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Property--Right of Re-entry--Descent and Alienability

John R. Frazier
West Virginia University College of Law

sensitivity of the position and the seriousness or type of charge alleged. The alleged malingering of a state road worker is not as serious as the alleged misuse of a high government position for personal gain. Another state interest would be the added expense necessary to pay the individual pending outcome of the hearing, although this can be minimized by increasing the efficiency of the hearing procedure, or by possible action to recoup any salary paid between notification of the hearing and the final determination that the suspension was justified. The Court would then have to weigh these conflicting interests to determine whether a hearing prior to suspension of government employment was required.

The Court's decision in *Goldberg v. Kelly* provided the welfare recipient with protection against the arbitrary and capricious discontinuance of welfare assistance by affording the recipient the constitutional right to a pre-termination evidentiary hearing entailing the right to timely and adequate notice, the right to confront adverse witnesses with oral arguments and evidence, the right to disclosure of the evidence used to prove the government's case, and the right to an impartial decision resting on the legal rules and evidence brought forth at the hearing. "To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure."[61] *Goldberg v. Kelly* provided a measure of this shelter.

Michael A. Albert

Property—Right of Re-Entry—Descent and Alienability

On January 13, 1821, Noah Zane made a deed granting a certain parcel of land to the City of Wheeling, West Virginia. In the deed the grantor Zane reserved a right of re-entry[1] if the city ceased to use the land as a "market house." In 1964 the City discontinued the use of the property as a "market house", at which time the heirs of Noah Zane exercised the right of re-entry and entered and took possession of the land. A short time later the city instituted a proceeding of eminent domain against the grantor's heirs and again acquired ownership of the property.

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[61] REICH, *The New Property*, 73 YALE L.J., 733, 787 (1964).

[1] A power of termination (right of re-entry) is a future interest left in the transferor or his successor in interest on the transfer of

Just compensation for the property was set at $85,000 and a commissioner was appointed to ascertain the interest of all those entitled to share in such compensation. At Noah Zane's death in 1831 he had two living heirs, Carolina, a daughter, and Platoff, a son. By the commissioner's report one-half of the compensation was to be awarded to Thomas R. Shelton, Jr., as the descendant of Carolina, and the remaining one-half was to be distributed in various shares to the twelve descendants of Platoff. Several of the descendants of Platoff filed exceptions to the commissioner's report with the Circuit Court of Ohio County. In April 1968 the circuit court affirmed the commissioner's report and Platoff's descendants appealed.

Held, judgment affirmed. A right of re-entry is an inheritable future interest which descends to the heirs of the grantor at the grantor's death rather than to heirs at the time the right of re-entry accures and is exercised. The immediate heirs of the grantor take the right per capita,[2] and such right is subsequently transmitted according to the statute of descent and distribution[3] through a successive chain of later heirs until the right is vested, at which time the grantor's descendants so determined are entitled to share to the extent of their respective interests in the property. *City of Wheeling v. Zane,* 173 S.E.2d 158 (W. Va. 1970).

The controversy in this case was not whether a right of re-entry passes to the heirs of the intestate; there can be no doubt that it does.[4]

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an estate subject to a common law condition subsequent . . . .In order to create a condition subsequent, appropriate language expressing an intent to divest a vested interest must be used, the courts construing the language of condition against the transferor.

L. SIMES, FUTURE INTERESTS § 14 (2d ed. 1951). *See also* RESTATEMENT OF PROPERTY § 155 (1936).

[2] The terms "per capita" and "per stirpes" have been used traditionally to refer to methods of computing the share of an estate which is to be allocated to individual members of a class of heirs or distributees. To take per capita, under the common use of the term, is to take equally with other children, other brothers or sisters, or other kin of the intestate, and in one's own right. Per capita means by the head or individual. Per stirpes means to take, by representation, a share which a deceased ancestor would have taken had he survived the intestate.

Baxton v. Noble, 146 Kan. 671, 676, 73 P.2d 43, 47 (1937).

[3] W. Va. Code ch. 42, art. 1, § 1 (Michie 1966): "When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course: . . . ."

