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The Power Of Equity To Bind Unborn Persons To A Sale For Partition - Hardy v. Leager

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The Power Of Equity To Bind Unborn Persons To A Sale For Partition

Hardy v. Leager[1]

The complainant-appellee and his sister had been tenants in common in the fee of certain realty. Subsequently the complainant's sister died, devising to complainant a life estate in all of her property with the remainder, after the satisfaction of certain pecuniary bequests, in equal shares to the complainant's surviving children or, upon failure of such survivors, over, in equal shares, to such children of certain named cousins as should survive the complainant. Thus the complainant became the owner in fee of a one-half undivided interest in the land with a life

[1] 212 Md. 565, 130 A. 2d 737 (1957).

estate in the other half subject to a contingent remainder in alternative classes of persons.

The complainant filed a bill praying for a sale for partition and for other relief. *The only ground averred for the relief prayed was that the land could not be divided in kind without loss or injury to the parties.* The trial court decreed a sale. At the date of the decree all living persons in interest were parties to the cause including living infant members of each of the alternative classes. The infants were represented by duly appointed guardians *ad litem.* The purchaser-appellant excepted to the sale urging that:

1. Under Section 170 of Article 16 of the Maryland Code[2] a court of equity does not have jurisdiction to decree a sale binding on possible after-born remaindermen, and;
2. Section 264 of Article 16 of the Maryland Code[3] was not complied with as there was neither an allegation nor affirmative proof that the sale was advantageous to the parties concerned.

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[2] Now 2 MD. CODE (1957) Art. 16, §154:

"The court may decree a partition of any lands, tenements or hereditaments, or any right, interest or estate therein, either legal or equitable, on the bill or petition of any joint tenant, tenant in common, or any parcener or any concurrent owner, whether claiming by descent or purchase, or if it appear that said lands, tenements or hereditaments, or right, interest or estate thereon cannot be divided without loss or injury to the parties interested, the court may decree a sale thereof, and a division of the money arising from such sale among the parties, according to their respective rights; this section to apply to cases where all the parties are of full age and to cases where all the parties are infants, and to cases where some of the parties are of full age and some infants, . . ., and if any contract hath been made for the sale of any lands, tenements or hereditaments held as aforesaid, or any interest therein for or on behalf of any infant, . . . which the court, upon hearing aforesaid and examination into all the circumstances, shall think for the interest and advantages, both of such infant, . . . and of the other person or persons interested therein to be confirmed, the court may confirm such contract, and all sales and deeds made in pursuance of and agreeably to an order of the court in the exercise of the above power shall be good and sufficient in law to transfer the estate and interest of such infant, . . ."

[3] Now 2 MD. CODE (1957) Art. 16, §167:

"In all cases when one or more persons is or are entitled to an estate for life or years or to an estate tail, fee simple, conditional, base or qualified fee, or any other particular, limited or conditional estate in lands, and any person or persons is or are entitled to a remainder or remainders, vested or contingent, or an executory devise or devises, or any other interest, vested or contingent in the same land, on application of any of the parties in interest, a court of equity may, if all the parties in being are parties to the proceeding, decree a sale or lease thereof, if it shall appear to be advantageous to the parties concerned, and shall direct the investment of the proceeds of sale or the limitations of the reversion and rent, as the case may be, so as to inure in like manner as by the original grant to the use of the same parties

The lower court overruled these exceptions and confirmed the sale.

On appeal, the case was remanded to permit compliance with Section 264 (now 167). The Court of Appeals rejected the complainant's contention that irrespective of Section 264 (now 167) the modern case law doctrine of virtual representation would bind after-born persons to the sale. Although the bill of complaint failed to allege advantage to all parties concerned, the Chancellor found such benefit in fact. However, the Court of Appeals was unwilling to accept this finding as a sufficient compliance with the requirement of Section 264 (now 167) that the proof show that the sale will be " 'advantageous to the parties concerned'."[4]

