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Real Property - Future Interests - Mere Possibilties - Mode of Conveyance

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REAL PROPERTY — FUTURE INTERESTS — MERE POSSIBILITIES — MODE OF CONVEYANCE

The recent South Dakota case of *Bechard et al v. Union County*[1] presents interesting questions in the field of conveyancing. In 1905, under A's will B became the life tenant of a particular tract of land, and after his death, it was to go to the heirs of B.[2] In 1922, X, a son of B's deceased brother, by quit claim deed reciting "grantor also remises, releases, and forever quitclaims to the grantee all right, title, or interest that he may acquire in the future," attempted to convey to B his future interest or expectancy which he might obtain in the tract as heir of B at his death. The question arose whether such interest was a mere possibility or was clearly a possibility coupled with an interest which existed at the time of conveyance.[3] The supreme court *held* whether X held a contingent or vested remainder was not of controlling importance; if he held only a contingent interest there was clearly a possibility coupled with an interest which existed at the time of conveyance, which was alienable and was conveyed by deed. Since

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[1] 27 N.W. 2d 591 (S.D. 1947).

[2] Under the rule in Shelley's case the entire fee would rest in B. After the abolition of the rule which has occurred in most jurisdictions, the heirs of B would hold a contingent remainder. For collection of cases regarding the abolition of the rule in Shelley's Case see 29 L.R.A. (N.S.) 963.

[3] From the cases and statutes in which the use of the term "possibility coupled with an interest" or "possibility not coupled with an interest" is employed, it seems evident that the courts are in disagreement as to the meaning of or have erroneously applied the phrase. Previous to the Statute of Uses there were certain restrictions on the creation of future interests which were indestructible, with one exception in the case of contingent remainders. However, after the enactment of the Statute of Uses in 1536 (27 Hn. VIII, c. 10) such future interests as were previously void became, by virtue of the doctrine of uses, capable of being created in the nature of springing and shifting uses, developing contingent interests in the property which could become vested interests by fulfillment of the particular contingency which would cause the estate to shift or spring to the holder of the executory interest. Price v. Atmore, 1 Bulstrode 191, 80 Eng. Rep. 879 (1610). The interest created could be said to be a legal interest which was yet contingent as to possession, in other words, a possibility coupled with an interest. Manning's Case, 8 Co. Rep. 94b, 77 Eng. Rep. 618 (1578) (whereby E had a mill for 50 years and he devised the lease to M of all the years to come after death of E's wife, M not to devise it, but to give it to E's son. E's wife entered, gave M a rental fee, died intestate 16 years later, M entered and the court held M received an executory devise and such interest in him was of sufficient quantum that upon the possibility of E's death before the end of the term for years, the whole of the legal interest would shift to M.) Compare Child v. Baylie et al, 4 Co. Rep. 66b, 79 Eng. Rep. 393 (1629) (where the possibility of the second devisee upon a possibility coupled with an interest in the first devisee was not such an interest that would descend to the second devisee's executor since the contingency upon which his interest might vest had not yet occurred.) The statutes of various states give the same legal effect to the creation of future estates as was accomplished by the doctrine of springing and shifting uses giving all such estates the designation contingent or vested

reversionary interests and vested remainders have always been subjected to alienation, consideration in this paper will be given only to those interests classified as contingent remainders, mere possibilities, and those designated as possibilities coupled with an interest so as to be alienable in accord with statutory provisions [4] and equitable principles.

