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FEUDAL AND COMMON-LAW CHARACTERISTICS OF FUTURE INTERESTS IN ILLINOIS*

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FEE UPON A FEE BY DEED IN ILLINOIS

THE case of *Harder v. Mathews*¹ settled a long standing uncertainty as to whether a fee may be limited upon a fee in the same deed by holding that where, for an express consideration, a grantor aliens, releases, remises, and quitclaims to a grantee and her heirs with a gift over in fee if the grantee shall die without living descendants, the Statute of Uses will operate to transfer the seizin by shifting use to the second taker upon the happening of the condition.

The uncertainty as to the validity of such shifting interests was due to two lines of cases, one of which held invalid all shifting interests by deed.² In some of these cases the decision was based upon the grounds of repugnancy and in others by the statement of the common-law rule that a fee cannot be mounted upon a fee in a deed but may by way of executory devise. *Palmer v. Cook*³ is the only case actually holding an ordinary shifting interest by deed to be void—the statements thereof in the other

* The first half of this article appeared at p. 17 of this volume.

¹ 309 Ill. 548, 141 N. E. 442 (1923).

² *Siegwald v. Siegwald*, 37 Ill. 431 (1865); *Peoria v. Darst*, 101 Ill. 609 (1882); *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191 (1889); *McCambell v. Mason*, 151 Ill. 500, 38 N. E. 672 (1894); *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029 (1894); *Palmer v. Cook*, 159 Ill. 300, 42 N. E. 796 (1896); *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173 (1896); *Stewart v. Stewart*, 186 Ill. 60, 57 N. E. 885 (1900); *Kron v. Kron*, 195 Ill. 181, 62 N. E. 809 (1902).

³ 159 Ill. 300, 42 N. E. 796 (1896).

cases are dicta—and the only case sufficient to have cast grave doubt upon the validity of such limitations.

The later cases⁴ all contain dicta indicating a trend in the direction of recognition of shifting interests in a deed, and in the majority of them the decision was grounded upon the principle that such interests were good as a conveyance under the Statute of Uses.

The long conflict of decision was apparently due to the fact that both the principles of the common law and a system of conveyancing, developed under the Statute of Uses, existed side by side in the Illinois law. There was a reluctance by some courts to overturn the old feudal rule that a fee upon a fee in a common-law conveyance is void. In the later decisions the courts gave more consideration to the fact that conveyances by deed in Illinois have always taken effect under the Statute of Uses by way of bargain and sale or a covenant to stand seized,⁵ and it was upon this ground that the court in *Harder v. Mathews* stood and finally (in 1923) committed the Illinois law to the doctrine that a fee may be created upon a fee in a deed.

SPRINGING FUTURE INTERESTS BY DEED

It seems that conveyances by way of springing use have always been good in Illinois. However, the question has been raised as to the nature of the estate held by a grantor after he has made a conveyance in fee effective upon his death, as by delivering the deed to a third person, without in express terms reserving to himself a life estate. The validity of the future interest in the grantee has been supported upon several theories. One theory is that the grantor by operation of the conveyance becomes seized of a life estate and that the grantee's interest takes

⁴ *Cover v. James*, 217 Ill. 309, 75 N. E. 490 (1905); *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163 (1906); *Bauman v. Stoller*, 235 Ill. 480, 85 N. E. 657 (1908); *Brown v. Brown*, 247 Ill. 528, 93 N. E. 357 (1910); *Morton v. Babb*, 251 Ill. 488, 96 N. E. 279 (1911); *Duffield v. Duffield*, 268 Ill. 29, 108 N. E. 673 (1915); *Pitzer v. Morrison*, 272 Ill. 291, 111 N. E. 1017 (1916).

⁵ *Schackelton v. Sebree*, 86 Ill. 616 (1877).

effect as a remainder.⁶ Another is that the deed is effective under Section 1 of the Conveyances Act.⁷ It might also be regarded as operative under the Statute of Uses either as a covenant to stand seized or as a bargain and sale.⁸ It is suggested by Mr. Kales⁹ that it is preferable to sustain the limitation after the grantor's death as a springing interest, which cuts short a resulting fee in the grantor, and which is valid either under the Statute of Uses or the Conveyances Act.

RELEASE OF CONTINGENT REMAINDERS AND OTHER CONTINGENT INTERESTS AT COMMON LAW

The feudal law did not favor contingent remainders or rights of re-entry, since they were usually adverse to the interests of tenants in possession. Such interests at best were only tolerated, and anything which would get rid of them was looked upon with favor. For this reason their release was permitted, under certain conditions, because this would put an end to them and tend to preserve such vested estates as might be subsisting.¹⁰ The remainderman could not alone nor of himself give a good title so long as the remainder was contingent. He could not complete the title immediately except by the assistance of the persons having vested interests. In some instances this would be the person in whom the reversion in fee was vested by resulting use, or it might be the heir at law of the former owner by whose will the contingent remainder was created. Whenever the fee was granted under a contingency permitted by the rules of the common law, the owner of the contingency might release to the person having a vested inheritance or the latter could join with the contingent remainderman in a

⁶ *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565 (1896); *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548 (1898).

⁷ *Schackelton v. Sebree*, 86 Ill. 616 (1877).

⁸ *Vinson v. Vinson*, 4 Ill. App. 138 (1879); *Roe v. Tranmer*, 2 Wils. 75, 95 Eng. Rep. 694 (1757).

⁹ Albert M. Kales, *Estates, Future Interests, and Illegal Conditions and Restraints in Illinois* (2d ed., Callaghan & Co., Chicago, 1920), p. 537, § 465.

¹⁰ *Lampet's Case*, 10 Rep. 48a and 48b (1612).

release to a third person. The weight of authority supported the view that, when the fee was granted in contingency, the inheritance was considered to be in abeyance or expectation and not vested in any person; so the former owner then had only a possibility of reverter as distinguished from an actual reversion.¹¹ The possibility of release would seem to have been the same whether this interest was a reversion or only a possibility of reverter. A contingent remainder to B and his heirs was looked upon as only a possibility of obtaining an estate and was to be treated like a possibility of reverter which could not be conveyed to another by deed of grant.