At early common law and in Maryland today, a tenant in common or joint tenant of real property has a right to partition in kind.[5] Though partition was by statute an action at law, the Court of High Chancery took jurisdiction because the legal remedy was difficult to obtain.[6] The possibility of inconvenience and dissention arising from cotenancy of land were considered inimical to its full enjoyment, and thus owners were granted a right to enjoyment in severalty.[7] The right was held to be absolute, and resulting inconvenience to the other cotenants was not a bar.[8] In cases where the land could not be partitioned without loss or injury to the parties in interest, the courts were powerless to decree sales and divide the proceeds.[9] It was to remedy this situation that Article 16, Section 170 (now

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who would be entitled to the land sold or leased, and all such decrees, if all the persons or parties who would be entitled if the contingency had happened at the date of the decree, shall bind all persons whether in being or not, who claim or may claim any interest in said land under any of the parties to said decree, or under any person from whom any of the parties to such decree claim, or from or under or by the original deed or will by which such particular, limited or conditional estates, with remainders or executory devises, were created."

EDITOR'S NOTE: The above statutes will be referred to hereinafter by their 1957 Code section numbers.

[4] *Supra*, n. 1, 573.

[5] 31 Hen. VII c. 1 (1539), 1 ALEX. BRIT. STAT. (2nd ed. 1912) 407; 32 Hen. VIII c. 32 (1540), 1 ALEX. BRIT. STAT. 438 (2nd ed. 1912); 8 and 9 Wm. III, c. 31 (1697), 2 ALEX. BRIT. STAT. (2nd ed. 1912) 834; *cf.* Lloyd v. Gordon & Wife, 2 H. and McH. 254 (Md. 1789) where an action for partition was brought on the law side of the court.

[6] History discussed: 1 STORY, EQUITY JURISPRUDENCE (12th ed. 1877) §§646-647, citing Speke v. Walrond (1649) as the earliest case.

[7] Baskins v. Krepcik, 153 Neb. 36, 43 N. W. 2d 624 (1950), noted 49 Mich. L. Rev. 764 (1951).

[8] Campbell v. Lowe, 9 Md. 500, 509 (1856).

[9] Roche v. Waters, 72 Md. 264, 19 A. 535 (1890).

154) of the Maryland Code was enacted.[10] Though the statute is merely permissive in form, it is considered to provide a cotenant of realty an absolute right to a sale for partition upon a showing that partition in kind cannot be made "without loss or injury to the parties".[11] Furthermore the subject case states that the right to a sale for partion is paramount to the interests in remainder of infant persons.[12]

At common law partition in kind was limited to present interests. The right to separate enjoyment was understood as merely the right to present unhampered physical dominion. Section 170 (now 154) in authorizing a sale for partition provides an alternative means of severing concurrent ownership.[13] The Maryland Court of Appeals has, however, consistently construed the right to a sale to be broader in scope than partition in kind and allowed sales for partition of realty involving future interests.[14] This resulted in the creation of a situation, not existing thereto-

[10] Dugan and Lyman, Trustees v. Mayor &c. of Baltimore, et al., 70 Md. 1, 6, 16 A. 501 (1889).

[11] Johnson v. Hoover, 75 Md. 486, 23 A. 903 (1892); Kemp v. Waters, 165 Md. 521, 170 A. 178 (1934). Because of this absolute right to sale, the court could not require that an "upset price" be honored. Though this construction is an extension of the rights of concurrent owners, the courts are at the same time effectuating the broad public policy in favor of the free alienability of land.

[12] Hardy v. Leager, 212 Md. 565, 569, 570, 130 A. 2d 737 (1957). There is some question whether this is not novel law. As a practical matter, attorneys, when seeking to invoke Section 154, include an allegation of "interest and advantages" to the infant parties — thus anticipating any possible effect of the third clause of the Section. Accordingly, the question usually does not arise. See Downin v. Sprecher, 35 Md. 474 (1872). This practice was not followed in the instant case. However, Dorsey v. Gilbert, et al., 11 G. & J. 87 (Md. 1839) states that Maryland courts of equity have jurisdiction over the land of infants independently of any of the statutes empowering sales. This power is based upon benefit to the infant. It is difficult to see how it is to the infant's advantage to decree a sale premised upon a "paramount" right of another. A more equitable position would be to hold that §167 preempts the matter of sales of *future interests* and that advantage to *all* parties concerned must be shown. In Beggs v. Erb, 138 Md. 345, 113 A. 881 (1921) a case where advantage to the *infant parties* but not to possible unborn remaindermen had been shown, the court said at 353 "And yet it is not perceived why an infant party to the suit should be any more bound than should those unborn who were parties by representation."