An estate which gives to its owner the present right to future possession and enjoyment of real property is a future estate.[5] A future interest means that the owner is entitled to possession of property only at a future time,[6] and includes reversions and contingent future interests limited to third parties, which were not estates, but mere possibilities at common law and as such were not assignable.[7] In considering the alienability of these future interests in real property, particular attention must be given to the extent of the future interest intended to be transferred. The creation of future interests at common law

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remainder as the case may be. N. D. Rev. Code (1943) Sec. 47-0232 and 47-0419. And North Dakota also declares that contingent and vested remainders are capable of alienation and states the indestructibility of contingent remainders, N. D. Rev. Code (1943) Sec. 47-0230, and further goes on to exclude "possibilities not coupled with an interest" from that which may be conveyed. N. D. Rev. Code (1943) Sec. 47-0902. After examining and analyzing "possibilities not coupled with an interest" together with interests possessed today, it appears that no such interest is actually existent since there is no necessity for that type of interest since the kind of interest that was previously so designated is covered in the statute of North Dakota by the provision relating to contingent remainders. There apparently is no reason why such a provision should be incorporated since its effect only frustrates and confuses the courts. In Avon State Bank, et al v. Commercial and Savings Bank, et al, 49 S. D. 575, 207 N. W. 654 (1926) the court misapplies the use of the phrase "possibility coupled with an interest" stating that X in mortgaging property which may become his as an heir of his father, could effectuate a mortgage of property in which he had no present interest had he expressly stated his intention to mortgage that interest which may become his as an heir of his father, thereby mortgaging a "possibility coupled with an interest." It seems inconsistent to allow one with only the possibility of an interest to place such an interest in himself by merely stating his intention to so create it. There is another theory as to the use of the term which is retrospective. That is, the conveyance of a bare possibility such as the expectancy of an heir is looked upon at the time the possibility has ripened into a *praesenti* interest and has vested in the grantee upon equitable principles. The courts then construe such an interest as being a possibility coupled with an interest and as such is transferable. Nevertheless, there seems to be error in this view point also because the subject of the conveyance should be looked upon at the time it is conveyed, and not at the time the conveyance has become one which passes to the transferee. The basis for this is illogical in that it is not within the province of either a court or individual to create and convey an interest in land which is capable of conveyance when such an interest does not exist at the time of conveyance.

[4] N. D. Rev. Code (1943) Sec. 47-0220.

[5] Walsh, THE LAW OF PROPERTY, (2nd Ed.) p. 460.

[6] N. D. Rev. Code (1943) Sec. 47-0211; Civil Code of Calif. (Deering 1941) Sec. 690.

[7] Walsh, THE LAW OF PROPERTY, (2nd Ed.) p. 461-464.

was looked upon with disfavor because of the fact that the common law necessity of continuity of seisin forbade any attempt to create a remainder where there was a lapse of time between the particular estate conveyed and the remainder, or between two remainders.[8] The power of alienation possessed by a tenant in fee simple was great. Under certain restrictions he was enabled to grant interests in land in which the possession was to commence in the future. So during the period which may elapse before the commencement of such estate, the land may be withdrawn from its former liability to complete alienation and may be tied up for the benefit of those who may become the owners of such future estates.[9]

A remainder chiefly differs from a reversion in that, as between an owner of a particular estate and an owner of the remainder, no tenure exists. They both derive their estate from the same source, the grant of the owner in fee simple. A reversion arises by operation of law from the grant of the particular estate, being that part of the estate of the grantor which remains undisposed of, but a remainder is always created by an express grant.[10] Until the Real Property Act of 1845,[11] if feoffment were employed in alienation, there was no occasion for a deed to limit or mark out the estates of those who could not have immediate possession. If a tenant held a term for years the seisin would devolve from the free-holder as he so specified in the order in which estates were limited to come into possession.[12]

Until nearly the end of the medieval period only vested remainders were recognized.[13] The reason was that seisin could not be in abeyance — there must have been a definite person in existence in whom the seisin was vested.[14]

In defining a remainder the North Dakota statute recites: "When a future estate, other than a reversion is dependant on

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[8] Burdick, REAL PROPERTY, p. 349.

[9] See footnote 8, *supra*.

[10] Williams, REAL PROPERTY, (24th Ed.) p. 409.

[11] Stat. 8 & 9 Vict. c. 106, s. 3 repealing Stat. 7 & 8 Vict. c. 76, s. 4, replaced after 1925 by Stat. 15 Geo. V, c. 20, 52.

