation permits foreclosure of the interests of unborn contingent remaindermen where their rights are represented by parties properly

In reaching its conclusion in *Smith v. Fowler*, the court relied heavily on the necessity for a present adjudication and on its belief that no present adjudication could be had unless the trustee could represent the interests of the unborn contingent remaindermen.²¹ It completely omitted any discussion of the possibility of such interests being represented by the trustees of the named charity. While representation by the trustee of the estate is apparently sound, it is believed that by failing to discuss the other possibility the court overlooked an important point in the case. Had the will been sustained, and had the alleged life estate of the children of the testator fallen in at the time of the bringing of the action, while there were no lineal descendants of the life tenants in being, the estate would have gone to the charity. The charity then had in the estate an interest identical with that of such unborn lineal descendants and it is difficult to see why the trustees of the charity would not have been proper virtual representatives of these remaindermen.

5. Representation of Living Remaindermen.

Where living members of the class are available but are not made parties it has often been held in Kentucky that the contingent remaindermen are properly represented by persons holding vested interests in the property and having in the litigation an interest identical with that of the contingent remaindermen. It is probably on this point that the Kentucky doctrine on virtual representation makes the greatest deviation from the general view held by the American courts.²² A situation in which the problem might arise can best be illustrated by an example. A testator devised an estate to a trustee to pay the income for life to the testator's children with remainder to such of their children as should be living at the death of the life tenants. The trustee disclaimed and

before the court. The essentials of due process are fully satisfied by the provision in the statute which authorizes a court to appoint some competent and disinterested person as trustee of the interests of those not in being." *Gunnell v Palmer*, 370 Ill. 206, 18 N.E. 2d 202, 205 (1938).

Although beyond the scope of this note, an inquiry might well be made into the question whether such cases are properly considered under the doctrine of virtual representation or as merely a phase of the normal powers of a trustee. Whatever the proper rationalization might be, it seems to be rather generally accepted that a trustee may represent a class of contingent remaindermen, all of whom are as yet unborn.

²¹ " if the trustee had not been permitted to represent their interests, it would not have been possible to have had a construction of the will until after the death of Mr. Fowler's children." *Smith v Fowler*, 301 Ky 96, 99, 190 S.W. 2d 1015, 1017 (1945).

²² The general view held by American courts is that if remaindermen are available they must be made parties to actions involving titles. Note (1939) 120 A.L.R. 877-878.

the administrator with will annexed brought an action for the appointment of a new trustee. The children of the testator were named defendants but the living grandchildren were not made parties. The contingent interests of the grandchildren were virtually represented by the life tenants and the grandchildren were not necessary parties to the action.²³ No indication was given in the opinion as to why the living grandchildren were not made parties, the court apparently considering that a matter without significance.

If the life tenant is made a party to an action to enforce a lien against the property it is not necessary to join the contingent remainderman even though he is in being.²⁴ This is a rather broad application of the doctrine of virtual representation but it is justifiable on the theory that the life tenant has the same interest in protecting the estate that the remainderman would have.

The Kentucky court has often held that only the persons holding the first vested estate of inheritance need be joined in an action involving title to the property.²⁵ Thus in *Hermann v. Parsons*²⁶ a testator left property to his wife for life. At the death of the wife the property was to be divided equally among the testator's children. The issue of any deceased child was to stand in the posi-

²³ *Whallen v. Kellner*, 31 Ky. Law Rep. 1285, 104 S.W. 1018 (1907). In referring to this case in a subsequent opinion the court said, "It is true that the foregoing case is not in accord with the weight of authority, but we are not disposed to overrule it." *Newkirk v. Ingels*, 197 Ky. 473, 476, 248 S.W. 488, 489 (1923).

In an earlier case, *Clay's Adm'r. v. Edwards' Trustee*, 84 Ky. 548 (1886), the court had taken a position apparently opposed to the rule of *Whallen v. Kellner*. In the *Whallen* case the court distinguished the earlier case on the ground that there they were dealing with a vested, not a contingent remainder. However, it is submitted that this distinction is erroneous and that the remainders were contingent in both cases.