The release was available only to effect the future interest where it operated, not as a conveyance by way of enlargement of the releasee's interest, but by way of extinguishment of the releasor's interest.¹² The release to have any effect must run to him whose interest would be defeated by the vesting of the contingent remainder which is released, and it was effective only so far as the taking effect of the future interest in possession would cut short or interfere with the interest of the releasee. This principle permitted a contingent remainder after a life estate to be released to the reversioner.¹³ The release by the holder of a future interest to a person whose interest would not be affected by the taking effect of the latter interest was not permitted. For example, if the limitations were to A for life, remainder to B in fee if he survive A, but over to C in fee if A survive B, C's attempted release to A would be ineffective. It could not operate by way of extinguishing B's interest but only by way of enlarging A's interest by adding to it by means of a conveyance.¹⁴

¹¹ Richard Preston, *Conveyancing* (J. and W. T. Clarke, London, 1829), III, 252-255.

¹² Charles Fearn, *An Essay on the Learning of Contingent Remainders and Executory Devises* (4th Am. ed., Robert H. Small, Philadelphia, 1845), 421, 423.

¹³ Emory Washburn, *A Treatise on the American Law of Real Property* (5th ed., Little, Brown & Co., Boston, 1887), II, 641.

¹⁴ *Lampet's Case*, 10 Rep. 46b, 51 (1612).

Two authorities¹⁵ state that a contingent remainder cannot be released to the life tenant and that there must be privity of estate between the releasor and the releasee; that is, one of their estates must be so related to the other as to make but one and the same estate in law.

RELEASE OF CONTINGENT INTERESTS IN ILLINOIS

An early Illinois decision¹⁶ stated the rule that a quitclaim deed which grants, sells, and conveys to A all the right, title, and interest in and to certain lands described, to have and to hold to him, his heirs and assigns forever, will not vest a subsequently acquired title by the releasor in the releasee, if the releasor had no interest in the land at the time the deed was executed. The grantor had no title at the date of the deed, but subsequently acquired a patent from the United States. It was held that, since the deed contained no express covenants, and words of bargain and sale were absent, nothing passed. In construing the Illinois Conveyances Act then in force, the courts established the rule that words of bargain and sale carry implied covenants of warranty, and since there were neither express nor implied covenants in the deed in question, the conveyance was not within the provisions of the act providing for inurement of after acquired title and that the releasor was not estopped to claim subsequently acquired title. There was no evidence that the releasor had any claim to the land in question at the time he executed the deed of release or quitclaim and the court recognized and stated that this opinion overruled a former contrary decision.¹⁷ *Frink v. Darst* is to be taken, not as indicating that a quitclaim grant of a contingent remainder or of an executory interest does not pass, but as indicating that if the so-called interests are not interests at all but are mere possibilities of hav-

¹⁵ Bacon's Abridgment, Release, c. 4; Blackstone's Commentaries, 325.

¹⁶ *Frink v. Darst*, 14 Ill. 304 (1853).

¹⁷ *Frisby v. Ballance*, 2 Gilm. (Ill.) 141 (1845).

ing an interest nothing passes by such a purported grant.

The court had previously decided¹⁸ that a deed of release and quitclaim is as effectual for the purpose of transferring existing title to land as a deed of bargain and sale. The court, in announcing this rule, was departing from the common law doctrine that a release by the holder of a future interest to a person whose interest would not be affected by the taking effect of the latter interest would not be permitted. Although the court speaks of the transaction in *Frink v. Darst* as a release, it should be noted that the deed there under construction was a statutory quitclaim deed, and that case, as well as a long list of subsequent cases,¹⁹ holds that if the conveyance be by a statutory quitclaim deed or a deed containing no covenants, the grantee will never become vested with the estate, even though the remainder or other interest afterwards vests. In at least one case,²⁰ the court stated that in order that a contingent remainder pass by release, after the remainder vests, the release must be made to the reversioner, that is, to the person in whom the fee vested, pending the vesting of the contingent remainder.

It was held in *Williams v. Esten*²¹ that an executory devise may be released to the holder of the fee which was subject to be divested by the vesting of an executory devise. *Williams v. Esten* was erroneously cited in one case²² as authority that a contingent remainder may be released to a life tenant. However, the decision that the remainder would pass to the life tenant was correct, since the remainder was created by a deed containing a cove-

¹⁸ *McConnel v. Reed*, 3 Ill. 371 (1840).

¹⁹ The following are cited as typical and are selected at random: *Holbrook v. Debo*, 99 Ill. 372 (1881); *Benneson v. Aiken*, 102 Ill. 284 (1882); *Smiley v. Fries*, 104 Ill. 416 (1882); *Torrence v. Shedd*, 112 Ill. 466 (1884); *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173 (1896); *Williams v. Esten*, 179 Ill. 267, 53 N. E. 562 (1899); *Thompson v. Becker*, 194 Ill. 119, 62 N. E. 558 (1902); *Little v. Eaton*, 267 Ill. 623, 108 N. E. 727 (1915).

²⁰ *Hill v. Hill*, 264 Ill. 219, 106 N. E. 262 (1914).

²¹ 179 Ill. 267, 53 N. E. 562 (1899).

²² *Ortmayer v. Elcock*, 225 Ill. 342, 80 N. E. 339 (1907).

nant for further assurance and, if vested, would pass by estoppel to the life tenant. Still another case, *Drury v. Drury*,²³ contains dictum stating that a contingent remainder can be released to a life tenant. The court's statement in *Drury v. Drury* was not necessary to support its decision, since the limitation under consideration created a remainder to a class, contingent upon the members of the class surviving the life tenant. The court held the remainder to be vested subject to being divested if no member of the class survived the life tenant. Under this view, the conveyance was of a vested interest subject to defeasance, and the case cannot, therefore, be considered as authority that a contingent remainder may be released to a life tenant. The comparatively few Illinois cases in which the question has been considered seem to justify the statement that a contingent remainder can be released to the reversioner but not to the life tenant and that springing and shifting future interests are also inalienable but subject to release under the same conditions as attach to contingent remainders.

It has been held that one who, upon the death of a living person intestate, would be an heir may release his expectancy to the ancestor, and such a release will be enforced in equity for the benefit of the other heirs.²⁴

There may be a release of dower by either a husband or wife to the other by postnuptial agreement,²⁵ and it has been held that, if the instrument is not effective as a conveyance to release dower, a covenant therein not to assert a claim to dower is effective by way of estoppel to bar the spouse from asserting dower in the other's land. An antenuptial contract between husband and wife jointly, releasing all interest in the property of the other, renouncing forever all claims, curtesy, dower, homestead,

²³ 271 Ill. 336, 111 N. E. 140 (1916).

²⁴ *Donough v. Garland*, 269 Ill. 565, 109 N. E. 1015 (1915); *Simmons v. Ross*, 270 Ill. 372, 110 N. E. 507 (1915); *Mires v. Laubenheimer*, 271 Ill. 296, 111 N. E. 106 (1916).

