Vanderbilt Law Review

Volume 5
Issue 1 *Issue 1 - December 1951*

Article 7

12-1951

Alienability of Future Interests in Tennessee

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NOTES

ALIENABILITY OF FUTURE INTERESTS IN TENNESSEE

One of the most technical problems in the field of property law is the manner in which future interests in realty and personalty may be alienated. The term, future interest, is used here to mean a presently existing interest which is deprived of possession but which looks forward to possession in the future. The term is a misnomer. Such an interest is "future" only in the sense that it looks toward becoming possessory in the future. Just as future interests is a law of words, so the alienability of future interests is, in the absence of statute, a law of methods. The initial problem is to classify the interest. Only then can the proper methods of alienation be brought into play. At least 33 states have statutes which either expressly or impliedly provide for the transfer of these interests.[1] But in many states there are no statutes and the common law or more modern judicial decisions control.

It is the purpose of this Note to discuss two problems: (1) the voluntary or consensual inter vivos conveyance of future interests, and (2) the rights of creditors to seize these interests under judicial process in satisfaction of a debt. Particular emphasis will be placed on Tennessee law. But in order to understand the law of Tennessee in these problems and to point out possible future development in this state, it is necessary to consider in addition both the early common law decisions and recent developments in other states.

Statutes. By statute the English common law has been abrogated in that country and all future interests are transferrable into vivos.[2] In the United States there are three types of statutes bearing upon the question of alienability. Some of these lay down a broad general rule that all future interests may be conveyed inter vivos.[3] The New York Real Property Law is typical. It declares that "An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession."[4] This statute and those like it appear to abrogate any common law dogma denying the alienation of future interests. Perhaps the one exception would be the right of re-entry for condition broken. In some jurisdictions there are statutes referring to

1. See RESTATEMENT, PROPERTY § 162 (Supp. 1948). Some of the statutes here listed have been held not to include certain contingent future interests.

2. 8 & 9 VICT. c. 106, § 6 re-enacted in Law of Property Act, 1925, 15 GEO. V, c. 20, § 4(2).

3. See, *e.g.*, ARIZ. CODE ANN. § 71-105 (1939); GA. CODE ANN. § 29-103 (1933); MICH. STAT. ANN. § 26.35 (1937).

4. N.Y. REAL PROP. LAW § 59.

specific types of future interests.[5] Still a third type are those general conveyancing acts which make no particular reference to future interests but which have been interpreted so as to bring certain ones within their scope.[6]

I. Voluntary Inter Vivos Transfers

1. *Vested Remainders and Reversions*

A vested remainder is a presently existing interest in property created in a person other than the grantor which is deprived of immediate possession because of the existence of a preceding estate created by the same instrument and which is not subject to any condition precedent other than the termination of the prior estate. It is an estate in property in contradistinction to the mere possibility of having an estate. Vested remainders were freely alienable at common law and are everywhere recognized today as being capable of inter vivos transfer.[7] This rule applies both to indefeasibly vested remainders and to remainders vested subject to divestment.[8] The result is reached without the aid of statute since the vested remainder is a true estate just as a fee simple or a life estate. No distinction is made between realty and personalty today.

A reversion is that portion of an estate retained by the grantor, either expressly or by operation of law, when he creates an estate of less quantity than that which he has. For example, if *A*, the owner of the fee, conveys a life estate or an estate for years to *B*, *A* retains, by operation of law, a reversion which is a presently existing right in the property that is deprived of possession because of the existence of the lessor estate. A reversion is a vested estate and like the vested remainder, it has always been considered freely alienable.[9] As early as 1833 the Supreme Court of Tennessee held that a lessor may sell his reversionary interest,[10] and subsequent Tennessee cases have recognized this principle.[11]

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5. See, *e.g.*, Ala. Code Ann. tit. 47, § 13 (1940); Mass. Ann. Laws c. 184, § 2 (1933); Pa. Stat. Ann. tit. 21, § 3 (1930).

6. See, *e.g.*, Ky. Stat. Ann. § 2341 (Carroll 1936). See also Lindenberger v. Cornell, 190 Ky. 844, 229 S.W. 54 (1921) (contingent remainder); Stallcup v. Crowley's Trustee, 117 Ky. 547, 78 S.W. 441 (1904) (executory interest).

7. Greer v. Parker, 209 Ark. 553, 191 S.W.2d 584 (1946); DeVane v. Young, 154 Ga. 832, 115 S.E. 661 (1923); Baley v. Strahan, 314 Ill. 213, 145 N.E. 359 (1924); Thurston v. Buxton, 218 Ind. 585, 34 N.E.2d 549 (1941); Fulton v. Taeger, 183 Ky. 381, 209 S.W. 535 (1919); Lockwood & Co. v. Nye, 32 Tenn. 307 (1852); Kelly v. Morgan's Lessee, 11 Tenn. 347 (1832).

8. 3 Simes, Future Interests § 711 (1936).

9. Wilson v. Pharris, 203 Ark. 614, 158 S.W.2d 274 (1942); Gridley v. Gridley, 399 Ill. 215, 77 N.E.2d 146 (1948). See also Fidelity-Philadelphia Trust Co. v. Harloff, 133 N.J.Eq. 44, 30 A.2d 57 (Ch. 1943).

10. Marley v. Rodgers, 13 Tenn. 180 (1833).

11. Manhattan Savings Bank & Trust Co. v. Bedford, 161 Tenn. 187, 30 S.W.2d 227 (1930); Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906); Clopton v. Clopton, 49 Tenn. 31 (1870). See also Wiley v. Bridgman, 38 Tenn. 39 (1858).