[13] MILLER, EQUITY PROCEDURE (1897) §403 states that sales are *in lieu* of partition in kind. See the Dugan case, *supra*, n. 10, where it was argued that since partial partitions were not allowed at the common law, a partial partition by sale could not be decreed under §154.

[14] Bolgiano v. Cooke, 19 Md. 375, 393 (1863). Under §154 any interest or estate at law or in equity in possession or remainder may be sold. Billingslea v. Baldwin, 23 Md. 85 (1865), sale for partition of reversion during the life tenancy; Downin v. Sprecher, 35 Md. 474 (1872); Tolson v. Bryan, 130 Md. 338, 100 A. 366 (1917), owner of an undivided half interest with life estate in other half interest with remainder over was allowed a sale

fore, in which the interests of persons not *in esse* could be affected by a proceeding in the nature of partition. Since the problem could not have arisen before the passage of statutes allowing sales, there was no directly applicable body of common law.[15] The Maryland case of *Downin v. Sprecher*[16] is in point. One S.D., a life tenant of a one-sixth undivided interest in certain realty with remainder over to her sons "begotten or to be begotten", and her then living sons, were defendants in a successful suit brought for a sale in lieu of partition by the other concurrent owners. Forty-seven years later S.D.'s surviving sons attacked the decree in a suit in ejectment. The Court held that the two sons who were parties to the prior proceeding were bound but that the three after-born sons were not. In that case the two basic rules of equity's jurisdiction over the person came into conflict:

1. No decree respecting property of any persons shall be made without notice and opportunity to be heard.
2. In order to prevent mutiplicity of suits and to do complete justice, the decree should embrace a final settlement of all the rights of all the parties interested.[17]

Other American jurisdictions when confronted with this conflict have evolved a modern case law doctrine of virtual representation. Two forms of representation are applicable to the greatest number of cases involving judicial sales: (1) Representation of possible contingent remaindermen by a parent life tenant, and (2) representation of possible after-born contingent remaindermen by living members of the same class.[18] These exceptions to the general rule of necessary parties are supported on the principle that human laws (including the rule of neces-

for partition; Bosley v. Burk, 154 Md. 27, 139 A. 543 (1927), complainant held undivided one-third interest in the fee, life estate in undivided two-thirds interest. The estate held in the Bosley case was in effect the same as the interest involved in the present case. MILLER, *loc. cit. supra*, n. 13, *fn.* 1, criticizes this extension.

[15] SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956) §1819. Long v. Long, 62 Md. 33 (1884) — *dis. op.* 75, 87. In England sales for partition were allowed for the first time by 31 and 32 Vict. c. 40 (1868). All American jurisdictions have some provisions for sale for partition. See, RESTATEMENT (1948 Supp.), Property, §178, Comm. a, Special Note, for sales statutes of other jurisdictions.

[16] *Supra*, n. 14.

[17] See MILLER, EQUITY PROCEDURE (1897), §20.

[18] SIMES AND SMITH, *op. cit. supra* n. 15, §1801 *et seq.* and cases cited. Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 Ill. L. Rev. 580 (1936).

sary parties) are for the living and not for the wishes of the dead or the possible interests of persons not yet born.[19] Sales for partition prevent waste and inefficiency in the use of land and favor its free alienability.[20] Insecurity of title and the resultant possibility of litigation by after-born persons is not in the interests of society. In practice the doctrine of virtual representation requires the joinder of all living parties in interest, and further requires that among these persons there be a living contingent remainderman who has an identity of estate or a community of interest with unborn possible remaindermen. Unless their interests are shown to be adverse to those of the unborn persons, it is considered that the self-interest of the living persons will insure that the merits of the cause are before the court.[21] Weighing the various interests involved, the courts hold that it is not unreasonable to require that the unborn persons, upon coming into interest, accept the proceeds from the sale in lieu of the land itself. The doctrine of virtual representation is approved by the American Law Institute.[22]

[19] Mabry v. Scott, 51 Cal. App. 2d 245, 124 P. 2d 659, 663 (1942), *cert. den.* Title Ins. & Trust Co. v. Mabry, 317 U. S. 670 (1942).