²⁵ *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956 (1890).

etc., has been held to release the widow's award and bars a claim for it if there are no minor children of the deceased husband living with the widow.²⁶

It seems that there may be an express release by a reversioner of the right to declare or complete a forfeiture.²⁷ No Illinois cases directly in point have been found, but our Supreme Court has frequently held that the holder of a right of entry or the power of termination of a fee for breach of condition may, by his or her acts, waive the breach of the condition.²⁸ The waivers were considered as in the nature of *implied* releases and it would seem to follow that, if such a case is presented, the court would hold that an *express* release of a right to declare a forfeiture would likewise be effective to terminate the right.

TRANSFERABILITY OF LEGAL CONTINGENT REMAINDERS AT COMMON LAW

The non-transferability of contingent remainders has been previously referred to as an outstanding example of the survivorship of feudal principles in the Illinois law. Further discussion of the doctrine and its adoption as a rule of decision may be facilitated by the following preliminary survey of its origin and evolution which may be gathered from any authoritative history of the common law.

Legal contingent remainders were both inalienable and destructible at common law in England and remained so until comparatively recently. This characteristic of inalienability of contingent remainders is a survival of the feudal system of landholding, the very existence of which was threatened by any degree of freedom of alienation

²⁶ Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63 (1905); Pavlicek v. Roessler, 222 Ill. 83, 78 N. E. 11 (1906).

²⁷ Berenbroick v. St. Luke's Hospital, 155 N. Y. 655, 49 N. E. 1093 (1898); Brill v. Lynn, 207 Ky. 757, 270 S. W. 20 (1925); Sharpe v. N. C. R. Co., 190 N. C. 350, 129 S. E. 826 (1925).

²⁸ Sherman v. Town of Jefferson, 274 Ill. 294, 113 N. E. 624 (1916); Sanitary District v. Chicago Title & Trust Co., 278 Ill. 529, 116 N. E. 161 (1917).

of interests in land. Alienation tended to defeat the feudal policy that the lord and the tenant should be bound by ties of mutual interest and affection. The feudal system began with the theory that the tenant's interest was inalienable and such alienation as was permitted from time to time was treated as an exception to the general rule. The feudal policy was first relaxed to permit the alienation of vested remainders by grant and at that time it was not thought worth while to make contingent remainders alienable in the same manner for the reason that they were not considered as estates. The first relaxation of the rule of inalienability of contingent remainders by grant or by any other matter of record took the form that they might be extinguished by an estoppel raised by a purported grant of the fee, such as a fine or by suffering a common recovery, although they were not then capable of actual release. Not all contingent remainders could be extinguished by estoppel. However, contingent remainders to the survivors of several persons, or to such persons as shall be living at a certain time or upon the happening of a given event are examples of contingent remainders capable of being extinguished by estoppel but not by release.²⁹

Contingent remainders were in some cases descendible at common law. It was generally held that a contingent remainder in fee to an ascertained person would pass to his heirs should he die before the contingency happened, but in the case of an unascertained remainderman it would not descend.³⁰ An exception to the rule that contingent remainders would descend if the remainderman was ascertained was the case where the remainderman died prior to the happening of the contingency and the contingency was of such a character that his death would make vesting thereafter impossible. An example of such

²⁹ Preston, *Conveyancing*, III, 252-5.

³⁰ Washburn, *Real Property*, II, 640; Joshua Williams, *Real Property* (24th ed., Sweet and Maxwell, Ltd., London, 1926), pp. 438-440.

an exception is the case of a limitation to B in fee after a life estate to A upon the contingency that B survive A. If it should happen that A survived B, the remainder would not descend to B's heirs.

Since freehold land was not devisable at common law there was of course no question as to the devisability of contingent remainders until after the Statute of Wills.³¹ The courts in construing this statute held at first that contingent remainders were not the subject of a devise. Later decisions under this and subsequent statutes established the rule that contingent remainders were devisable only in so far as they had the attributes of descendibility.³² A contingent remainder limited to a living person and his heirs was thus descendible and so remained in England until January, 1926, prior to which date it would devolve upon his personal representatives, in trust, subject to his debts, for his heir or devisee. In case of his death on or after January 1, 1926, it devolved upon the personal representatives, in case of the intestacy of the remainderman and, in case of testacy, on trust, subject to payment of debts, for the devisee.³³

It was also a rule in equity that an assignment agreed, for a valuable consideration, to be made of a possibility should be decreed to be carried into effect.³⁴ The English Property Act of 1925³⁵ provides that a contingent interest and a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed. An heir's expectancy is considered as being but a bare possibility and so is not assignable at law, but it has been held that he might make a contract dealing with his expectancy, and equity will require specific performance of such contract if made for a valuable considera-

³¹ 32 Henry VIII, c. 1 (1540).

³² Fearne, *Contingent Remainders*, pp. 366-71.

³³ 15 Geo., c. 23.

³⁴ Fearne, *Contingent Remainders*, pp. 550-1.

³⁵ 15 Geo. V, c. 20, s. 4 and s. 51.

tion. Such a contract has been held to operate in equity as an assignment of the expectancy.³⁶

The feudal rule of inalienability of legal contingent interests was never applied to equitable contingent interests, since at all times the legal seizin was outstanding in the trustee. The transfer of an existing equitable interest in land required no formal act. Prior to the Statute of Frauds, the transfer could be by parol, and thereafter the only requirement was a writing signed by the transferor.³⁷

ESTOPPEL BY COVENANTS OF WARRANTY

If the contingent remainderman attempted to alienate by a deed with warranties and the remainder vested in his life time, the remainder would at common law pass to the alienee by way of estoppel where the mode of assurance was a feoffment, a fine, or a common recovery, and also where the assurance was by lease.³⁸

If the contingent remainderman should die after he attempts to convey with warranties and the remainder descends to his heirs, the question arises as to whether the remainder will then inure to the grantee of the ancestor. The heir of the warrantor seems to have been bound at common law if he was expressly named in the covenant and assets descended to him.³⁹ By the ancient feudal warranty, which was implied from a conveyance by feoffment, the heir was estopped to deny the title of his ancestor's feoffee by the doctrine of "lineal warranty."⁴⁰ During the reign of Queen Anne, "lineal warranties" were substantially abolished in England, and thereafter the heir, not being bound by the estoppel, would be entitled to the remainder after the contingency

³⁶ Williams, *Real Property*, p. 100n.