[4] The controversy centers on whether a right of entry descends to the heirs or whether they take by representation. Under either view the right of

The issue was: how and when did this right pass. There are two schools of thought regarding this question. The more prevalent position appears to be that a right of re-entry is inheritable and that it descends to the heirs at the time of the grantor's death.[5] But some jurisdictions hold that the right passes by representation[6] at the time of the occurrence of the contingency.[7]

The main point of argument between these conflicting viewpoints is whether a right of re-entry is an interest in land which is capable of descent under the statutes of descent and distribution. Under the second view until the occurrence of the specified event, a possibility of reverter[8] or right of re-entry is not in any sense an estate, but a mere possibility, and therefore there is nothing to descend until the event occurs, at which time the rights come into existence.[9] This view is based on the early common law rule that "seisin is the stock of descent."[10] These jurisdictions apply this vestige of the common law doctrine of descent to both possibilities of reverter and rights of re-entry. This is done nothwithstanding that other future interests are held to be capable of descent under statutes of descent.[11] Of course the argument for such a position is that a right of entry is not an interest or an estate which is capable

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entry passes to the heirs. *Compare* Copenhaven v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930) *with* Uppington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896). For a fuller discussion see 37 Va. L. Rev. 117, 125 (1951).

[5] *See* North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908) and Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930). *See also* RESTATEMENT OF PROPERTY § 164, comment c (1936); Annot., 77 A.L.R. 344, § IIIa (1932).

[6] *See* note 2, *supra.*

[7] *See, e.g.,* Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896); and Blount v. Walker, 31 S.C. 13, 9 S.E. 804 (1889); Annot., 77 A.L.R. 344, § IIIb (1932).

[8] A possibility of reverter is a future interest left in the transferor or his successor in interest on a transfer in fee simple determinable or in fee simple conditional. The special limitation which characterizes a determinable fee is commonly introduced by such words as "until" or "so long as"; but a mere statement of purpose is not sufficient to create a determinable fee.

L. SIMES, FUTURE INTERESTS § 13 (2d ed. 1951). *See also* RESTATEMENT OF PROPERTY § 154(3) (1936).

[9] *See* Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896); Blount v. Walker, 31 S.C. 13, 9 S.E. 804 (1889).

[10] Hammond v. Piper 185 Md. 314, 320, 44 A.2d 756, 759 (1946), *see also* 23 Am. Jur. 2d. *Descent and Distribution* § 71 (1965). L. SIMES, FUTURE INTERESTS § 31 at 69 (2d ed. 1951).

[11] *See* RESTATEMENT OF PROPERTY § 164, Comment c (1936). The West Virginia statute of descent and distribution (*see* footnote 3), is a result of the Virginia Statutes of 1785, 12 Henings Statutes at Large, ch. LX, §§ I and II, and the Virginia Code, 1849, ch. CXXIII, § 1. *See* 37 VA. L. REV. 117, 124 (1951).

of descent, but merely a possibility of becoming such an estate upon the happening of a contingency.

Notwithstanding these very conceptual arguments, the prevalent position seems to be that a right of re-entry descends under the statutes of descent in the same manner as other future interests.[12] Since it is universally accepted that common law rules of descent with respect to reversions, remainders and executory interests have been abolished by these statutes, it would seem to follow that such rules are also abolished with respect to rights of re-entry and possibilities of reverter.[13]

A contingent remainder and an executory interest have no greater expectancy than either a possibility of reverter or a right of re-entry—they are all only possibilities of becoming vested estates. They differ only in their legal operation and with respect to whom the contingent interest is to pass upon the occurrence of the contingency. There seems to be no good reason why a contingent remainder and an executory interest should be considered interests which are capable of descent while a possibility of reverter and a right of re-entry are considered only naked possibilities and not capable of descent.[14] Consequently, the prevalent view would seem to be better reasoned and more in accord with the intent of the statutes of descent and distribution.

The *Zane* case, as the court pointed out, was one of first impression in this state. However, there have been previous holdings and judicial statements which are relevant to the issues which it presented, including the dissenting opinion of Judge Brannon in *White v. Bailey*.[15] In the last paragraph of the *Zane* opinion the court stated that Judge Brannon had considered a right of re-entry to be inheritable, citing *Ballard, Real Property*.[16] However, there are statements in Judge Brannon's opinion which would tend to support the view under which a right of re-entry is not inheritable.[17]

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[12] *See* note 5, *supra*.

[13] RESTATEMENT OF PROPERTY § 164, Comment c (1936).

[14] For a discussion and distinction of these interests, see L. SIMES, FUTURE INTERESTS ch. 3 (2d ed. 1951).

[15] 65 W. Va. 573, 579, 64 S.E. 1019, 1022 (1909).

[16] A right of re-entry "is a mere right in action, not an interest in land; that it is not assignable nor grantable; that it descends to the grantor's heirs, but does not pass by conveyance." *Id.* at 584, 64 S.E. at 1024 quoting Ballard.