2. *Contingent Remainders and Executory Interests*

The English common law refused to allow contingent remainders and executory interests to be transferred inter vivos.[12] They were looked upon not as estates but as more expectancies or possibilities. To allow transfers of these possibilities amounted to little more than buying and selling lawsuits, to the English judges, who abhorred such practices and treated them as champertous. It was in this atmosphere that the common law rule developed. But the ingenuity of English conveyancers, coupled with a desire on the part of many judges to keep land titles free from possibilities and contingencies, gave rise to three well recognized exceptions to the rule. In *Lampet's Case,*[13] the court indicated that such interests could be released to the owner of the possessory interest. In effect the release of the interest extinguished it. The second exception was an outgrowth of the doctrine of estoppel by deed.[14] If *A,* the owner of the contingent interest, conveyed it by warranty deed to *B* and the contingency upon which the estate was to vest later occurred, the interest vested in *A* only for a moment and then passed through him to his grantee. *A* and his privies would be estopped to derogate from his deed to *B*. It is to be noted that a warranty deed was necessary; a quitclaim generally would not suffice.[15] The third exception was developed in chancery. If there was an attempted inter vivos transfer of a contingent interest which later became vested, equity would treat the transfer as a contract to convey and would specifically enforce it if there was sufficient consideration.[16] In any of these situations the grantee got only what the grantor had, so that if the contingency was never fulfilled or if the interest was void or destroyed, the grantee took nothing.

Many of the early American cases recognized and applied the common law principles and even today there are states that give deference to them.[17] "[I]t seems clear that a contingent remainder is an interest not capable of being transferred or mortgaged, nor can it be sold under execution for debt."[18]

12. See Lampet's Case, 10 Co. Rep. 46(b), 77 Eng. Rep. 994 (K.B. 1613); Doe *dem.* Christmas v. Oliver, 10 B. & C. 181, 109 Eng. Rep. 418 (K.B. 1829); Crofts v. Middleton, 8 De G. M. & G. 192, 44 Eng. Rep. 364 (Ch. 1856); 4 KENT, COMMENTARIES 295 (1896); MOYNIHAN, A PRELIMINARY SURVEY OF THE LAW OF REAL PROPERTY 73 (1940); 2 WASHBURN, REAL PROPERTY 527 (6th ed. 1902).

13. 10 Co. Rep. 46(b), 77 Eng. Rep. 994 (K.B. 1613).

14. See Doe *dem.* Christmas v. Oliver, 10 B. & C. 181, 109 Eng. Rep. 418 (K.B. 1829).

15. 3 SIMES, FUTURE INTERESTS § 710 (1936); 2 TIFFANY, REAL PROPERTY § 341 (3d ed. 1939).

16. Crofts v. Middleton, 8 De G. M. & G. 192, 44 Eng. Rep. 364 (Ch. 1856).

17. See, *e.g.,* Love v. McDonald, 201 Ark. 882, 148 S.W.2d 170 (1941); Kohl v. Montgomery, 373 Ill. 200, 25 N.E.2d 826 (1940); Du Bois v. Judy, 291 Ill. 340, 126 N.E. 104 (1920); Schapiro v. Howard, 113 Md. 360, 78 Atl. 58 (1910); Godwin v. Banks, 87 Md. 425, 40 Atl. 268, 273 (1898); Jackson *ex dem.* Varick v. Waldron, 13 Wend. 178 (N.Y. 1834).

18. Love v. McDonald, 201 Ark. 882, 148 S.W.2d 170, 174 (1941).

Those states that refuse to condone the outright transfer of a contingent interest permit a conveyance by release,[19] estoppel[20] or equitable assignment.[21] A few states have abrogated the common law by judicial decision without the aid of statute. Pennsylvania did so in 1892[22] and in 1915 an Oregon court declared, "Under the more modern doctrine all estates in land, whether in fee or remainder, may be conveyed by deed. Some of the authorities hold that such deeds operate only equitably by way of estoppel, and others, that the contingent interest passes directly. The latter we think the better rule. . . ."[23] These cases appear to make the proper distinction between a presently existing contingent interest and a mere possibility or expectancy of acquiring an estate in the future. "A bare possibility cannot be transferred at law; but by a possibility we mean the interest or chance of succession which an heir apparent has in his ancestor's estate. . . . They are uncertain interests and are the true technical possibilities of the common law. . . . But executory devises and contingent remainders are not considered as mere possibilities, but as certain interests and estates."[24]

Some authorities on future interests indicate that Tennessee falls in that category of states in which contingent interests are alienable by virtue of statute.[25] The Tennessee Code provides, ". . . and every grant or devise or real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument."[26] Two cases indicate that this statute makes contingent future interests alienable.[27] For a time the law appeared to be unsettled in view of expressions in some of the earlier cases that such interests were nontransferrable.[28] But in 1947 the Tennessee Supreme Court clarified the matter in *Hobson v. Hobson*.[29] There a son was a contingent remainder-

19. Bartholomew v. Murray, 61 Conn. 387, 23 Atl. 604 (1891); Williams v. Esten, 179 Ill. 267, 53 N.E. 562 (1899); McWilliams v. Havely, 214 Ky. 320, 283 S.W. 103 (1926).

20. Smith v. Carroll, 286 Ill. 137, 121 N.E. 254 (1918); Thames v. Goode, 217 N.C. 639, 9 S.E.2d 485 (1940).

21. McAdams v. Bailey, 169 Ind. 518, 82 N.E. 1057, 1059 (1907). See also Bishop v. Horney, 177 Md. 353, 9 A.2d 597 (1939); Watson v. Smith, 110 N.C. 6, 14 S.E. 640 (1892).

22. Whelen v. Phillips, 151 Pa. 312, 25 Atl. 44 (1892).

23. Love v. Lindstedt, 76 Ore. 66, 147 Pac. 935, 937 (1915).

24. Beacom v. Amos, 161 N.C. 357, 77 S.E. 407, 411 (1913).

25. See 3 SIMES, FUTURE INTERESTS § 713 (1936); Roberts, *Transfer of Future Interests*, 30 MICH. L. REV. 349 (1932).

26. TENN. CODE ANN. § 7597 (Williams 1934).

27. Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1925); Bruce v. Goodbar, 104 Tenn. 638, 58 S.W. 282 (1900). See also Mullens v. Mullens, 5 Tenn. App. 235 (M.S. 1927).