³⁷ Thomas Lewin, *Practical Treatise on the Law of Trusts* (13th ed., Sweet and Maxwell, Ltd., London, 1928), pp. 45 et seq., 679.

³⁸ William Henry Rawle, *Practical Treatise on the Law of Covenants for Title* (5th ed., Little, Brown and Co., Boston, 1887), § 243.

³⁹ *Ibid.*, § 309.

⁴⁰ *Ibid.*, § 238.

happened.⁴¹ The ancient implied feudal warranty was applicable only to feoffments and disappeared when the practice of conveyancing by this means was discontinued.

It seems that the feudal policy of hostility to the transferability of contingent interests must be considered as abandoned whenever the law provides means for their transfer. The English courts made the first step in this direction in *Weale v. Lower*,⁴² in 1672, by a new application of the doctrine of estoppel by deed. Although it had long been recognized that after acquired title would pass by a deed containing covenants of warranty, *Weale v. Lower* seems to be the first case wherein the English courts held that an attempted transfer of a contingent interest by way of deed containing covenants of warranty would, under the doctrine of estoppel, pass the title to the transferee in the event the contingency is resolved in favor of the transferor. The fact that the actual transfer of the contingent interest was postponed until it vested in the transferor indicates that the courts continued to recognize the old distinction between an interest and the possibility of an interest. The actual transfer of contingent interests by devise was postponed in England for nearly a century thereafter⁴³ and their transfer inter vivos was first permitted by statutory provision.⁴⁴

TRANSFER OF CONTINGENT INTERESTS IN ILLINOIS—EXTENT
OF TRANSFERABILITY BY ESTOPPEL AND BY INUREMENT
UNDER THE PROVISIONS OF THE CONVEYANCES ACT

The Illinois decisions, in some aspects, leave the law of transferability in a state of uncertainty, but there is no doubt that contingent interests do not pass after an attempted transfer inter vivos until the happening of the

⁴¹ 4 Anne, c. 16, s. 9; Rawle, op. cit., § 11.

⁴² Poll. 65 (1672).

⁴³ Fearne, *Contingent Remainders*, pp. 366, 371; Thomas Jarman, *A Treatise on Wills* (5th ed., Frederick Linn & Co., Jersey City, 1881), II, 240 et seq., III, 741, n. 4.

⁴⁴ 9 Vict., c. 106, s. 6 (1845).

contingency vesting the interest in the transferor and in some cases in his heirs. In other words, we are still following the 17th century English doctrine of estoppel by deed exemplified in *Weale v. Lower*, except as modified by our Conveyances Act providing for inurement of title. There is no other remnant of the feudal land law more persistently present in the Illinois law than the characteristic that remainders are inalienable to a stranger so long as they remain contingent. That contingent remainders or other interests are not transferable by deed, either quitclaim or warranty, nor by devise or execution sale is evidenced by a long line of cases.⁴⁵ In such of these decisions as involved the transferability inter vivos of contingent interests after the resolution of the contingency, the courts have given effect to the common-law doctrine of estoppel by deed insofar as it was not inconsistent with the provisions of the Conveyances Act providing for inurement of title.

The pertinent provisions of the Illinois Conveyances Act ⁴⁶ are as follows:

§ 7. If any person shall sell and convey to another, by deed or conveyance, purporting to convey an estate in fee simple absolute, in any tract of land or real estate, lying and being in this state, not then being possessed of the legal estate or interest therein at the time of sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest, at the time of said sale or conveyance.

⁴⁵ *O'Melia v. Mullarky*, 124 Ill. 506, 17 N. E. 36 (1888); *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332 (1889); *Furnish v. Rogers*, 154 Ill. 569, 39 N. E. 989 (1895); *Butterfield v. Sawyer*, 187 Ill. 598, 58 N. E. 602 (1900); *Golloday v. Knock*, 235 Ill. 412, 85 N. E. 649 (1908); *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N. E. 669 (1911); *Hull v. Ensinger*, 257 Ill. 160, 100 N. E. 513 (1913); *Pitzer v. Morrison*, 272 Ill. 291, 111 N. E. 1017 (1916); *Dubois v. July*, 291 Ill. 340, 126 N. E. 104 (1920); *Raritan State Bank v. Huston*, 329 Ill. 604, 161 N. E. 141 (1928).

⁴⁶ Ill. Rev. Stats. 1937, Ch. 30, §§ 6, 7 (§§ 7, 8 of the Act of 1872 as amended in 1881).

§ 8. In all deeds whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, or other legal representatives, the words "grant," "bargain" and "sell," shall be adjudged an express covenant to the grantee, his heirs, and other legal representatives, to-wit: that the grantor was seized of an indefeasible estate in fee simple, free from encumbrances done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns, may in any action, assign breaches, as if such covenants were expressly inserted: Provided, always, that this law shall not extend to leases at rackrent, or leases not exceeding one and twenty years, where the actual possession goes with the lease.

The language of the foregoing sections is substantially the same as that in the Conveyances Acts of 1827 and 1872. The provision for statutory forms of conveyance originated in the Act of 1872, and Section 9, prescribing a statutory form of warranty deed, has not been changed in wording or effect. A number of the cases cited in footnote 19 were decided under the Statute of 1872. These cases indicate that a quitclaim deed not purporting to convey more than the grantor's present interest will not pass a contingent remainder or other contingent interest upon the resolution of the contingency. Such a deed must contain words of bargain and sale of the land or purport to convey a fee simple in order to pass after acquired title; if it does, the interest will pass to the grantee in the event that it later vests in the grantor and in some cases, as will be seen, if it thereafter becomes vested in his heirs or devisees.

In a leading case⁴⁷ it was held that even a doubly contingent interest was passed by covenants in a deed. The interest was contingent upon the life beneficiary's predeceasing the ultimate beneficiary. The doctrine of estoppel by deed controlled, and it was held that upon the resolution of both contingencies the interest would vest in

⁴⁷ *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332 (1889).

the grantee.