[12] Williams, REAL PROPERTY (24th Ed.) p. 424.

[13] Williams, REAL PROPERTY, (24th Ed.) p. 425, note d.

[14] Holdsworth, HISTORY OF ENGLISH LAW, Into., p. 68; for a recent case concerning remainders see Conlee v. Conlee, 190 S. W. 2d 43 (Ky. 1945) stating that in a vested remainder the present capacity of taking possession, if the present possession were to become vacant, and *not* the *certainty* that the possession *will* become vacant before the estate limited in remainder determines, distinguishes a vested remainder from one that is contingent.

a precedent estate, it may be called a remainder. . .," [15] and in distinguishing vested and contingent remainders says: " . . . It is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest. It is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain." [16]

If the language of the instrument creating the expectant estate clearly shows an intention to postpone the vesting until the happening of a particular contingent event or refers to a future point of time for the ascertainment of the persons who are to take, the remainder will be held to be contingent.

In the middle of the 15th Century, an exception was made to the rule that the law would recognize only a vested remainder. In 1453 if land were given to A for life, remainder to B's heirs (B a living person) and B died, before A's death, leaving an heir, B's heirs' interests became vested remainders which were contingent remainders before B's death. It was not until the 16th century that the validity of remainders dependent upon contingencies and rules governing them were recognized and ascertained.[17] Although common law would not uphold the validity of conveying one's contingent remainder, it would go so far as to uphold the validity of a release made by the contingent remainderman of his expectancy to the ancestor holding the life estate, or an assignee of the life tenant.[18] Some jurisdictions allowed the release without the consent of the ancestor [19] while other jurisdictions deemed such consent a necessary requirement in making the release operative.[20] The release could be employed only when the party receiving the release was in possession of a freehold estate. Another method by which the contingent remainder could be conveyed and destroyed was by fine and recovery, which was a fictitious proceeding to accomplish a conveyance [21] in which there was an

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[15] N. D. Rev. Code (1943) Sec. 47-0410.

[16] N. D. Rev. Code (1943) Sec. 47-0215.

[17] See footnote 7, *supra*.

[18] Jeefers v. Lampson, 10 Ohio St. 101 (1859).

[19] Mastin v. Marlow, 65 N. C. 695 (1871); Evenson v. Webster, 3 S. D. 382, 53 N. W. 747 (1892); Hale v. Hollon et al, 39 S. W. 287 (Tex. 1897); Bridge v. Keydon, 163 Cal. 493, 126 P. 149, 43 L.R.A. (N.S.) 404 (1912).

[20] McClure v. Raben, 133 Ind. 507, 33 N. E. 275 (1893); Ortmayer et al. v. Elcock, 225 Ill. 342, 225 N. E. 342 (1907).

[21] Guthrie v. Owens' Heirs, 18 Tenn. (10 Yerg.) 339, 341 (1837).

agreement to conduct a law suit whereby the lands in question became or were acknowledged to be the right of one of the parties.[22]

From the development of the early common law into modern law, it is now generally recognized that a contingent remainder is one in which the possession of the property is merely delayed until the happening of some contingent future event upon which the vesting of the remainder is dependent. However, that contingency is not such that it prohibits the possibility of vesting from being coupled with an interest since the contingent interest in the property is created at the time the precedent estate together with the contingent remainder are made the subject of the grant. Upon applying this construction to the *Bechard Case, supra,* it is evident that the possibility of the grantor of the quitclaim deed (X) was coupled with an interest at the time the devise to the life tenant with the remainder over was made. Therefore, that interest is capable of being classified as a contingent remainder.[23] and therefore alienable. By the law existing today declaring (1) that a future interest is either vested or contingent[24] and (2) by excluding a contingent remainder from that which *cannot* be transferred,[25] and (3) finally, construing the conclusion that the interest is contingent and is a future interest together with the provision that "future interests may pass by succession, will or transfer in the same manner as present interests,"[26] it is manifest that the interest of X was alienable.