28. See Rutherford v. Rutherford, 116 Tenn. 383, 387, 92 S.W. 1112, 15 Am. St. Rep. 799 (1906); Nichols v. Guthrie, 109 Tenn. 535, 73 S.W. 107 (1902); Turner v. Ivie, 52 Tenn. 222, 236 (1871).

29. 184 Tenn. 484, 201 S.W.2d 659 (1947).

man under the will of his father. He executed a deed of trust conveying to his creditor his interest under the will. At his mother's death, her administrator sued the creditor to have the trust deed set aside, alleging that the son was her debtor and that his attempted conveyance of the contingent remainder was void since such interests were inalienable. In holding for the defendant-creditor the court declared that a contingent remainder is a mere expectancy and not an estate and that it could not be conveyed at common law except by way of estoppel. The decision was put upon the express ground that the defendant gave consideration and that the transfer would be treated in equity as a contract to sell. The language implied that the Tennessee statute is not applicable and that there is no general capacity freely to sell a contingent interest. The case does fit Tennessee into one of the common law escape methods designed to avoid the nonalienability rule. Although these interests may not be alienated in the usual manner, they may be released to the owner of the possessory interest.[30] A warranty deed will later estop the grantor to derogate from his grant[31] and equity will enforce such transfers as contracts to sell if supported by consideration.[32]

A distinction has been made between those interests that are contingent as to persons who are to take upon fulfillment of the contingency and those interests that are contingent as to the event. When the persons to take have been ascertained and the contingency is with respect to the event, there is an indication that the interest may be alienated inter vivos.[33] But when the interest is contingent in the sense that the parties to take are not yet ascertained, it is not transferrable because there is no one to pass title.[34] There is language in *Bruce v. Goodbar*[35] indicating that if the contingency is with respect to the person to take, the interest may not be released. No other Tennessee case has been found to support this expression of dictum and its vitality is questionable.

To be perfectly safe, the Tennessee conveyancer would do well to use one of the three methods of transfer outlined above in conveying a contingent

30. Johnston v. Osment, 108 Tenn. 32, 65 S.W. 23 (1901); Garner v. Dowling, 58 Tenn. 48 (1872).

31. Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1925); Nichols v. Guthrie, 109 Tenn. 535, 73 S.W. 107 (1902); Bruce v. Goodbar, 104 Tenn. 638, 58 S.W. 282 (1900); Ankenbauer v. Ankenbauer, 6 Tenn. App. 221 (M.S. 1927); *see* Hobson v. Hobson, 184 Tenn. 484, 493, 201 S.W.2d 659, 663 (1947).

32. Hobson v. Hobson, 184 Tenn. 484, 201 S.W.2d 659 (1947). See Taylor v. Swafford, 122 Tenn. 303, 123 S.W. 350, 25 L.R.A. (N.S.) 442 (1909), where the Court said equity would specifically enforce a contract for the sale of an expectancy of an heir if supported by consideration. *A fortiori,* it would enforce a sale of a contingent interest.

33. Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1925); Bruce v. Goodbar, 104 Tenn. 638, 58 S.W. 282 (1900). See also Du Bois v. Judy, 291 Ill. 340, 126 N.E. 104 (1920); Kennedy v. Rutter, 110 Vt. 332, 6 A.2d 17, 23 (1939).

34. Nichols v. Guthrie, 109 Tenn. 535, 73 S.W. 107 (1902).

35. 104 Tenn. 638, 643, 58 S.W. 282, 283 (1900).

interest, regardless of whether the contingency is with respect to the person or the event. It is particularly important that a warranty deed with covenants of title be used if the transfer is to a stranger. Otherwise, there may be no estoppel.

Numerous reasons can be advanced favoring the alienability of these contingent interests. They are by definition presently existing interests in property. Unlike medieval England, ours is a commercial world in which the emphasis is upon transferability of property rights. The modern tendency of the law is to shift the emphasis from common law technicalities based on the feudal system to marketability consistent with the commercial practices of 1951. A man should be allowed to dispose of any property interest regardless of its expectant character. England, the source of the rule against alienability, has abolished it by statute. The *Restatement of Property* takes the position that contingent interests are alienable inter vivos[36] and this is the rule in most states today. On the other hand, a great deal can be said in favor of the nonalienability rule. To allow outright transfer may defeat the intent of the grantor or devisor. These interests are not vested but are mere expectancies, and the law should not adopt the attitude of favoring land transactions in such expectancies. The rule, however, is really not as harsh as it would at first blush appear. Most all situations requiring transfer of these interests are such as can be satisfied by one of the three exceptions. Any harshness in the rule exists primarily in the sense that it represents a trap for the unwary lawyer.[37]

3. *Possibilities of Reverter and Rights of Re-entry*

Many courts have unfortunately failed to make the proper distinction between possibilities of reverter and rights of re-entry for condition broken, and these interests have been confused on too many occasions. A possibility of reverter arises when the grantor conveys a fee simple determinable.[38] Although not a vested reversion, it is in the nature of a reversionary interest. The words generally used to create a determinable fee are "so long as . . . and no longer," "until such time as," "while" and other comparable language which indicates that the fee is to terminate upon the happening of the named event.[39] It is particularly important to note that when the determinable fee terminates, the estate *automatically* reverts to the grantor or his suc-

36. RESTATEMENT, PROPERTY § 162 (1936).

37. For other comments on alienability of future interests see Reno, *Alienability and Transmissibility of Future Interests in Maryland,* 2 MD. L. REV. 89 (1938); Roberts, *Recent Kentucky Cases on Future Interests,* 21 KY. L.J. 217 (1933); Roberts, *Transfer of Future Interests,* 30 MICH. L. REV. 349 (1932); Notes, 22 IOWA L. REV. 696 (1937), 25 N.D. BAR BRIEFS 124 (1949), 21 ORE. L. REV. 81 (1941).