²⁴ *Newkirk v. Ingels*, 197 Ky. 473, 248 S.W. 488 (1923) *Davie's Executor v. City of Louisville*, 171 Ky. 663, 188 S.W. 911 (1916), *Jaillete v. Bell*, 33 Ky. Law Rep. 159, 110 S.W. 298 (1908)

²⁵ If the action is one for sale and reinvestment it is apparently covered by the code provision that, "In an equitable action by the owner of a particular estate of freehold in possession, or by a guardian or committee as provided in Section 489, against the owner of the reversion or remainder, though, he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind—real property may be sold for reinvestment of the proceeds in other real property." Ky. CIV. CODE PRAC. (Carroll, 1938) sec. 491 (Supp. 1947). The rule, however, has been applied in other situations. *Hermann v. Parsons*, 117 Ky. 239, 25 Ky. Law Rep. 1344, 78 S.W. 125 (1904) (action to enforce a lien).

²⁶ 117 Ky. 239, 25 Ky. Law Rep. 1344, 78 S.W. 125 (1904)

tion of its parent. In an action to enforce a lien against the property the widow and the children were made parties but the grandchildren were not. It was held that the widow had a life interest and the children a fee subject to its being defeated by their death preceding that of the widow. The grandchildren were mere contingent remaindermen. The interest of the widow plus that of the children made up the first estate of inheritance and they were, therefore, the only parties necessary to the action.²⁷

Under the first-estate-of-inheritance rule it seems clear that where there is a limitation to one class of contingent remaindermen, and, in default of that class, provision is made for an alternative class, the members of the alternative class, although in being, are not necessary parties to an action involving title to the property.²⁸ In *Goff v. Renick*²⁹ there was a devise to a donee for life with remainder to the children of the donee. If the donee should die without issue the remainder was to go to his brothers, and if they should predecease the donee, then to their descendants. An action was brought under section 491 of the *Kentucky Civil Code of Practice* for sale and reinvestment. It was held that the living descendants of the life tenant's brothers were not necessary parties to the action.³⁰ In such a case it is sufficient that the persons in whom the estate will vest if the contingency happens at the time of the bringing of the action, the devisees apparent, are made parties.³¹ The

²⁷ The first-estate-of-inheritance doctrine has been criticised as not applicable to this type of situation and not necessary to explain the cases purporting to follow it. Such critics point out that it is properly referred to only in connection with the English estate tail. 3 SIMES, *FUTURE INTERESTS* (1936) sec. 672. However, it is often referred to in the Kentucky cases and is apparently used as a basis for many of the decisions. *Goff v. Renick*, 156 Ky. 588, 161 S.W. 983 (1913) *Hermann v. Parsons*, 117 Ky. 239, 25 Ky. Law Rep. 1344, 78 S.W. 125 (1904)

²⁸ *Willis v. Lapsley*, 240 Ky. 829, 43 S.W. 2d 47 (1931), *Goff v. Renick*, 156 Ky. 588, 161 S.W. 983 (1913).

²⁹ 156 Ky. 588, 161 S.W. 983 (1913)

³⁰ It might be noted that in this case there were three classes of contingent remaindermen, the life tenant's children, his brothers, and the brothers' descendants. Both the first and second were made parties but the third was not. The same rule that made it unnecessary to make the living members of the third class parties would seem to remove the necessity for the second also, and the court so indicated, stating in its opinion that, "If our construction of section 491, of the Civil Code, correctly interprets its meaning, the brothers of the life tenant were not necessary parties to the action, though doubtless made so as a matter of precaution on the part of the life tenant and to show their approval of the sale of the land." *Goff v. Renick*, 156 Ky. 588, 593, 161 S.W. 983, 985 (1913).

³¹ " although the remainder may be contingent, yet if the person in being in whom the remainder interest would have vested, if the contingency had happened before the commencement of the

fact that there are at the time other living persons who have an alternative contingent interest in the property does not affect the validity of the decree. In a similar case under the same code provision the court later stated that the alternative contingent remaindermen "were neither necessary nor proper parties."³² This is apparently a very unusual position for a court to take. In effect, it is that persons who admittedly have an interest in property are not proper parties to an action involving title to that property