In 1829 an English court held that vested remainders and reversions could be conveyed by deed of grant, but contingent interests were mere possibilities which were deemed incapable of alienation by a conveyance at law. They could, however, be released to the tenant in possession.[27] It appears that the common law conception of the contingent remainder was

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[22] 2 Blackstone Commentaries 394; fines later abolished by Stat. 3 & 4 Wm. IV, c. 74.

[23] N. D. Rev. Code (1943) Sec. 47-0215; Civil Code of Calif. (Deering 1941) Sec. 696.

[24] N. D. Rev. Code (1943) Sec. 47-0215, Civil Code of Calif. (Deering 1941) Sec. 693, Minn. Stat. (1946) Sec. 500.2.

[25] N. D. Rev. Code (1943) Sec. 47-0902; Civil Code of Calif. (Deering 1941) Sec. 1045; S. D. Code (1939) Sec. 51.0222.

[26] N. D. Rev. Code (1943) Sec. 47-0218; Civil Code of Calif. (Deering 1941) Sec. 699; Minn. Stat. (1946) Sec. 500.6; S. D. Code (1939) Sec. 51.0220.

[27] Doe D. Christmas v. Oliver, 10 B. & C. 187 (1829).

that of a mere possibility or more clearly, a possibility not coupled with a *praesenti* interest in the property.[28]

It also appeared that if A held the fee simple in real property, and his son, B, conveyed during the life of A, whatever interest B would have as an heir of A, the effect of the deed would be a nullity and no interest whatsoever would pass under the attempted conveyance. The transaction whereby a prospective heir executes an assignment of his expectant interests in the estate of a living ancestor has peculiar characteristics. The subject of such an assignment is a bare hope of succession; the interest to which it relates is at the time nonexistent and may never exist.[29] In *Hunt, et al, v. Smith, et al,*[30] it was said: "To make a contract of bargain and sale valid there must be a thing or subject matter to be contracted for and if the subject-matter is not in *esse* at the time of the contract, no rights can be acquired under it." In an early Kentucky case it was decided that a mere possibility or contingency not founded on a right or coupled with an interest cannot be the subject of sale or assignment.[31] "Expectancy is the bare hope of succession to the property of another such as may be entertained by an heir apparent. Such a hope is inchoate. It has no attribute of property and the interest to which it relates is at the time nonexistent and may never exist." [32] Upon examination of the definition attributed to the word, "expectancy," it would seem proper to conclude that it is not of the quantum of being a possibility coupled with an interest and is only a bare hope not supported by any present interest, and is subject to vesting by the oc-

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[28] Where A devised to B for life, then to the next heir male of B in fee tail and a son was born to B and B enfoeffed X in fee simple, B died and his son entered upon the land, a peculiar construction was placed upon such a situation. The court held in favor of X saying "...by the foeffment of the tenant for life, the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate, or at least *eo instanti* that it determines in fact or in law, before the contingency falls, the remainder is void." *Archer's Case,* 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1597). This rule of destructibility of the contingent remainder has gradually disappeared from the law of property and has been abolished in many states and England because it operates to defeat the intention of the grantor. Tscherne v. Crane Johnson Co., 56 S. D. 101, 227 N. W. 479 (1929); N. D. Rev. Code (1943) Sec. 47-0230; Civil Code of Calif. (Deering 1941) Sec. 742; Minn. Stat. (1946) Sec. 500.16; Iowa Code (1939) Sec. 10048.

[29] Johnson v. Breeding, 136 Tenn. 528, 190 S. W. 545 (1916).

[30] 191 Ky. 443, 230 S. W. 936 (1921). *Accord:* Hall v. Hall, 153 Ky. 379, 155 S. W. 755 (1913).

[31] McCall's Admin. v. Hampton et al, 17 Ky. 697, 32 S. W. 406 (1895).