38. 1 SIMES, FUTURE INTERESTS § 177 (1936); 1 TIFFANY, REAL PROPERTY § 220 (1939).

39. 1 SIMES, FUTURE INTERESTS § 181 (1936).

cessors without any further act by the grantor. In this respect, there is an essential difference between the possibility of reverter and the right of re-entry.[40] Any increments or profits accruing to the land between the event which terminates the determinable fee and the assertion of right on the grantor's part inure to the benefit of the grantor. On the other hand, a right of re-entry is a power retained by the grantor when he conveys a fee simple on a condition subsequent.[41] Such a conveyance passes the entire fee and leaves the grantor or his heirs only a right to re-enter if the condition subsequent is broken. In order to terminate the grantee's estate and revest it in the grantor, some act of re-entry or action by the grantor is necessary.[42] A fee simple on a condition subsequent is created by the use of any language which shows the existence of a condition subsequent. The *Restatement* calls this right of re-entry a "power of termination."[43]

Possibility of Reverter. The authorities seem to agree that at early common law possibilities of reverter were not alienable by an inter vivos transfer.[44] These interests were looked upon as mere possibilities or expectancies. "It is well settled that under the common law a mere possibility of reverter is not an estate, present or future, but a possibility of having an estate; that possibilities of reverter were inalienable at common law by deed or will, since such a right arises out of a grant so limited that it may last forever or terminate on a contingency, and is a mere possibility of having the fee again. . . ."[45]

There is a distinct split of authority on the alienability of possibilities of reverter today.[46] The *Restatement* takes the position that this interest may be transferred by an inter vivos conveyance.[47] Those states that adhere to this view probably look upon the possibility of reverter as a reversionary

40. *Id.* § 177.

41. *Id.* § 159.

42. *Id.* § 160.

43. RESTATEMENT, PROPERTY § 155 (1936).

44. *See* Battistone v. Banulski, 110 Conn. 267, 147 Atl. 820, 821 (1929); Davis v. Austin, 348 Mo. 1094, 156 S.W.2d 903, 905 (1941); County School Board v. Dowell, 190 Va. 676, 58 S.E.2d 38, 43 (1950). See also 2 TIFFANY, REAL PROPERTY § 314 (1939); Roberts, *Assignability of Possibilities of Reverter and Rights of Re-entry*, 22 B.U.L. REV. 43 (1942).

45. Ricks v. Merchants Nat. Bank & Trust Co., 191 Miss. 323, 2 So.2d 344, 345 (1941).

46. For alienability: Reclamation Dist. v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638 (1904) (implication); Battistone v. Banulski, 110 Conn. 267, 147 Atl. 820 (1929) (statute); Irby v. Smith, 147 Ga. 329, 93 S.E. 877 (1917); Fall Creek Township v. Shuman, 55 Ind. App. 232, 103 N.E. 677 (1913); Siegel v. Herbine, 148 Pa. 236, 23 Atl. 996 (1892); Calhoun v. Hays, 155 Pa. Super. 519, 39 A.2d 307 (1944); County School Board v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950) (statute).

Against alienability: Cookman v. Silliman, 22 Del. Ch. 303, 2 A.2d 166 (Ch. 1938); Regular Predestinarian Baptist Church v. Parker, 373 Ill. 607, 27 N.E.2d 522, 137 A.L.R. 635 (1940); O'Donnell v. Robson, 239 Ill. 634, 88 N.E. 175 (1909); Blue v. Wilmington, 186 N.C. 321, 119 S.E. 741 (1923).

47. RESTATEMENT, PROPERTY § 159, comment *a* (1936).

interest and compare it with the reversion which is a vested interest alienable inter vivos. The states which still follow the common law regard it as a mere possibility. It has already been noted that several states have statutes dealing with nonvested future interests.[48] Those statutes which declare "all future interests" to be alienable inter vivos probably include possibilities of reverter.[49] However, those that make all "estates" alienable probably would not include this interest in view of the courts' reluctance to classify the possibility of reverter as an "estate."[50] Even in those states that hold that a possibility of reverter is not alienable in the ordinary manner, the conveyancer has two methods of effecting such a transfer. As late as 1941 the Illinois Supreme Court indicated that when the owner of a possibility of reverter attempts to convey it, his deed passes nothing to the grantee at that time but if the determinable fee is later terminated so that the estate reverts to the grantor, he will be estopped to derogate from his prior grant.[51] This estoppel presupposes the existence of a warranty deed. A second method available to the conveyancer is a release to the owner of the determinable fee.[52] The determinable fee and the possibility of reverter merge so as to extinguish the possibility and vest an absolute fee simple in the grantee.

A distinction must be made between those transfers of the original grantor's interest attempted before the determinable fee has terminated and those made afterwards. When the event which is to terminate the determinable fee occurs, the estate automatically reverts to the grantor. He then has a present possessory interest which can be transferred as any comparable possessory interest.[53] It is of extreme importance that the distinction between possibilities of reverter and rights of re-entry be kept in mind because an attempted inter vivos transfer of a possibility has no effect upon it. As we shall see later, an attempted conveyance of a right of re-entry destroys it.

Tennessee recognizes both possibilities of reverter[54] and rights of re-entry.[55] Although the langnage of some cases confuses the two, they are generally treated as separate and distinct interests. The leading case on possibilities of reverter is *Yarbrough v. Yarbrough*.[56] Alex Yarbrough

48. See page 80 *supra*.

49. 3 SIMES, FUTURE INTERESTS § 715 (1936).

50. *Ibid.*

51. Pure Oil Co. v. Miller-McFarland Drilling Co., 376 Ill. 486, 34 N.E.2d 854, 135 A.L.R. 567 (1941).

52. Burche v. Neal, 107 W. Va. 559, 149 S.E. 611 (1929) (implication).

53. See North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908); Magness v. Kerr, 121 Ore. 373, 254 Pac. 1012 (1927).

