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The Alienation of Future Interests in Missouri

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THE ALIENATION OF FUTURE INTERESTS IN MISSOURI

Although the holder of a fee simple estate could at common law transfer his entire interest by a single instrument, the common law developed in such a manner that, if he conveyed any lesser interest, he might have found that he had created in another person an interest which that person could not transfer, or that he himself was left with an interest which he could not transfer. In more modern times it has been the tendency to hold that more and more of these interests are alienable, and it is the purpose of this note to consider the alienability of some of these interests in Missouri. In considering to what extent future interests are alienable in Missouri it is proposed to limit the investigation to those future interests known as: (1) contingent remainders and executory limitations, and (2) possibilities of reverter and rights of re-entry where there has been no re-entry, for these are the interests over which most of the controversy has arisen.

CONTINGENT REMAINDERS AND EXECUTORY LIMITATIONS

The authorities agree that at common law contingent remainders and executory limitations were generally inalienable, but there is little agreement as to the reason for the existence of this rule.[1] The best reasons seem to be that the rule was an outgrowth of the feudal system, which greatly restricted the alienability of land, and the fact that the common law judges objected very strenuously to anything that looked like champerty or maintenance.[2]

Although there was a tendency among the early American cases to follow the English common law in this respect, today the overwhelming majority of American jurisdictions permit the

1. In 3 SIMES, LAW OF FUTURE INTERESTS 145 (1st ed. 1936), it is pointed out that there were three exceptions to the common law rule that executory interests and contingent remainders were alienable. First, if the conveyance were by fine or common recovery, an estoppel arose, and when the contingent interest vested it actually passed to the grantee; second, if the conveyance were for a valuable consideration, equity would give effect to it as a transfer when the contingency happened; and third, although a contingent interest could not be transferred to a stranger, it could be released to the person whose estate would be divested by the vesting of the contingent interest.

2. In England all varieties of future interests in land were made alienable by statute in 1845. 8 & 9 Vict. c. 160, 6, re-enacted in the Law of Property Act 1925, 4 (2).

transfer of these interests by statute, or, in the absence of statute, by one of the following means: a conveyance which is effective as a release; a conveyance containing a covenant of warranty or other representations of ownership which will be the basis for estopping the grantor from denying the grantee's title when the contingency occurs; or equity's treating the conveyance, if there is adequate consideration, as a contract to convey and giving specific performance to the contract when the contingency occurs.[3]

Those statutes which have been held by the courts to permit alienation of future interests fall into three general classes: first, those laying down a broad general principle that future estates or future interests are alienable; second, those statutes referring specifically to particular types of future interests; and third, general conveyancing statutes, making no reference to future interests at all, which have been held to make certain types of contingent interests alienable.[4] The Missouri conveyancing statute is of the last type mentioned. It reads as follows:

> Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act of ceremony whatever.[5]

By construing this statute broadly to include contingent remainders, the Missouri courts have uniformly held that contingent remainders are alienable by deed.[6]

Although there are dicta in an earlier case to the effect that contingent remainders could be alienated,[7] the first time that the question was directly passed upon was in *Godman v. Simmons*,[8] where land was conveyed to Mary Godman for life with a re-

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3. 3 SIMES, *op. cit. supra* note 1, at 149.
4. *Id.* at 147.
5. MO. REV. STAT. §442.020 (1949).
6. Grimes v. Rush, 335 Mo. 573, 197 S.W.2d 310 (1946); Byrd v. Allen, 351 Mo. 99, 171 S.W.2d 691 (1942); Callison v. Wabash Ry., 219 Mo. App. 271, 275 S.W. 965 (1925); Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922); Parrish v. Treadway, 267 Mo. 91, 183 S.W. 580 (1916); Summet v. City Realty and Brokerage Co., 208 Mo. 501, 116 S.W. 614 (1907); Brown v. Fulkerson, 125 Mo. 400, 28 S.W. 632 (1894); Sikemeier v. Galvin, 124 Mo. 367, 27 S.W. 551 (1894); Godman v. Simmons, 113 Mo. 122, 20 S.W. 972 (1892); Donaldson v. Donaldson, 311 Mo. 208, 278 S.W. 686 (1925); Vance v. Humphreys, 210 Mo. App. 498, 241 S.W. 91 (1922).
7. White v. McPheeters, 75 Mo. 286 (1873).
8. 113 Mo. 122, 20 S.W. 972 (1892).

mainder to the heirs of her body.[9] The children of Mary Godman, who were the plaintiffs in this ejectment action, conveyed their respective interests in the property, during the lifetime of their mother, to one under whom the defendant claimed. The Missouri Supreme Court held that the contingent remainders held by the children passed immediately under the conveyance and that after the conveyance the grantee stood in the shoes of the grantor so that his interest in the land vested only in the event the grantors survived Mary. Mr. Justice Brace, speaking for the court, said:

> In this state, while we have no similar express statute, our statutes do provide that 'conveyances of lands, or of any estate or *interest therein*, may be made by deed' (Revised Statutes, 1889, Sec. 2395); that all estates or *interests* in land are subject to be seized and sold under execution (Secs. 4915, 4917); and that any person having an interest in real estate, whether the same be present or future, vested or contingent, can come into partition for the disposal of such interest (Secs. 7136-7137). . . .
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> This rule of the common law seems to be inconsistent with the general scope of our statutes regulating the disposal of real estate, and not in harmony with the genius and spirit of our institutions, which brooks no restraint upon the power of a citizen to alienate any of his property. We are preeminently a trading and commercial people; our lands are our greatest stock in trade, and the whole tendency of our laws is to encourage and not restrain their alienation. The spirit and genius of the federal system and the common law were exactly the reverse. And we do not think that this now almost obsolete common law rule ought to obtain in this state.[10]

In the recent case of *Grimes v. Rush*,[11] an unsuccessful attempt was made to distinguish the *Godman* case on the ground that it did not involve a conveyance by a quitclaim deed, but the court held that for purposes of transferring contingent remainders a quitclaim deed is as effective as any other deed.

Some of the American courts distinguish between a contingent

9. MO. REV. STAT. §442.490 (1949) [then MO. REV. STAT. §8838 (1899)] provided that where a remainder is limited to the heirs or the heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life, shall be entitled to take as purchasers in fee simple. The court applied the statute in this case, holding that remainders, contingent on the children's surviving their mother, were created in the children.

10. 113 Mo. 120, 130, 20 S.W. 972, 974 (1892).

11. 355 Mo. 573, 197 S.W.2d 310 (1946).

estate where the taker is unascertained and an estate where the taker is fully ascertained but the estate is contingent upon the happening of some other condition precedent. Despite the dicta in the early case of *White v. McPheeters*[12] to the effect that alienation is limited to cases of the latter type, the subsequent Missouri cases have not made this distinction and have held that contingent remainders are interests in land and are alienable regardless upon what the contingency depends.[13] In *Gordon v. Tate*,[14] testator left all his property in trust with his executor as trustee. It was recited in the will that he owned a house in which his granddaughter was living, the free use of which she was to enjoy during her lifetime, and then it was to go to her children. It was further provided that ". . . when the time comes for final distribution of the principal of my estate, the said property shall be deeded to said granddaughter, or in case of her decease, then to her children." The court held that the will gave the granddaughter "an equitable life estate and also a contingent remainder in fee." It further held that where these interests were levied upon and sold at an execution sale, the sale was ineffective because of a clause in the will providing that the interests should not be subject to execution for twenty-one years. The court, not indicating clearly whether it regarded the remainder as legal or equitable, said with regard to a provision in the will making the interests inalienable during that period, that the testator

> . . . had the *jus disponendi*, which imports that he could give absolutely, or could impose any restrictions or fetters not repugnant to the nature of the estate which he gave. Alienability is not a necessary attribute of a contingent remainder. Under the common law such interests were inalienable. There is no reason therefore why the testator as the founder of a trust could not provide that such an interest in his property should go to his beneficiary with the restriction that it should not be alienable by anticipation, or subject to sale under execution in advance of its vesting.[15]

Although it is not clear whether the court considered the remainder as legal or equitable, this restriction would probably have been upheld in either case despite the policy against re-

12. 75 Mo. 286 (1873).
13. Grimes v. Rush, 355 Mo. 573, 197 S.W.2d 310 (1946); Vance v. Humphreys, 210 Mo. App. 498, 241 S.W. 91 (1925).
14. 314 Mo. 508, 284 S.W. 497 (1926).
15. *Id.* at 515, 284 S.W. at 499.

straints on alienation, at least where the restriction applies, as here, only while the interest remains contingent.[16]

Although numerous cases have been found upholding the alienability of contingent remainders, no cases have been found concerning the alienability of executory interests. However, in view of the fact that executory interests are recognized in Missouri,[17] and the fact that both English and American courts have, without exception, treated the two interests in the same manner with respect to alienation, it is not likely that they would be treated differently in Missouri.

Possibilities of Reverter and Rights of Re-entry

At common law both the possibility of reverter and the right of re-entry were considered mere possibilities of estates and were inalienable. An attempt to transfer these interests was not only abortive in the sense that the transferee received nothing, but in the case of an attempted transfer of a right of re-entry, the interest was absolutely destroyed.[18] This result did not follow from an attempted transfer of a possibility of reverter; the unsuccessful transferor retained his interest.[19] The American cases are divided as to the alienation of a possibility of reverter after a determinable fee, but a right of re-entry for breach of condition, unaccompanied by a reversion, is by the great weight of authority inalienable.[20] Moreover, some courts still follow the view that an attempt to alienate a right of re-entry destroys the right.[21] Although the *Restatement of Property* first accepted this view, it has subsequently reversed its position, citing as the reason for so doing a growing judicial recognition of the unsoundness of the rule, and the fact that no English case has ever been found to support the statement in *Sheppard's Touchstone,* which has been made the basis for the rule in five states.[22]

The question of the inter vivos alienability of possibilities of

16. 3 Simes, *op. cit. supra* note 1, at 311.
17. Sullivan v. Garesche, 229 Mo. 446, 129 S.W. 949 (1936); O'Day v. O'Day, 193 Mo. 62, 91 S.W. 921 (1906).
18. Lawler and Lawler, A Short Historical Introduction to the Law of Real Property 111 (1st ed. 1940).
19. *Id.* at 114.
20. 3 Simes, *op. cit. supra* note 1, at 159. When the grantor retains a reversion along with a right of re-entry for condition broken or a possibility of reverter, these interests are alienable as incidents to the reversion.
21. *Id.* at 163.
22. Restatement, Property, §160, comment *c* (Supp. 1948).

reverter and rights of re-entry has never been definitely passed upon in Missouri, although there are dicta in three recent decisions as to the alienability of rights of re-entry.