A number of Kentucky cases can be found holding that the alternative remaindermen are not necessary parties. In one case property was devised to A for life with remainder to A's children and, in default of issue, to named third persons or to the issue of any of the named third persons who might be dead. The issue of the third persons were not necessary parties to an action by the life tenant for a decree of sale and reinvestment.³³ In another case land was conveyed to A for life with remainder to A's children and in default of issue remainder to the heirs of the grantor. The heirs of the grantor were not necessary parties to an action for the sale of the land.³⁴

As indicated above, these cases, holding that living contingent remaindermen may be virtually represented in actions involving title to property, are peculiar to Kentucky and possibly a few other states,³⁵ the general rule being that if remaindermen are available they must be made parties. It is believed, however, that the Kentucky rule is sound in theory and that there is little possibility that injustice will result from its application. The interests of the contingent remaindermen are clearly protected since it is required that parties be before the court whose interests are the same as theirs. Such persons will have the same motive for protecting the estate that the remaindermen themselves would have. The Kentucky rule also has the added advantage of making it unnecessary to bring before the court persons who are only remotely interested and who are unlikely ever to have a vested interest in the estate. This advantage is particularly noticeable when the alternative contingent remaindermen are very numerous or difficult of ascertainment.

action, be properly before the court a complete and perfect title may be passed. " *Luttrell v. Wells*, 97 Ky. 84, 90, 16 Ky. Law Rep. 812, 814-815, 30 S.W. 10, 11 (1895).

³² *Willis v. Lapsley* 240 Ky. 829, 835, 43 S.W. 2d 47, 50 (1931).

³³ *Walsh v. Parr's Executor & Trustee*, 33 Ky. Law Rep. 242, 110 S.W. 300 (1908).

³⁴ *Fritsch v. Klausung*, 11 Ky. Law Rep. 788, 13 S.W. 241 (1890) (Emphasis placed on the remoteness of the interest claimed by the alternative remaindermen).

³⁵ See *Edwards v. Harrison*, 236 S.W. 328 (Mo., 1921).

6. Conflicting Interests.

Where there is a conflict of interest between the representative and the party purporting to be represented there appears to be no basis for the application of the doctrine. In one case a deed purported to convey a life estate to the grantee with remainder to his bodily heirs. Before any such heirs were in existence the grantee brought action against the grantor to have the deed reformed so as to give him a fee instead of a life estate, alleging that the limitation to a life estate was put into the deed by mistake. Since the interest of the life tenant was clearly in conflict with that of the remaindermen, the former could not be the virtual representative of the latter and no decree could be had which would bind the unborn heirs.³⁶ Had the action been one to enforce a lien against the property or to establish some other claim adverse to the interest of the life tenant as well as that of the remaindermen, no doubt the life tenant would have been a proper representative of the unborn bodily heirs.³⁷ A different result could possibly have been reached under the facts presented if a guardian ad litem had been appointed to represent the unborn heirs.

7. Suits Between Parties Privy to The Estate.

A judgment obtained by a party privy to the instrument creating the remainder has been distinguished from a judgment obtained by a stranger although the extent of the distinction is none too clear. In *Johnson v. Jacob*³⁸ an estate was devised to a trustee, the income to go to a named beneficiary for life, remainder to his descendants and if no descendants, to his heirs. The life tenant erected valuable buildings on the land and then petitioned the court for permission to withdraw property from the trust in an amount sufficient to compensate him for the buildings. All living presumptive heirs were made defendants, and the life tenant was permitted to withdraw the property. On the death of the life tenant, an heir born after the original judgment had been entered claimed her interest in the property as against the life tenant's devisee. It was held that the after-born heir had not been virtually represented by the living presumptive heirs in the prior action and was not bound by the decree rendered. Some of the language in the court's opinion would seem to indicate that a contingent remainderman can never be virtually represented in an action

³⁶ *Lowe v. Taylor*, 222 Ky. 846, 2 S.W. 2d 1042 (1928).

³⁷ The court stated in its opinion that, "If such suit is brought by or against a stranger to the estate, it is generally held sufficient to bring before the court all persons in being who have vested estates, and whose interest in the subject of the litigation is identical with after-born and contingent remaindermen." *Lowe v. Taylor*, 222 Ky. 846, 848-849, 2 S.W. 2d 1042, 1043 (1928).