54. See Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1924); Overton v. Lea, 108 Tenn. 505, 68 S.W. 250 (1902).

55. See Board of Education v. Baker, 124 Tenn. 39, 134 S.W. 863 (1910); Lunsden v. Payne, 120 Tenn. 407, 114 S.W. 483, 21 L.R.A. (N.S.) 605 (1907); Newman v. Ashe, 68 Tenn. 380 (1876).

56. 151 Tenn. 221, 269 S.W. 36 (1924).

conveyed property to a church for church purposes only, "To have and to hold . . . so long as used for the purposes hereinabove stated," and when the property ceased to be so used, it was to revert "back to the original tract of land." In 1913 he conveyed the property to Huggins who in turn conveyed to Mack Yarbrough. In 1918 the property ceased to be used for church purposes and the trustees gave it to Mack Yarbrough. Two years later Alex conveyed all his interest to Huggins and the two sued Mack in ejectment to regain the premises. The supreme court construed the original grant as creating a determinable fee in the church with an attempted gift over to whoever might be the owner of the tract when the fee terminated. The attempted gift over was an executory interest which the court held to be void because it violated the Rule against Perpetuities. A possibility of reverter remained in the grantee and the court held that this could not be alienated by an inter vivos transfer. Hence, the 1913 deed to Huggins and the subsequent deed to Mack Yarbrough passed nothing. When the estate terminated, it automatically reverted to Alex and his 1920 deed to Huggins conveyed the entire fee.

Right of Re-entry. The common law treated the right of re-entry like the possibility of reverter and refused to allow its alienation inter vivos.[57] "It is of the essence of an estate on condition, that the right to enter for a breach of the condition is reserved to the grantor and his heirs. It cannot be reserved to strangers. . . . A mere right of entry could not be conveyed at common law. It would be contrary to the ancient well settled rule that 'nothing in action, entry or re-entry, can be granted over. . . .' It contravenes the policy of the law, which does not permit the buying or selling of pretended or disputed titles, or rights to real estate, which rest wholly in action."[58] Various reasons have been advanced to support this rule.[59] The rule arose at a time when legal scholars would not countenance the transfer of a mere right unattached to something tangible. Some authorities maintain that to allow such rights to be transferred inter vivos would tend to clog land titles or thwart the grantor's intent. Perhaps the most significant reason given is to prevent champerty and maintenance. The great weight of authority today follows the common law.[60] But at least seven states have statutes

57. Strothers v. Woodcox, 142 Iowa 648, 121 N.W. 51 (1909); Rice v. Boston & Worcester R.R., 94 Mass. (12 Allen) 141 (1866); Guild v. Richards, 82 Mass. (16 Gray) 309 (1860); Helms v. Helms, 137 N.C. 206, 49 S.E. 110 (1904); MOYNIHAN, SURVEY OF REAL PROPERTY 56 (1940); 2 POWELL, REAL PROPERTY 485 (1950); Core, *Transmissibility of Certain Contingent Future Interests,* 5 ARK. L. REV. 111 (1951); Roberts, *Assignability of Possibilities of Reverter and Rights of Re-entry,* 22 B.U.L. REV. 43 (1942).

58. Guild v. Richards, 82 Mass. (16 Gray) 309, 317 (1860).

59. See Core, *Transmissibility of Certain Contingent Future Interests,* 5 ARK. L. REV. 111 (1951).

60. See Ruch v. Rock Island, 97 U.S. 693, 24 L. Ed. 1101 (1878); Ralston v. Hatfield, 81 Ind. App. 641, 143 N.E. 887 (1924); Dyer v. Siano, 298 Mass. 537, 11

expressly declaring rights of re-entry to be alienable inter vivos.[61] Those statutes declaring all future interests to be alienable may include the right of re-entry, but it is likely to be excluded from the operation of those allowing the transfer of all "estates."[62]

There are two exceptions to this non-alienability rule. A right of re-entry may be released to the owner of the fee simple on condition subsequent upon the theory that such release tends to clear the title.[63] When the right of re-entry accompanies a reversion, it may be alienated along with the reversion.[64] These two interests are concomitants in leases.

In *Newman v. Ashe*,[65] the Tennessee Supreme Court, referring to rights of re-entry, said by way of dictum that, ". . . the authorities hold that the right to enter or avoid the deed is reserved only to the bargainer or his heirs, and does not pass to his grantee."[66] *Board of Education v. Baker*[67] is the leading case on the subject. One Simpson conveyed property to the Board's predecessor in 1881. Although the language of the habendum looks as if it created a determinable fee, the court treated it as a fee simple on condition subsequent with a right of re-entry remaining in the grantor. In 1887 and 1907 Simpson conveyed the property to Baker and when he went into possession, the Board sought to eject him. The lower court found as a fact that there had been no abandonment of the premises but decreed that when the property was abandoned, it should go to Baker because of the deeds to him. The Board appealed on this point and the Supreme Court reversed, holding that the right of re-entry left in Simpson was not alienable inter vivos because it was a bare possibility and such possibilities may not be sold. In addition to this, the court vested the absolute fee in the Board saying, ". . . it is clear that the conveyance by Simpson to Baker was a relinquishment of his right of re-entry and an election upon his part not to exercise it. . . ."[68]

N.E.2d 451 (1937); Juif v. Dillman, 287 Mich. 35, 282 N.W. 892 (1938); Halpin v. Rural Agricultural School Dist., 224 Mich. 308, 194 N.W. 1005 (1923), 22 MICH. L. REV. 271 (1924); Trustees of Calvary Presbyterian Church v. Putnam, 221 App. Div. 502, 224 N.Y. Supp. 651 (4th Dep't 1927); O'Connor v. Saratoga Springs, 146 Misc. 892, 262 N.Y. Supp. 809 (Sup. Ct. 1933); RESTATEMENT, PROPERTY § 160 (1936); 3 SIMES, FUTURE INTERESTS § 716 (1936).