In *University City v. Chicago, R. I. & P. R. R. Co.*,[23] which involved a suit to condemn an abandoned railroad right of way for a public street, the lineal heirs of the original grantor to the railroad claimed their ancestor's deed conveyed a fee on a condition subsequent which reverted to them upon the abandonment of the right of way. In opposition to this contention it was argued that the interest that remained in the grantor was alienable under the Missouri general conveyancing statute considered above. Having stated that at common law a mere possibility of reverter is not an estate and is "inalienable, unassignable and cannot be devised, but is descendible," the court observed that the statute relied upon did not define the "interest" therein mentioned, that the common law must be looked to for an answer, and that there is authority on both sides. But the court held that a determination of the question was not necessary since the deed involved conveyed only an easement and did not create a fee on a condition subsequent.

The question was again presented a few months later in *Davis v. Austin*,[24] where the *University City* case was cited, but the court, repeating the statements made concerning the common law in the *University City* case, held that the interest involved in the case before it was a true reversion and not a possibility of reverter.

In *Farmer's High School Consolidated Dist. No. 3 v. Parker*,[25] the Kansas City Court of Appeals evidently considered the Missouri Supreme Court at least tacitly committed to the common law rule, for *Davis v. Austin* is therein cited as supporting the rule that rights of re-entry are "inalienable, unassignable, and cannot be devised but are descendible." In 1881 an acre of land was conveyed to School Dist. No. 66 for the purpose of erecting a school building, and in the conveyance the grantor required as a condition that the directors of the school district were "to enclose the same with a good and lawful fence, and keep the same in repair, and for a failure on the part of said directors to

23. 347 Mo. 814, 49 S.W.2d 321 (1941).
24. 348 Mo. 1094, 156 S.W.2d 903 (1941).
25. 240 Mo. App. 331, 203 S.W.2d 516 (1947).

maintain a good and lawful fence around the same will forfeit the title to the above described acre of land and will fall back to . . ." the grantor and his heirs. School District No. 66 was absorbed by the plaintiff school district, and no fence was maintained around the tract. Although it is not clear upon what basis the defendant claimed title to the land, in 1945 he took possession thereof, and the plaintiff brought suit in ejectment. The defendant contended that the breach of the condition forfeited the title of the school district, so that it had no title to assert against one in possession. The court stated that there was no doubt that the provision in the grantor's deed amounted to a condition subsequent and that the condition was broken, but that in order to terminate the estate there had to be an entry by the grantor or his heirs after the condition was breached, and that since there was no evidence of such an entry by the grantor or his heirs, the district had sufficient title to maintain the action. Concerning rights of re-entry the court stated:

> In reference to a condition subsequent . . . it is said that such a condition gives rise to an interest which is not an estate but merely a possibility of reverter which may or may not eventuate. The effect of the deed is to immediately vest the whole of the fee title in the grantee, subject to be defeated by breach of the condition and re-entry by the grantor or his heirs. This interest is inalienable, unassignable, and cannot be devised but is descendible.[26]

Although the decisions in the three cases are sound on the facts, it is doubtful that the same can be said concerning the dicta as to the alienability of rights of re-entry. It is most desirable that all interests in land be freely alienable, and the Missouri general conveyancing statute is sufficiently broad to include rights of re-entry and possibilities of reverter.[27] In any event there is no sound reason why these interests should be treated differently from contingent remainders, since it is clear that all are "interests" in land.[28] It has been urged that since neither rights of re-entry nor possibilities of reverter are subject to the

26. *Id.* at 335, 203 S.W.2d at 517.
27. MO. REV. STAT. §442.020 (1949).
28. Several states which have general conveyancing statutes similar to the one in Missouri have held that possibilities of reverter and rights of re-entry are interests in land within the meaning of the statute. Fulton v. Teager, 183 Ky. 381, 209 S.W. 535 (1919); Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930).

rule against perpetuities, their alienability permits the creation of interests which are extremely tenuous in nature and which become defects in the title of long continuance, and that their nuisance value can be greatly mitigated by their being made inalienable. This contention is not sound, however, as Simes points out,[29] for the fact that the law perhaps should have subjected possibilities of reverter and rights of re-entry to the rule against perpetuities is not an adequate reason for an illogical rule as to alienation.

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29. 3 SIMES, *op. cit. supra* note 1, §715 (1936).