[32] See footnote 29, *supra.*

curence of a contingency. That definition is accepted today and has been reiterated by the statutes of many states.[33]

The basis upon which the non-assignability of such an interest as the expectancy of an heir apparent or presumptive was upheld was perhaps dependent upon several elements. In the main, the nature of the mere possibility not coupled with a present interest was not such a sufficient interest in the property as could be conveyed.[34] Another reason why common law courts gave no effect to such an attempted conveyance lay in the possibility of fraud and deception upon the ancestor. In *Hoyt v. Hoyt* [35] the court said: "At Common Law agreements for the sale of expectancies are generally held to be pernicious and void for the reason that they offer temptation to heirs to anticipate the enjoyment of property by making disadvantageous bargains which tend to their harm and involve the name and character of the family." The contract of an heir in assigning his expectancy was also looked upon with disfavor as it was deemed to be a wagering or gambling contract, and as such was opposed to public policy, in that one should be not allowed by an irrevocable contract to denude himself of all control over all his property of every nature whatever which he at the time possess or may afterward acquire.[36] The transfer was also opposed to policy of law as expressed in the wills statutes and intestate succession because of the fact that the conveyance may have perverted the intent of the present owner when the opportune time arrived for the disposal of that particular property in the manner in which he may have desired. Apparently the above-mentioned objection to the conveyance was that to allow a person who was not yet capable of being determined an "heir" because of the existence of his ancestor,[37] to exert control over that possibility of interest in the property which interest had as much possibility of not ever vesting in him as there was the possibility of it vesting in him [38] would destroy the free-willed alienation by the ancestor.

After chancery courts were established in England, assignments of possibilities made by a presumptive or expectant

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[33] N. D. Rev. Code (1943) Sec. 47-0220; Civil Code of Calif. (Deering 1941) Sec. 700.

[34] Hite v. Hite, 120 Ohio St. 253, 166 N. E. 193 (1929).

[35] 61 Vt. 413, 18 Atl. 313, 314 (1889).

[36] McClure v. Raben, *supra*.

[37] See Avon St. Bank et al v. Commercial Savings Bank et al, 49 S. D. 575. 207 N. W. 654 (1926).

[38] See footnote 29, *supra*.

heir were upheld. However, the equity courts did not look upon the transaction as being an "operative upon execution" conveyance. It upheld the assignments of choses in action, contingent interests, and expectancies and of that which had no present actual or potential existence, but which rested in mere possibility only,[39] but it treated the assignment as a present contract to take effect and attach to the things assigned when and as soon as they came into *esse* and enforced it as a contract in rem.[40] However, it was necessary for such enforcement that it be determined that the contract was fairly made with an adequate consideration [41] and not against public policy.[42] Upon the vesting of that which was a mere possibility in the transferor into a present interest in the property, the contract which was executory until the moment that it ripened into ownership was treated as having been fully executed and the title to that property would vest in the transferee [43] or assignee. Because of the conditions upon which such a contract will be upheld, it is true that equity courts carefully scrutinize such transactions [44] and where fraud is alleged the burden is on the assignee to repel such inference.[45]

It is generally accepted that "... the owner of any remainder or executory interest in land has the power by an otherwise effective conveyance inter vivos to transfer his interest or any part thereof." [46] Such a theory has been universally accepted since 1845.[47] However, the mode of treatment of conveyance of a mere possibility still remains questionable,

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[39] Hight v. Carr, 185 Ind. 39, 112 N. E. 881 (1916); Morris v. Delobbel-Flipo, 2 Ch. 352, 61 L. J. Ch. 518, 66 L. T. 320 (1892).

[40] Thornton v. Louch, 279 Ill. 204, 130 N. E. 467 (1921); See Casady v. Scott, 40 Idaho 137, 237 P. 415 (1925).

[41] Clendening v. Wyatt, 54 Kan. 530, 38 P. 792 (1895); Klingensmith v. Klingensmith, 193 Ia. 350, 185 N. W. 75 (1921); Keys v. Keys, 148 Md. 279, 129 A. 504 (1925); Dyblie v. Dyblie, 389 Ill. 326, 59 N. E. 2d 657 (1945); but see Rickey v. Rickey, 189 Ia. 1300, 179 N. W. 830 (1920) (where heir assigned his expectancy of one fourth interest in realty at that time valued at $3,000 and valued at $7,000 at time of the suit, the consideration was held to be inadequate).