61. CAL. CIV. CODE § 1046 (1945); CONN. GEN. REV. STAT. § 5033 (1930); IDAHO CODE ANN. § 54-502 (1932); MICH. COMP. LAWS § 12966-2 (Supp. 1940); MONT. REV. CODES § 6839 (1939); N.J. STAT. ANN. § 46:3-7 (1946); R.I. GEN. LAWS c. 433, § 10 (1938).

62. 3 SIMES, FUTURE INTERESTS § 716 (1936).

63. Trustees of Calvary Presbyterian Church v. Putnam, 221 App. Div. 502, 224 N.Y. Supp. 651 (4th Dep't 1927); Note, 3 ST. JOHN'S L. REV. 124 (1928); 27 MICH. L. REV. 346 (1929).

64. Gwynn v. Jones' Lessee, 2 Gill & J. 173 (Md. 1830). *But cf.* Trask v. Wheeler, 89 Mass. (7 Allen) 109 (1863) (implication).

65. 68 Tenn. 380 (1876).

66. *Id.* at 385.

67. 124 Tenn. 39, 134 S.W. 863 (1910).

68. *Id.* at 48, 49, 134 S.W. at 866.

Atkins v. Gillespie [69] illustrates that both the possibility of reverter and the right of re-entry might be released. The court referring to both of these interests as a "possibility of reverter" said, "We are of the opinion that this 'possibility of reverter' may be released to the person or persons in whom the fee-simple title is vested, by those persons who answer the description of heirs at law of the grantor at the time of the execution of the release, and who would have the right to the estate if the condition should be broken, or the determinable fee should determine, at that time."[70] Dictum in *Fowlkes v. Wagoner*[71] supports this position.

Only a few states have holdings on the effect of an attempt to convey a right of re-entry but most of those that have expressed opinions have emphatically held that such an attempt destroys the interest and vests the absolute fee in the original grantee.[72] The landmark case in point is *Rice v. Boston & Worcester R.R.*[73] This was an action for a writ of entry. The demandant's father had conveyed the property to the railroad which was to hold upon condition that it would maintain a pass-way and certain fences. Before his death the father had attempted to convey his interest to the demandant who sought to regain the premises in this suit when the conditions were broken. In its decision in favor of the railroad the Massachusetts court, after stating that a right of re-entry could not be conveyed by an inter vivos transfer, held that an attempted conveyance destroyed the interest and vested the absolute title in the original grantee. Since the right of re-entry is not alienable, the grantee gets nothing by the deed. Neither the grantor nor his privies will be allowed to assert the right because they cannot derogate from the deed of the interest. Since there is no one to assert the right, it is in effect extinguished. It is noteworthy that the demandant was the heir of the grantor and in the absence of the attempted inter vivos transfer to him, the right would have descended to him and he could have asserted it later. In this case, however, nothing descended because the attempted transfer destroyed the interest. The *Restatement of Property* originally took the positionof the *Rice* case,[74] but the *1948 Supplement* lays down the rule that an attempted conveyance does not destroy the right of re-entry.[75] Reliance for the change is placed upon the lack of historical precedent and the "recent

69. 156 Tenn. 137, 299 S.W. 776 (1927).

70. *Id.* at 142, 299 S.W. at 778.

71. 46 S.W. 586, 592 (Tenn. Ch. 1898).

72. Union Colony Co. v. Gallie, 104 Colo. 46, 88 P.2d 120 (1939); Dyer v. Siano, 298 Mass. 537, 11 N.E.2d 451 (1937); Rice v. Boston & Worcester R.R., 94 Mass. (12 Allen) 141 (1866); Juif v. Dillman, 287 Mich. 35, 282 N.W. 892 (1938); Halpin v. Rural Agricultural School Dist., 224 Mich. 308, 194 N.W. 1005 (1923), 22 MICH. L. REV. 271 (1924); O'Connor v. City of Saratoga Springs, 146 Misc. 892, 262 N.Y. Supp. 809 (Sup. Ct. 1933); Board of Education v. Baker, 124 Tenn. 39, 134 S.W. 863 (1910).

73. 94 Mass. (12 Allen) 141 (1866).

74. RESTATEMENT, PROPERTY § 160, comment *c* (1936).

75. RESTATEMENT, PROPERTY § 160, comment *c* (Supp. 1948).

judicial trend"[76] as expressed by the case of *Jones v. Oklahoma City.*[77] Although it is true that this case held that an attempt to alienate did not destroy the right of re-entry, it was a 5-4 decision. The cases cited by the majority involved possibilities of reverter and did not stand for the proposition for which they were cited. Nevertheless, the *Jones* case is a living example of the vitality of the common law and represents, along with the new position of the *Restatement,* a definite development in the field of future interests. To what extent this view will be adopted by other jurisdictions is conjecture, but it is likely to be received with favor in those states that have not yet passed on the issue directly. It is not possible to predict whether states like Tennessee and Massachusetts that have passed directly on the question will adopt the *Restatement's* position or follow their precedents. The new position of the American Law Institute appears to be the sounder view. An attempted transfer of a possibility of reverter or any other contingent interest is simply null and void. It does not operate to destroy the interest. As one court has put it by way of dictum, "It seems rather fantastic to us, that a conveyance which is ineffective to convey what it attempts to convey is nevertheless an effective means of destroying it."[78] The same policy considerations exist with respect to all contingent future interests. To permit an attempted transfer to destroy the right of re-entry amounts to nothing more than a forefeiture. Regardless of these arguments, it is to be noted that the present status of the law in those other states which have passed on the issue is that the attempted conveyance destroys the interest.[79]

Several reasons have been advanced as to why possibilities of reverter and rights of re-entry should be alienable inter vivos.[80] The fear of dangers arising from the sale of lawsuits has long since abated, and maintenance and champerty are no longer a nightmare to the courts. There are more practical advantages in allowing such transfers in that they enhance marketability and are highly desirable methods of clearing titles to property. There may be occasions on which an owner of one of these interests is in need of ready cash and to prevent a conversion of this intangible interest to cash may represent a definite inconvenience. On the other hand such interests are not vested but are mere possibilities or expectancies. To allow a sale by voluntary transfer is in effect to allow a wager to be placed upon the contingency or event which would terminate the estate. Some authorities indicate that the possibility of reverter is inalienable since it is not subject to the Rule against Perpetuities and to prevent its voluntary transfer reduces

76. *Ibid.*

77. 193 Okla. 637, 145 P.2d 971 (1943).