It has also been held that if the contingency is never resolved so that the transferee shall benefit, the transferee cannot claim from the transferor more than the transferor had at the time of the deed, or, in other words, should the transferor acquire the title other than by the happening of the contingency, it is not subject to the estoppel.⁴⁸

A case⁴⁹ involving the construction of two deeds and a will has received considerable attention. The testator died in 1854, leaving his property to his wife, Nancy, for life and to her children after her death; and if Nancy did not have children that would live to inherit said property, then, at the death of Nancy, to Moses Golloday and his heirs. Nancy had no children at the death of testator but remarried and had one child who lived to be 23 years of age and predeceased Nancy. Moses died in 1855, leaving two children, William and Mary. William, in 1900, executed a warranty deed purporting to convey the property involved in the will and died intestate January 1, 1904. Mary died intestate in 1890, leaving six children as her only heirs. One of her sons, on February 27, 1904, conveyed his interest in the land by warranty deed to the grantee of William. Nancy died in 1907. The remainder was held to be contingent with a double aspect to be determined upon the death of Nancy. The court also held that the devise over to the heirs of Moses took effect upon, but not before, the death of Nancy; that the heirs of Moses who predeceased Nancy took nothing and William had nothing to convey by warranty deed; that William's children who asserted title were not estopped by the covenants in their father's deed since they took title under the will of the testator; that had William's children claimed by descent from their father, they would have been barred by Section 6 of the Conveyances Act

⁴⁸ Thomas v. Miller, 161 Ill. 60, 43 N. E. 848 (1896).

⁴⁹ Golloday v. Knock, 235 Ill. 412, 85 N. E. 649 (1908).

which would have transferred the remainder he purported to convey as soon as it descended to them. It was also held that the other deed, in which one of the children of Mary was grantor and who survived the life tenant, operated to transfer his share under Section 6 of the Act. Under the first deed, the grantee took nothing under the doctrine of *Thomas v. Miller*⁵⁰ and under the second deed he obtained the grantor's interest under the same rule as announced in *Walton v. Follansbee*.⁵¹

A later case⁵² illustrates that warranty deeds are effective only to the extent of the interest warranted. The land was held under a limitation to one for life and remainder to the issue surviving the life tenant. The life tenant had twelve children, six of whom died in infancy and six of whom reached their majority. Four of the six adults made conveyances by warranty deeds purporting to convey their interests while their father and the other five adult remaindermen were still alive. Prior to the death of the life tenant, two of the four children who had conveyed and one who had not conveyed died. The question for decision was the size of the interest taken by the transferees upon the death of the life tenant. It was held that the transferors each took a third, because there were only three survivors, but their warranties were effective to the extent only of the interest warranted; that although the conveyance was in the form of a conveyance of all right, title, and interest in and to the property, the warranty was in terms limited to one-sixth. It was held that the grantors had no estate to convey at the time the deeds were made.

The rules of transferability by estoppel, applicable to contingent remainders, also apply in the same manner to executory interests and the latter can be conveyed by estoppel but do not pass by the conveyance directly. In

⁵⁰ 161 Ill. 60, 43 N. E. 848 (1896).

⁵¹ 131 Ill. 147, 23 N. E. 332 (1889).

⁵² *Robeson v. Cochran*, 255 Ill. 355, 99 N. E. 649 (1912).

Pitzer v. Morrison,⁵³ there was a life estate to Susan with a remainder in fee to James, and an executory devise over to the testator's wife and daughter if James predeceased them, with a further gift over to the heirs of James upon the death of the testator's wife and daughter, providing the latter left no children. Susan, James and his wife, and the testator's wife and daughter conveyed by warranty deed to Morrison. It was held that the grantee took the fee, subject only to the gift over to the wife and daughter; that although the gift over was an executory devise and did not pass by their deed, it would inure by way of estoppel to the grantee, and that the warranties of the wife and daughter bound them and also their heirs.

Pitzer v. Morrison clearly indicated that heirs are bound by the warranties of their ancestors, in Illinois, but the clarity of the rule announced in that case was somewhat clouded by the decisions in two later cases.⁵⁴ The same will was involved in both of these cases and it contained a provision giving the testator's son, John, a fee with an executory devise over to the testator's surviving children if John died without issue. John's brothers and sisters conveyed to him by warranty deed, and he thereupon claimed to have an indefeasible title in fee simple. The first case arose from the filing by John of a bill to remove the executory devise as a cloud upon his title. It was held that John's title was not indefeasible. Both parties to the controversy conceded that the estoppel created by the warranty might prevent the brothers and sisters, and their heirs as well, from claiming under the executory devise. The court held that this was the limit of the estoppel; that it would simply prevent anyone claiming to take under the executory devise; that if John died without leaving issue, his fee would be divested, the gift over would not take effect, and there would, there-

⁵³ 272 Ill. 291, 111 N. E. 1017 (1916).

⁵⁴ *Gavin v. Carroll*, 276 Ill. 478, 114 N. E. 927 (1917); *Smith v. Carroll*, 286 Ill. 137, 121 N. E. 254 (1918).

fore, be an intestacy. It would appear from this that it was not certain that John would get anything. In the second case involving the same will, the Supreme Court stated that more had been said in the earlier opinion than was necessary and held that, as events had turned out, the transferee got title anyhow. The partial recall of the dicta in the first case clarified the situation considerably but enough remained to suggest that there may be an estoppel sufficient to bar the transferor and his heirs or those claiming under him and yet the transferee would not get full title if the first taker's interest is divested so that there would be an intestacy.

The Supreme Court in a later case⁵⁵ placed more definite limits upon the doctrine of estoppel in considering what may be passed by a quitclaim deed. The testator had devised his property to his son for life with remainders to those persons who might be found to be his descendants or heirs at the time of the son's death. A creditor of the life tenant acquired his interest in a creditor's proceeding and thereupon three of the life tenant's eight children quitclaimed to that creditor. Two of the three children who conveyed survived their father and claimed a share in the land notwithstanding they had sold and received pay for their interests. In deciding that these children shared in the estate, the court stated there can be no transfer of contingent remainders or executory interests in Illinois except by release, equitable transfer, or estoppel.

In a more recent case⁵⁶ originating in a bill for partition, there is dictum that contingent remainders and executory interests are not transferable. It would seem from the foregoing cases that, while Illinois is definitely committed to the rule that such interests are not transferable by conveyance inter vivos, there is some uncertainty as to whether the warrantor's heirs are bound by estop-

⁵⁵ *DuBois v. July*, 291 Ill. 340, 126 N. E. 104 (1920).

⁵⁶ *Rairitan State Bank v. Huston*, 329 Ill. 604, 161 N. E. 141 (1928).

pel, and that there may be some cases wherein the transferees will not get the title upon the happening of the contingencies even though the heirs be barred by the estoppel. The difficulty of binding the heirs of the warrantor and the open question as to when they will be bound provides an element of uncertainty which is undesirable and could be eliminated by making these interests directly transferable by conveyances *inter vivos*.