[42] Blackwell v. Harrelson, 99 S. C. 264, 84 S. E. 233 (1914). For case holding such assignment void as against public policy see Flatt v. Flatt, 189 Ky. 801, 225 S. W. 1067 (1920).

[43] Spense's Equity Jurisprudence, Vol. 2, p. 865; Glover et al v. Crandall, 163 Ill. 566, 45 N. E. 173 (1896).

[44] Graef v. Kanouse, 205 Wis. 597, 238 N. W. 377 (1931); McAdams v. Bailey, 169, Ind. 518, 82 N. E. 1057 (1907); McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434 (1860).

[45] McAdams v. Bailey, *supra*.

[46] 2 RESTATEMENT OF PROPERTY, Sec. 162 (1).

[47] See footnote 11, *supra*.

although most jurisdictions do allow a transfer of the possibility provided the instrument effecting the conveyance is correctly and adequately constructed. A warranty deed with the general warranties contained therein will, when the title to the property is actually vested in the transferor, operate by estoppel of the warranties in precluding the transferor from denying that he did not intend to effectuate a transfer of that particular property to the transferee.[48] However, a contrary view is adopted in another jurisdiction stating that since there was no interest to convey there was nothing to warrant.[49] A quit claim deed reciting "do remise, release, quit claim and convey" or similar language adopted by each particular jurisdiction is operative only to convey whatever quantum of interest the transferor owns and therefore will not place the possibility, having become a present vested interest, in the transferee by the estoppel or after-acquired title doctrines.[50] A quit claim deed within which there is a distinct recital indicating an intention to convey a future interest or right, which he, the transferor may obtain after the deed is executed, is operative to so convey that interest which at the time of the conveyance may have been a mere possibility.[51] This seems to be the accepted doctrine in the United States with the exception of Kentucky.[52] One theory upon which such transfer is supported and that particular interest was conveyed is that such language may be as effectual to create an estoppel as a warranty,[53] while another theory states that the distinct recital in the quit claim deed showing the intent to convey the possibility that may ripen into ownership is effective to pass the future interest by the obvious intention of the party being shown specifically in the instrument of conveyance.[54]

Although the assignment of mere possibilities such as expectancies will not be upheld at law, the prevailing view in-

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[48] Blackwell v. Harrelson, *supra*; Taylor v. Swafford, 122 Tenn. 303, 123 S.W. 350, 25 L.R.A. (N.S.) 442 (1909).

[49] Spacey v. Close, 184 Ky. 523, 212 S.W. 127 (1919).

[50] U. S. Bank of La Grande v. Miller et al, 122 Ore. 285, 258 P. 205 (1927); Williams v. Reid, 37 S.W. 2d 537 (Mo. 1931).

[51] Glover et al. v. Candell, *supra*; Bowden et al. v. Lynch et al., 173 N.C. 274, 91 S.E. 967 (1917); Inlow et al. v. Herren et al., 306 Mo. 42, 267 S.W. 893 (1924).

[52] Burton v. Campbell, 176 Ky. 495, 195 S.W. 1091 (1917); Consolidation Coal Co. v. Riddle, 198 Ky. 256, 248 S.W. 530 (1923).

[53] Blake v. Tucker, 12 Vt. 39 (1940); Van Rennsselar v. Kearney, 11 How. (U.S.) 297 (1850).

[54] Inlow et al. v. Herren et al., *supra*; Sears v. Rule, 151 P. 2d 293 (Calif. App. 1944).

dicates that a court of equity looking at the equities of the case, the intention of the parties, the consideration involved, the good faith of the transferors, and the mode of conveyance employed will sanction and enforce the assignments of mere possibilities.

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