78. Reichard v. Chicago, B. & Q. R.R., 231 Iowa 563, 1 N.W.2d 721, 729 (1942).

79. See note 72 *supra.*

80. See Roberts, *Assignability of Possibilities of Reverter and Rights of Re-entry,* 22 B.U.L. REV. 43 (1942).

its nuisance value.[81] Despite these arguments, pro and con, the law is well settled in most states, including Tennessee, that rights of re-entry are not alienable. Although there is a more divergent split of authority on possibilities of reverter, most states, including Tennessee, appear to treat them as inalienable.

II. RIGHTS OF CREDITORS

Closely related to the material that has just been discussed is the problem of the extent to which creditors may satisfy their claims out of their debtor's future interests. It is not the purpose of this Note to discuss the various local procedures for satisfying these claims. Suffice it to say that the primary methods are: (1) a writ of execution issued in favor of a judgment creditor; (2) attachment of the interests to insure payment of any judgment that might be rendered; (3) a creditor's bill in equity; (4) claims filled with the trustee in bankruptcy of a bankrupt debtor; and (5) claims filed against the estate of a deceased debtor.[82] Today all these methods, with the possible exception of the bill in equity, are largely statutory. Only a few statutes make any reference to future interests[83] so that the problem of whether they fall within the scope of the statutes is primarily a matter of judicial decision.

The criterion which has been established to determine whether a particular future interest may be seized by a creditor is its attribute of voluntary inter vivos transfer. If the owner could, by a voluntary inter vivos transfer, convey the interest, creditors of the owner may levy upon the interest to satisfy their claims.[84] This is the view taken by the *Restatement* with respect to executions[85] and attachments[86] and appears to be the overwhelming weight

81. See 3 SIMES, FUTURE INTERESTS § 715 (1936). For an excellent discussion of the Rule against Perpetuities in Tennessee see Warner, *The Rule Against Perpetuities,* 21 TENN. L. REV. 641 (1951).

82. 2 POWELL, REAL PROPERTY 514 (1950); 3 SIMES, FUTURE INTERESTS 186 *et seq.* (1936).

83. At least three states have statutes restricting sale or execution to vested future interests: ALA. CODE ANN. tit. 7, § 519 (1945); OHIO CODE ANN. § 11655 (1940); WYO. COMP. STAT. § 3-4201 (1945).

84. Horton v. Moore, 110 F.2d 189 (6th Cir. 1940), *cert. denied,* 311 U.S. 692 (1940); Gaffney v. Shepard, 108 Conn. 339, 143 Atl. 236 (1928); Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N.E. 669 (1911); Noonan v. State Bank of Livermore, 211 Iowa 401, 233 N.W. 487 (1930); *In re* Cunningham's Estate, 340 Pa. 265, 16 A.2d 712 (1940); Albergotti v. Summers, 205 S.C. 179, 31 S.E.2d 129 (1944); 2 POWELL, REAL PROPERTY 517 (1950); 3 SIMES, FUTURE INTERESTS § 736 (1936). In order to alleviate certain hardships on the debtor, the Washington court has very admirably declared that even though a creditor may levy on the interest, a sale of the interest will be postponed until it becomes possessory so that the rights of both parties will be safeguarded. Mears v. Lamona, 17 Wash. 148, 49 Pac. 251 (1897). This practice is recommended by the writer if the interest is likely to become possessory in the near future.

85. RESTATEMENT, PROPERTY § 166 (1936).

86. *Id.* § 167.

of authority. Creditors of a deceased debtor may file a claim against the interest if it vested at the debtor's death and became alienable at that time, even though it could not be alienated during his lifetime.[87] Of course if it was alienable within his lifetime, it could be seized under the "alienability" rule. In those jurisdictions where contingent future interests are alienable only by way of release, estoppel or equitable assignment, the interest is beyond the creditor's reach.[88] Logically, this result is proper. A creditor to whom a voluntary release would be effective should not be able to force one, and thus occupy a priority position over other creditors. With regard to estoppel or equitable assignment, the basic theory is that nothing passes until the interest vests and becomes alienable. Under the above rules vested future interests could always be the subject of levy.[89]

This criterion of transferability has been adopted in the Federal Bankruptcy Act. Under this Act, a trustee in bankruptcy is vested by operation of law with title to all property interests the bankrupt "could by any means have transferred" during life or which might have been levied upon by creditors.[90] The law of the state which governs the interest determines its alienability.[91] There is some conflict in the authorities as to whether a contingent future interest alienable only by way of release, estoppel or equitable assignment is an interest which the bankrupt "could by any means have transferred." Most cases hold that such interests do not pass to the trustee[92] but the rule of the seventh circuit is contrary.[93] The latter view seems to be unwise in view of the fact that such interests are not leviable under state processes. This puts a premium on bankruptcy proceedings with its concomitant expenses and slight gain to the creditor.

Tennessee appears to follow the majority rules with respect to creditors' rights. The attachment and execution statutes fail to throw any light on the

87. RESTATEMENT, PROPERTY § 169(1),(2)(b) (1936); SIMES, HANDBOOK ON FUTURE INTERESTS § 39 (1951).

88. Plumlee v. Bounds, 118 Ark. 247, 176 S.W. 140 (1915); Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N.E. 669 (1911); RESTATEMENT, PROPERTY §§ 167(2), 166, comment *a* (1936); 3 SIMES, FUTURE INTERESTS § 738 (1936).