The limited application of the doctrine of estoppel by deed and the construction heretofore placed upon the Conveyances Act justifies an attempt to formulate rules of some certainty, as to when contingent interests will pass by deed. The following rules are given by one writer⁵⁷ following an extensive analysis of the Illinois cases: (1) Title will inure under Section 7 of the Conveyances Act if the remainder vests during the life of the transferor and the deed contains covenants; it will not inure under this section under any deed, other than one purporting to convey a fee simple, if vesting does not occur while the transferor is living. (2) If the deed contains covenants or is in the form prescribed by Section 9 of the Act, a contingent remainder or other executory interest will pass by estoppel. (3) Every executory interest or contingent remainder which would pass under Section 7 will also pass under the doctrine of estoppel by deed but the converse is not true.

There are contingent remainders and executory interests which, in the highest conceivable degree of probability, must vest in some of the named donees, and if there is a reversion defeasible by such vesting, there is the same degree of probability that it will never become vested in possession, indefeasibly or otherwise. An Illinois case⁵⁸ involved a deed creating such limitations. The grant contained limitations of the general form, to A for life

⁵⁷ Hoopes, *Executory Interests in Illinois* (Burdette J. Smith and Co., Chicago, 1918), p. 195.

⁵⁸ *Belding v. Parsons*, 258 Ill. 422, 101 N. E. 570 (1913).

and on his death, if survived by children, to them; if not so survived and if there were descendants of the grantor in being, then to such descendants. If A were not survived by children, and there were no descendants of the grantor, then to a named charitable corporation. The reversion of the grantor was held to be transferable. The interests of the remaindermen are not immediately transferable although one or more of such were almost certain to vest in interest. This obvious inconsistency results from rules forbidding alienation of all contingent remainders and executory interests, regardless of the degree of certainty of their vesting, but permitting the transfer of a defeasible reversion, however remote may be the possibility of its ever vesting in possession. So long as the transferability and validity of future interests in land is controlled by whether or not they are said to be "vested," it is to be expected that courts will be moved to treat them as such upon strained constructions, either to save them from the operation of the Rule against Perpetuities or to permit their transfer when justice and fair dealing require it. As a result, one inconsistency is frequently followed by another, which is the natural consequence of the first.

TRANSFERABILITY IN EQUITY — RIGHTS OF CREDITORS

Equity developed its own rules for giving effect to transfers of contingent remainders and executory interests. It was not satisfied with the feudal distinction between vested and contingent remainders as a test of alienability and was unwilling that all transfers of contingent remainders should fail. It has already been stated that the expectancy of one as the prospective heir of a living person may be released to the ancestor and that in equity such a release will be enforced for the benefit of the other heirs. The expectancy of the heir is assignable in equity to a stranger who may, upon the death of the ancestor, maintain a bill for specific performance.⁵⁹

⁵⁹ *Parsons v. Ely*, 45 Ill. 232 (1867); *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172 (1900); *Donough v. Garland*, 269 Ill. 565, 109 N. E. 1015 (1915).

The court in one case⁶⁰ assumed that a guardian, having power to deal with the ward's estate, could not, by his contract to convey, so bind the estate that a court of equity would give specific performance of an attempted transfer of a contingent remainder when it vested. Equity has given specific performance of attempted conveyances of springing and shifting executory interests, if the event has happened upon which the future interest is to take effect, by treating them as contracts to convey.⁶¹ In order that the assignee may have specific performance, the conveyance must show an intent to convey the future interest. If the future interest is not mentioned expressly, an attempted transfer by quitclaim deed is not sufficient in equity to transfer the future interest although the transferor has only the future interest in the land and nothing else.⁶²

There can be no equitable execution upon contingent remainders by creditor's bill,⁶³ nor can title pass under an execution sale on a judgment against the contingent remaindermen.⁶⁴

Although the law is well settled that a contingent remainder cannot be levied upon and sold under judicial process in Illinois, it will, in accordance with a recent Federal court decision in the Seventh Circuit, pass to a trustee in bankruptcy and thereby become available as assets for the benefit of creditors.⁶⁵ Landis, a resident of, and owning property in, Illinois, died testate June 15, 1906, leaving his widow and three children surviving. By his will, he gave all of his estate to his wife for life

⁶⁰ Hill v. Hill, 264 Ill. 219, 106 N. E. 262 (1914).

⁶¹ Ridgeway v. Underwood, 67 Ill. 419 (1873); Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970 (1910).

⁶² Kingman v. Harmon, 131 Ill. 171, 23 N. E. 430 (1890).

⁶³ Kenwood Trust Co. v. Palmer, 285 Ill. 552, 121 N. E. 186 (1918).

⁶⁴ Mittel v. Karl, 133 Ill. 65, 24 N. E. 553 (1890); Temple v. Scott, 143 Ill. 290, 32 N. E. 366 (1892); Madison v. Larmon, 170 Ill. 65, 48 N. E. 556 (1897); Phayer v. Kennedy, 169 Ill. 360, 48 N. E. 828 (1897); Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214 (1904); Robertson v. Guenther, 241 Ill. 511, 89 N. E. 689 (1909); Aetna Life Ins. Co. v. Hoppin, 214 F. 928 (1914).

⁶⁵ In re Landis, 41 F. (2d) 700 (1930).

and provided that after the expiration of the life estate, the remainder in the real estate should go to the three children. One of the testator's sons was adjudged a bankrupt on June 18, 1925, while the widow was still alive, and notwithstanding the will expressly provided that the interests given to his children should not become vested during the life time of his wife, the District Court held that the bankrupt's interest was a vested remainder and passed to the trustee. The question for decision was whether or not the lands devised to the bankrupt were assets in the hands of the trustee under U.S.C.A., Tit. 11, paragraph 110 (a5). It was contended on the one hand that the interest was a contingent remainder and did not pass to the trustee and, on the other hand, that it was a vested remainder but that, whether vested or contingent, it passed as assets of the bankrupt.

Upon appeal, it was held that the remainder was contingent; that if, under the Illinois law, a contingent remainder passed to the trustee, the order of the lower court should be affirmed notwithstanding it erred in holding the remainder to be vested. The foregoing section of the Bankruptcy Act specifies two classes of property which by operation of law vest in the trustee: (1) all property which, prior to the filing of the petition, the bankrupt could, by any means, have transferred; (2) all property which, prior to the filing of the petition, might have been levied upon and sold under judicial process against him. Since the land was in Illinois, the law of this state was held to control as to what property falls within these classes. A contingent remainder does not fall within the second class but does fall within the first, since, although it cannot be granted, it may be transferred by warranty deed by way of estoppel and is assignable in equity pursuant to a contract of sale when made for a valid consideration. It was held that under the Illinois law "means" existed by which the bankrupt

could have transferred the contingent remainder and that it therefore passed to the trustee. Since the Illinois state courts hold that contingent interests are not transferable in Illinois and the Federal courts say that they are not precluded by the Illinois decisions as to what constitutes transferability, it follows that if the question is litigated in the Federal courts these interests pass to the trustee, but if litigated collaterally in the Illinois courts they do not pass.