³⁸ 74 Ky. (11 Bush) 646 (1876).

brought by one in privity with the estate.³⁹ Such a meaning, however, was apparently not intended by the court and is not in harmony with other decisions. Numerous cases can be found holding that the doctrine of virtual representation applies to suits between parties privy to the estate for a decree of sale and reinvestment.⁴⁰ The doctrine also applies to actions for the construction of a will⁴¹ and for reformation of a deed⁴² even though the person bringing the action is in privity with the estate.

The real basis for the distinction made in *Johnson v. Jacob* appears to be, not merely that the person bringing the action was privy to the title, but that he was a privy who had deliberately created a claim against the estate and then brought an action in the hope of profiting at the expense of the contingent remaindermen. It was probably this deliberate creation of a claim that was of greatest influence in the decision of the court.⁴³ Even so, it is difficult to find any important difference between an action by a life tenant to withdraw part of the property from the operation of a trust and an action by a life tenant to reform a deed so as to give him a fee simple. It was held in *Kendall v. Crawford*⁴⁴ that in the latter type of case the living contingent remaindermen could represent the unborn persons of the same class in an action brought by the life tenant, no suggestion being made as to any necessity for a guardian ad litem. In view of the other decisions referred to, it is doubtful if the case of *Johnson v. Jacob* will be extended beyond its particular facts and that the restriction will not be applied except in cases where the party bringing the action is, not only in privity with the estate, but also has actively participated in the creation of the claim which he seeks to assert against it.

³⁹ In referring to other cases cited by opposing counsel the court said, "In each of these cases the complainant was a stranger to the title under and through which the contingent remaindermen claimed title." *Johnson v. Jacob*, 74 Ky (11 Bush) 646, 660 (1876).

⁴⁰ *Middleton v. Graves*, 229 Ky 640, 17 S.W 2d 741 (1929); *Goff v. Renick*, 156 Ky 588, 161 S.W 983 (1913); *McClure v. Crume*, 141 Ky 361, 132 S.W 433 (1910); *Walsh v. Parr's Executor & Trustee*, 33 Ky Law Rep. 242, 110 S.W 300 (1908); *Fritsch v. Klausung*, 11 Ky Law Rep. 788, 13 S.W 241 (1890).

⁴¹ *Masonic Widows' & Orphans' Home & Infirmary v. Heatt Bros.*, 197 Ky. 301, 247 S.W 34 (1923).

⁴² *Kendall v. Crawford*, 25 Ky. Law Rep. 1224, 77 S.W 364 (1903).

⁴³ The court pointed out that, "Here the life-tenant, holding under the title through which these appellants claim, and with full knowledge of all the facts, voluntarily created or attempted to create in his own behalf a claim against the estate of the remaindermen." *Johnson v. Jacob*, 74 Ky. (11 Bush) 646, 659 (1876).

⁴⁴ 25 Ky Law Rep. 1224, 77 S.W 364 (1903).

8. Conclusion.

In conclusion it may be stated that the doctrine of virtual representation of holders of future interests has received a rather broad and liberal interpretation by the Kentucky courts. Where all living members of a class are made parties to an action the possible unborn members are not necessary parties. Even though no members of the class in question are in being they may be virtually represented by others whose interests are identical with theirs. It is ordinarily held sufficient that there be before the court the persons making up the first vested estate of inheritance. All contingent remaindermen coming after them are then bound by the judgment. This doctrine has been applied to make it unnecessary to bring before the court alternative contingent remaindermen who are in being if the person in whom the estate would vest, if the contingency happened at the time of the bringing of the action, were made a party. A distinction has been made between cases where contingent remaindermen's rights are affected by a judgment obtained by one in privity with the estate and by a stranger to the instrument creating the contingent remainder. It is doubtful, however, if this distinction is of any importance except in cases where the suitor in privity with the estate, with full knowledge of the remaindermen's rights, deliberately creates a claim against the estate and then seeks to enforce it through a virtual representative.

The virtual representation doctrine is planted on the theory of the identity of interests of parties before the court with those of parties not before the court. It is this principle that is of most aid in solving the cases. A contingent remainderman is never bound by a judgment if his only representative in the action was a person having an interest which was in conflict with his own. It is believed that if this requirement of identity of interest is kept in mind and if all members of a given class are treated equally, there should be little difficulty in dealing with problems as they arise.

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