89. See *e.g.*, Williams v. Spears, 235 Ala. 611, 180 So. 266 (1938); Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942); Peters v. Thoning, 231 Iowa 755, 2 N.W.2d 76 (1942); Perabo v. Gallagher, 241 Mass. 207, 135 N.E. 113 (1922) (implication); Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1940); Riverside Trust Co. v. Twitchell, 342 Pa. 558, 20 A.2d 768 (1941).

90. 52 STAT. 880 (1938), 11 U.S.C.A. § 110(a)(5) (Supp. 1950).

91. See *In re* Martin, 47 F.2d 498 (6th Cir. 1931) (Tennessee law); Suskin & Berry, Inc. v. Rumley, 37 F.2d 304 (4th Cir. 1930); Noonan v. State Bank of Livermore, 211 Iowa 401, 233 N.W. 487 (1930).

92. See Kahn v. Rockhill, 132 N.J.Eq. 188, 28 A.2d 34 (Ch. 1942), *aff'd*, 31 A.2d 819 (Ct. Err. & App. 1943); Luttgen v. Tiffany, 37 R.I. 416, 93 Atl. 182 (1915); RESTATEMENT, PROPERTY § 168, comment *e* (1936); 2 POWELL, REAL PROPERTY 519 (1950); 3 SIMES, FUTURE INTERESTS § 738 (1936).

93. See *In re* Landis, 41 F.2d 700 (7th Cir. 1930), *cert. denied*, 282 U.S. 872 (1930); *In re* Reifsteck, 71 F. Supp. 157 (E.D. Ill. 1947) (district court reluctantly followed the *Landis* case).

subject. It has been held that vested remainders and reversions may be levied upon by way of attachment or execution and that such interests pass to a trustee in bankruptcy.[94] Since contingent future interests may not be conveyed by an outright transfer, they are beyond the reach of creditors, even though they may be alienated by release, estoppel or equitable assignment.[95] In *Nichols v. Guthrie*[96] a testator devised property to Elizabeth Sims for life with remainder to her children living at her death. This gave the children a contingent remainder. During Elizabeth's life, a judgment creditor of Walter Sims, son of Elizabeth, caused execution to be levied on his interest and there was a sale through which the defendant claimed title. Later Walter sold his interest to his sister through whom the plaintiff claimed title. In a suit for partition at the life tenant's death, the court gave judgment for the plaintiff, holding that a contingent remainder is not subject to execution so that the defendant had no interest. The rationale of the case was that since such interests are not transferrable inter vivos, they are not subject to claims of creditors even though they are alienable by release, estoppel or equitable assignment. The plaintiff got title by estoppel. As late as 1939 the Tennessee Supreme Court held that contingent interests are not subject to creditors' claims because they are not alienable inter vivos.[97]

Had it not been for the statutory interpretation in *Nichols v. Guthrie*, Tennessee law could well have developed to the anomalous position that contingent future interests could be levied even though they are nontransferrable inter vivos. The Code provides that the terms "real estate" "real property" and "lands" include land and "all rights thereto and interests therein."[98] Other code sections provide that executions may issue against lands[99] and that attachments may be levied upon real property.[100] These three sections would appear to allow a creditor to reach contingent future interests but *Nichols v. Guthrie* and *First National Bank of Springfield v. Pointer* indicate that the statutes do not bring these interests within their scope.

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94. First Nat. Bank of Springfield v. Pointer, 174 Tenn. 472, 126 S.W.2d 335 (1939); Manhattan Savings Bank & Trust Co. v. Bedford, 161 Tenn. 187, 30 S.W.2d 227 (1930); Puryear v. Edmundson, 51 Tenn. 43 (1871); Kissom & Keeler v. Nelson, 49 Tenn. 4 (1870); Wiley v. Bridgman, 38 Tenn. 39 (1858); Lockwood & Co. v. Nye, 32 Tenn. 307, 58 Am. Dec. 73 (1852); Kelly v. Morgan's Lessee, 11 Tenn. 347 (1832).

95. First Nat. Bank of Springfield v. Pointer, 174 Tenn. 472, 126 S.W.2d 335 (1939); Nichols v. Guthrie, 109 Tenn. 535, 73 S.W. 107 (1902). *See* Henderson v. Hill, 77 Tenn. 25, 34 (1882).

96. 109 Tenn. 535, 73 S.W. 107 (1902).

97. First Nat. Bank of Springfield v. Pointer, 174 Tenn. 472, 126 S.W.2d 335 (1939).

98. TENN. CODE ANN. § 15 (Williams 1934).

99. *Id.* § 8863.

100. *Id.* § 9451.

A great deal has been written concerning the policy considerations on the rights of creditors to reach future interests. On the one hand, such rights represent an asset of the debtor which he ought not be permitted to protect behind the sanctity of futurity. This asset has a present value which, although perhaps speculative, nevertheless gives the creditor something out of which to satisfy his claim. The speculative character of these interests gives rise to the opposing position. To allow contingent interests to be levied upon may represent a dire sacrifice to the debtor and a windfall to the creditor if and when the interest vests. Regardless of these policy arguments, the law is well established that the rights of creditors depend upon the inter vivos alienability of the interest. It is important that precedents be read against the background of alienability existing at the time the dispute arose. An early case denying a creditor's right to levy upon a nonvested future interest may, in effect, have been overruled by a subsequent decision or statute allowing alienability of the interest in question. If the law regarding alienability has been changed, the law of creditors' rights changes with it and cases decided prior to the change should not be controlling and indeed should have no legal efficacy.

Conclusion

This study in Tennessee law shows that the state substantially follows the early common law in dealing with the issues under consideration. In this respect Tennessee differs in the over-all picture from most of the other states, but as to rights of re-entry and possibilities of reverter, there are a substantial number of states that reach comparable conclusions. The exigencies of our modern society compel a re-evaluation of the basic theories upon which the common law principles rest. Since the problem is not one which is likely to create a great deal of public sentiment, statutory change is not probable. In bringing about a closer integration between principles of property law and our commercialized world, we must look to the court to exercise its great common law heritage and change the law by judicial decision.

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