[20] Long v. Long, 62 Md. 33 (1884), *dis. op.* 75, 83-4:

"[I]n 1833, Baltimore County Court had the opportunity to choose between two courses of action. It could authorize a sale of every interest in the property, and preserve the portions of the purchase money, to which persons not then in existence might in future contingencies be entitled; or it might refuse altogether to act, and leave the property to go to destruction."

See Tolson v. Bryan, 130 Md. 338, 100 A. 366 (1917).

[21] SIMES AND SMITH, *op. cit. supra*, n. 15, §1804 and cases cited. Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62 (1921).

[22] 2 RESTATEMENT, PROPERTY (1936), §§183, 184.

§183:

"A person unborn at the time of the commencement of a judicial proceeding is duly represented therein by a person duly joined as a party thereto, when

(a) the person so joined as a party, and the unborn person, sustain to each other such a relationship that an adequate presentation of the legal position of the party would be an adequate presentation of the legal position of the unborn person; and

(b) the judgment, decree or other result of such proceeding operates with equal regard for the possible interests of the person joined as a party and of the unborn person; and

(c) the conduct of the person so joined as a party constitutes a sufficient protection under the rule stated in §185'."

§184:

"The relationship between the person joined in a judicial proceeding as a party and the unborn person, which is one of the prerequisites for effective representation under the rule stated in §183, exists when the person so joined as a party

(a) is one member of a class in favor of which an interest in land or other thing is limited in such manner that the class can increase its membership by the birth of the un-

During the infancy of this doctrine,[23] the Maryland Court of Appeals in *Downin v. Sprecher*[24] rejected both the rule that a parent life tenant might represent a possible contingent remaindermen and the rule allowing living remaindermen to represent unborn members of the same class. The Court pointed out that the common law precedent for applying the rule of representation by holders of first estates of inheritance was not applicable to life tenancies.[25] The Court took judicial notice of what is presently Article 16, Section 167, which had been passed after the sale in question and said, "[a]part from legislative authority, which was not then given, and the rule of representation, which we have decided, does not apply, this decree had no operation or effect upon the title of these after-born sons".[26]

In the subject case the appellee asked the Court to reexamine the doctrine of virtual representation. Both clauses (a) and (d) of Section 184 of the Restatement of Property would apply. However, the Court, citing *Downin v. Sprecher*[27] and *Long v. Long*,[28] reasserted its former holding that the doctrine of virtual representation is not the law in Maryland. The Court further stated that *prior to the enactment of Section 264* (now 167):

> "'. . . courts of equity in this State had no jurisdiction to give to a decree the effect of binding the interests of parties not then in being, there being no such au-

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born person, whether or not the class can decrease its membership by the death of the person so joined; or

(b) is the person who has the first vested estate of inheritance in land and the interest limited in favor of the person unborn becomes possessory, if ever, subsequent to, or in defeasance of, the estate of the person so joined; or

(c) is the presumptive taker of an estate of inheritance in land which although not a vested estate of inheritance, is so limited that the unborn person may take as the substitute for the person so joined; or

(d) has an estate for life in land and the limitation of the interests subsequent to such estate for life is in favor of unborn issue of the person joined; or * * *."

[23] Faulkner v. Davis, 18 Gratt (Va.) 651, 98 Am. Dec. 698 (1868) is an example of an early case.

[24] 35 Md. 474 (1872). This is the leading Maryland case.

[25] The rule of representation by holders of first estates of inheritance is found in §184(b) of the RESTATEMENT (*supra*, n. 22). This rule appears to be the ancestor of the later rule applying to life tenancies as described in clause (d) of the same section.

[26] *Supra*, n. 24, 483.

[27] *Supra*, n. 24.

[28] 62 Md. 33 (1884).