DESCENDIBILITY OF CONTINGENT INTERESTS

It may be concluded from the Illinois decisions that contingent remainders will descend to the heirs of the remaindermen and that executory interests will also similarly descend to the heirs of the owners providing there is no uncertainty as to the persons who are to take and provided there are no conditions precedent that such persons be in esse at a particular time.⁶⁶ Dicta can be found in the Illinois decisions that might lead to the erroneous conclusion that if a remainder is contingent upon some event which may occur after the death of the remainderman, and the remainderman dies before the life tenant and before the contingency happens, the remainder perishes and the grantor takes by way of reversion. In one of these cases,⁶⁷ the remainder was subject to a condition precedent that the life tenant should die without issue surviving. The life tenant outlived the remainderman and died without issue, and it was held that the remainder descended to the heirs of the remainderman. The court, however, called the remainder vested by adopting the New York statutory definition. The language of this decision is such as easily to lead the reader to the erroneous inference that if the remainder had been contingent it could not have passed by descent. It is held in some of the

⁶⁶ *Fearne, Contingent Remainders*, p. 364; *Ortmayer v. Elcock*, 225 Ill. 342, 80 N. E. 339 (1907); *Drury v. Drury*, 271 Ill. 336, 111 N. E. 140 (1916); *Fitzgerald v. Daly*, 284 Ill. 42, 119 N. E. 911 (1918).

⁶⁷ *Chapin v. Nott*, 203 Ill. 341, 67 N. E. 833 (1903).

cases cited in footnote 66 that a contingent remainder or an executory interest will pass by devise if, in the absence of devise, it would descend to the testator's heirs.

TRANSFERABILITY OF RIGHTS OF ENTRY AND
POSSIBILITY OF REVERTER IN ILLINOIS

The term "possibility of reverter," in its larger meaning, includes both the right of entry upon a breach of a condition subsequent and the right remaining in the grantor or the testator's heirs following the creation of a fee upon a special limitation, or a determinable fee, as it is more frequently designated.

A right of entry for condition broken is not subject to the Rule against Perpetuities,⁶⁸ nor is a possibility of reverter after a determinable fee.⁶⁹ Both of these interests were recognized by the feudal land law long before the appearance of the Rule against Perpetuities, and since that rule was evolved to limit the creation of new interests made possible after the Statute of Uses and the Statute of Wills, it was to be expected that those existing interests would both be excepted from its application. This the Illinois courts have done. The English courts apply the Rule to rights of entry but not to possibilities of reverter.⁷⁰ Legislation subjecting powers of termination upon breach of a condition subsequent and possibilities of reverter to the application of the Rule against Perpetuities would seem to be desirable. The same disfavored postponement of vesting attends a possibility of reverter or power of termination on breach of condition subsequent as attends an executory interest limited upon the same event, and since the latter is subject to the Rule, there is no sound reason for not similarly restricting the effective duration of the former.

At common law, the attempted transfer of a right to

⁶⁸ *Wakefield v. VanTassell*, 202 Ill. 41, 66 N. E. 830 (1903).

⁶⁹ *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927 (1889).

⁷⁰ *Gray's Rule Against Perpetuities* (Little, Brown & Co., Boston, 1886), secs. 299-313.

re-enter destroyed the right in the attempting transferor. A number of states have followed the common law rule, but there appears to be no Illinois decision holding that the attempted alienation of the right terminated it. The Illinois decisions⁷¹ generally hold that a right of entry for a breach of a condition can only be taken advantage of by the grantor and that it descends to the grantor's or the testator's heirs. It was expressly held in *O'Donnell v. Robson*⁷² that a right of entry for breach of a condition is not devisable, but in two cases⁷³ the court has used language indicating that such a right is devisable, and in an earlier case⁷⁴ it was stated by way of dictum that the right of entry was assignable. Because such statements are nothing more than dicta and because there are express holdings to the contrary, it seems correct to state that rights of entry are neither devisable nor are they assignable before breach. In the case of a condition subsequent attached to an estate for life or for years, the right of entry passes to the assignee of the reversion.⁷⁵

The conveyance of land in fee, subject to condition subsequent, is a device or means that has been utilized both to coerce affirmative action by the grantee and to encourage abstinence from undesired action by him, his heirs or assigns and, upon occasion, to provide a termination of the granted interest without such coercion. The socially desirable or undesirable character of the results sought to be accomplished by conditions subsequent is frequently the determining factor as to their validity. Grants have been made subject to a re-entry in Illinois if the grantee failed to pay the taxes and assessments,⁷⁶ failed to main-

⁷¹ *O'Donnell v. Robson*, 239 Ill. 634, 88 N. E. 175 (1909); *Golconda Ry. Co. v. Gulf Lines R. R.*, 265 Ill. 194, 106 N. E. 818 (1914).

⁷² 239 Ill. 634, 88 N. E. 175 (1909).

⁷³ *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850 (1889); *Gray v. Chicago, M. & St. P. Ry.*, 189 Ill. 400, 59 N. E. 950 (1901).

⁷⁴ *Helm v. Webster*, 85 Ill. 116 (1877).

⁷⁵ *Fisher v. Deering*, 60 Ill. 114 (1871); *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31 (1897).

⁷⁶ *Dodsworth v. Dodsworth*, 254 Ill. 49, 98 N. E. 279 (1912).

tain a mill upon the conveyed land,⁷⁷ or if the grantee failed to care for the grave of the grantor.⁷⁸

The existence of determinable fees and possibilities of reverter since the Statute of Quia Emptores has long been questioned in some jurisdictions, but it is beyond question that they may be created in Illinois.⁷⁹

A leading case⁸⁰ settled it as the law of Illinois that, upon dissolution of a charitable corporation having neither stockholders nor creditors, land which had been conveyed to it by way of gift reverts to the original donor, and that a conveyance by such donor after the corporation was dissolved and before he had made an entry or done any other act to perfect a forfeiture, was sufficient to pass a fee simple. The court did not hold that there was a condition subsequent implied by law which had been breached by the dissolution of the corporation but, on the contrary, called the interest of the donor a possibility of reverter. It might have been held that the land or its proceeds should be distributed *cy pres*, or that it escheated to the county or to the state. The latter disposition would have been contrary to the feudal rule that upon the dissolution of a corporation, the donor shall have the land and not the lord by escheat.⁸¹

The question has been raised as to the nature of the interest of the dedicator following a statutory dedication of the fee simple estate to a state or to a municipality. The Illinois decisions recognize the right of the original dedicator to recover back the land upon vacation of the dedication but whether this right is a possibility of reverter or a right of entry upon breach of a condition subsequent

⁷⁷ *McElvain v. Dorris*, 298 Ill. 377, 131 N. E. 608 (1921).