> thority under the general powers of chancery courts nor by statute.' *Miller, Equity Procedure,* Section 411; . . ."[29]

After discussing the *Downin*[30] case the Court goes on to say:

> "Section 264 [now 167] of Article 16 is designed to meet just the type of situation in which Section 170 [now 154] fell short, as in *Downin v. Sprecher, supra,* and the 'benefit of the law embraces almost every conceivable estate in which unborn children may be interested.' *Miller, Equity Procedure,* Sec. 411, and cases there cited. As said in *Ball v. Safe Deposit & Trust Co., supra,* (92 Md. at 507-8): 'The jurisdiction of a Court of equity to decree a sale of land under this Act rests upon the concurrence of two conditions precedent, and they are that all parties in interest and in being, who would be entitled, if the contingency had happened at the date of the decree must be parties to the proceedings, and the sale must be made to appear to be advantageous to the parties concerned. If these conditions, as contemplated by the Act, are not complied with, *at the date of the decree,* the Court will be without jurisdiction to decree a sale. The language of the Act is, " 'and all such decrees if all the persons are parties who would be entitled if the contingency had happened *at the date of the decree,* shall bind all persons whether in being or not, who claim any interest in said land under any of the parties to the decree".' "[31]

The Court found lack of sufficient proof of advantage and held that Section 264 (now 167) was not satisfied. It concluded that the possible unborn remaindermen are protected but not bound by the sale, thus treating the question as if it had arisen *before* this statute was enacted.

Therefore, under the present Maryland Law a concurrent owner of realty, upon a showing that the land cannot be divided without loss or injury, is entitled under Section 170 (now 154) as a matter of right to a decree for sale in lieu of partition, but such sales are subject to the interests and advantages of after-born persons. Thus, where rights of unborn persons may be involved the sale must satisfy the requirements of both Section 170 (now 154) and Sec-

[29] Hardy v. Leager, 212 Md. 565, 570, 130 A. 2d 737 (1957).
[30] 35 Md. 474 (1872).
[31] *Supra,* n. 29, 572. Parenthetical section numbers supplied.

tion 264 (now 167) or the title offered at the sale will in effect be unmerchantable, the sale will bring a lower price, and all persons in interest will be adversely affected. The refusal of the Court of Appeals to apply the doctrine of virtual representation has the effect of restricting this absolute right to partition by sale provided in Section 170 to cases not involving the possibility of unborn remaindermen.

On the other hand, the enactment of Section 264 (now 167) had as its purpose the protection of all persons involved, both born and unborn, against loss by waste or deterioration of the property.[32] To accomplish this end it in substance employs the doctrine of virtual representation.[33] In fact this section is capable of infringing upon the rights of unborn persons more than the common law doctrine. There must be a community of interest with one of the joined parties for the common law doctrine to operate, whereas under this Section such community of interest between a living party and unborn persons is not required, so long as the sale will be advantageous to the unborn persons. However, the common law doctrine of virtual representation should have a place in Maryland law as an accepted method of getting the issue as to whether the sale will be advantageous to unborn persons before the court. The joinder of living members of a class would of necessity raise the issue of advantage to such persons and thus incidentally to unborn persons of the same class, and any finding of advantage to the unborn persons should be strengthened by the fact that the living members of the same class were joined as defendants. In an admittedly close case such as was before the Court in *Hardy v. Leager*[34] the existence of this community of interest should have been controlling on the Court of Appeals, where the trial court had found advantage to all persons concerned.

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[32] Downes v. Long, 79 Md. 382, 389, 29 A. 827 (1894):
"The purpose of the Legislature in passing it, doubtless, was not only to protect the interests of those immediately concerned in the property, but to subserve a broad public policy, of preventing, as far as possible, such estates, as are contemplated by the Act, from becoming obstructions to the general progress of the community, in consequence of waste and decay, due to the inefficiency or feebleness of those having the temporary use or control of them."

[33] In Beggs v. Erb, 138 Md. 345, 352, 113 A. 881 (1921), the court said:
"The whole theory of the Act of 1862, Ch. 156 . . . is that the parties *in esse* represent those who are unborn."
This is now 2 MD. CODE (1957) Art. 16, §167.

[34] 212 Md. 565, 130 A. 2d 737 (1957).