⁷⁸ *Dunne v. Minsor*, 312 Ill. 333, 143 N. E. 842 (1924).

⁷⁹ *Hunter v. Middletown*, 13 Ill. 50 (1851); *Gebhart v. Reeves*, 75 Ill. 301 (1874); *Zinc Co. v. City of La Salle*, 117 Ill. 411, 2 N. E. 406 (1886); *North v. Graham*, 235 Ill. 178, 85 N. E. 267 (1908); *Dees v. Cheuvronts*, 240 Ill. 486, 88 N. E. 1011 (1909); *City of Berwyn v. Berglund*, 255 Ill. 498, 99 N. E. 705 (1912); *Hart v. Lake*, 273 Ill. 60, 112 N. E. 286 (1916).

⁸⁰ *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927 (1889).

⁸¹ *Co. Litt.*, 13b.

depends upon the statute relating to Vacation of Streets⁸² and upon the intent of the dedicator to be implied from the act of dedication.⁸³

The nature of the dedicator's interest is necessarily involved where the question arises as to the alienability of his interest after vacation of the dedicated property and before any act in the nature of a re-entry is done by the dedicator or his heirs. The question was raised in a United States Supreme Court case,⁸⁴ where the court assumed that the fee had vested by dedication in the town for school and church purposes. The town made a conveyance of the land for other purposes, and thereafter the heirs of the dedicator, without having made a re-entry or done any act equivalent thereto, conveyed to the plaintiffs, who brought an action of ejectment. It was held that the right of the heirs was not a possibility of reverter but a right to enter for breach of a condition subsequent; that if the condition subsequent was broken, the estate continued until forfeiture was consummated; that this could be done only by the grantor or his heirs; and that after breach only a right of action existed which, at that time, could not be conveyed so as to vest the right to sue in a stranger.

The rights of owners of property abutting upon a street or highway to the fee in the street or highway in case it is vacated depend upon the nature of the dedication and the provisions of the statute. Where the dedication passes a fee in the street, with a right in the dedicator to retake possession in case of a vacation, the deed of the dedicator covering abutting property ought to be construed as expressing an intent to transfer his right in the street, since it has always been held that a conveyance by the owner of land abutting a highway, fee of which is in him, carries with it the fee in the highway. The difficulty

⁸² Ill. Rev. Stats. 1937, Ch. 145, § 2.

⁸³ *St. John v. Quitzow*, 72 Ill. 334 (1874); *Helm v. Webster*, 85 Ill. 116 (1877); *Village of Hyde Park v. Borden*, 94 Ill. 26 (1879).

⁸⁴ *Ruck v. Rock Island*, 97 U. S. 693 (1878).

seems to be that the original dedicator has nothing left but a possibility of reverter or a right of entry for condition broken, and this cannot be transferred to a stranger.⁸⁵ In another case,⁸⁶ the abutting owner was defending his possession in a street that had been vacated after a statutory dedication. The plaintiff was the grantee of the original dedicator in a deed executed before the vacation had occurred. Since the court affirmed a judgment in favor of the plaintiff, this must be taken as holding that the right of the original dedicator was transferable by deed to the plaintiff. The decision in this case seems to have been based upon the legislation in favor of the abutting owner and to have been restricted in its application to streets or highways vacated by act or acts of the state. There have been three of these acts regulating vacation of streets, alleys, and highways in force in Illinois, known as the Acts of 1851, 1865, and 1874. The acts have been construed as limited in their application to lands which by dedication come into possession of the state or some municipal corporation as distinguished from a private person or corporation. These acts have apparently modified the common law rules as to the existence of a possibility of reverter in land so dedicated. The acts do not unjustly favor the abutting owner as against the original dedicator provided that they are not retroactive in their operation. The legislature has merely done, in the case of a statutory dedication, that which the courts have done in the case of a common law dedication where the fee did not pass. It is presumed that the dedicator who sells land abutting on a street has knowledge that he is parting with all his interest in the street and will price the land accordingly. Moreover, it is socially undesirable that small strips of land should revert back to the dedicator or his heirs.

⁸⁵ Gebhardt v. Reeves, 75 Ill. 301 (1874).

⁸⁶ Helm v. Webster, 85 Ill. 116 (1877).

SUGGESTED REMEDIAL LEGISLATION

Only a small portion of the Illinois law of Future Interests has been discussed and that more or less cursorily. It is believed that the principles and decisions considered are sufficient to show the extent to which the Illinois law remains permeated with feudal characteristics, many of which no longer have any utility. Real property law is notoriously conservative but there seems to be no excuse for the retention of ancient rules which our neighbors have long since discarded. A careful investigation indicates that only five states follow the feudal rule of inalienability of contingent remainders and executory interests, borrowed from England in the 17th century. These states are Connecticut, Illinois, Maine, Maryland and New Hampshire. As has been seen, the rule has been discarded in England. Nine states appear to have followed the English method of providing full transferability by gradual evolution. In this group are found Indiana, Iowa, Nebraska, North Carolina, Ohio, Oregon, South Carolina, Tennessee, and Texas. Another group of eight states seem to have made such interests fully transferable by judicial construction of conveyances acts similar to the Illinois act. Included in these states are Arkansas, Colorado, Kansas, Kentucky, Mississippi, Missouri, Virginia, and West Virginia. All or nearly all of the remaining states have made such interests fully transferable by express statutory enactment. Moreover, Illinois seems to be the only state in which contingent remainders are both indestructible and inalienable.

The lag in real property law is further emphasized by the persistence of the Rule in Shelly's Case in Illinois, a rule concerning which it has been said frequently that it never operates except to defeat the intention of the settlor. Only a few of the states retain this rule.

There is just cause for criticism of the retention of rules that never had any utility or whose utility was confined to

feudal environments. The courts cannot change such of these rules as have become absolute rules of property. The remedy is to be found in legislation permitting full alienation of all interests in land and the abolition of other fossilized rules of property such, for example, as the Rule in Shelly's Case.