[17] *See, e.g., Id.* at 582, 64 S.E. at 1023, where Judge Brannon cited *Southard v. Railroad Co.*, 26 N.J.L. 21 (2 Dutcher), (1856), which held that a right of condition broken could only be taken advantage of by a party

Nevertheless the court, as evidenced by its holding, chose to reject such statements by Brannon. Further, the majority in the *White* case suggested that a right of re-entry could be devised to one's executor.[18]

Several other West Virginia cases provide insight into the court's decision. In *Kidwell v. Rogers*[19] executory interests were held to be not mere possibilities but substantial interests which descend by inheritance before the happening of the contingency upon which they depend. In *Carney v. Kain*[20] the court stated that a "possibility of resulting trust" was "somewhat in analogy to the possibility of reverter," and then held that a "possibility of resulting trust" was transferrable under the statute of descent and distribution. For the purpose of classifying future interests, there is little difference between a possibility of reverter and what is refered to in *Carney* as a "possibility of resulting trust."

In summary, *Zane* follows what appears to be a tendency on the part of the court to reject the remaining vestiges of early common law in this area and to adopt a less conceptual point of view. In view of the strong precedent in other jurisdictions, the decision was not unexpected. However, both the decision and the dictum within the opinion have raised certain questions.

Unfortunately the court may have left the impression that a right of re-entry and a possibility of reverter are synonymous. Although the court clearly distinguished the two in one part of its opinion,[21] the two are used almost interchangeably in other sections of the decision.[22]

Interchangeable treatment of the two interests may have been the result of several factors. First, the principles used by the court to decide the issues raised in this case were applicable to both possi-

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to it or privies in right and representation. *See also* on the statement that a right of entry is not an estate or interest in land, White v. Bailey 65 W.Va. 573, 584, 64 S.E. 1019, 1924 (1909). By citing *Upington v. Corrigan*, 151 N.Y. 143, 45 N.E. 359 (1896), and other New York cases which hold that a right of enry and a possibility of reverter are mere possible interests in land and not inheritable, one might reasonably conclude that Judge Brannon in fact did not consider a right of entry inheritable.

[18] *See* 65 W. Va. at 579, 64 S.E. at 1022.

[19] 103 W. Va. 272, 137 S.E. 5 (1927).

[20] 40 W. Va. 758, 23 S.E. 650 (1895).

[21] *See* City of Wheeling v. Zane, 173 S.E.2d 158, 162 (W. Va. 1970).

[22] *Id.* at 158, 161, 162.

bilities of reverter and rights of re-entry.[23] To support its position, the court necessarily cited cases dealing with both of these interests. Another reason may have been that some courts use the same terminology to identify the estates which precede both a right of re-entry and a possibility of reverter. The terms "base," "qualified," and "determinable fee" are generally used interchangeably to denote a fee which has a qualification annexed to it and to identify the estate which preceeds a possibility of reverter. A fee on condition subsequent precedes a right of re-entry and is distinguishable in that an entry is necessary to terminate it, while such entry is not necessary to terminate the above.[24] Without regard to this distinction some courts have used the terms "base" or "qualified fee" to identify the estate preceeding both a right of re-entry and a possibility of reverter.[25] Under such circumstances it is not surprising that the two interests are sometimes considered interchangeable.

In terms of legal operation, the distinction between a right of re-entry and a possibility of reverter is clear. The West Virginia Court in *Zane* stated it thus:[26]

> [T]he possibility of reverter takes effect in possession immediately and automatically upon the happening of the event named in a common law condition subsequent, [but] the possessory estate does not vest immediately in the one having the right of re-entry for breach of condition. He must first elect to terminate the granted estate before the possessory estate vests in him.

Therefore, regardless of whether these two interests are treated equally as to inheritability and even alienability, the fact remains that they are distinguishable in their legal operation.

In West Virginia, where the issue of alienability is still in question, it is particularly dangerous to equate these two future interests. This is so because the law prior to the *Zane* case seemed to be that a possibility of reverter could be alienated,[27] while a right

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[23] *Id.* at 163, where the court, after referring to a case involving a possibility of reverter, held, "Though that case involved a possibility of reverter, the principles enunciated as to descendibility and the time of descent apply to and govern the right of re-entry in the case at bar."

[24] *See* Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930); Johnson v. Lane, 98 Ark. 274, 135 S.W.2d 853 (1940).

[25] *See, e.g.,* Kidwell v. Rogers, 103 W. Va. 272, 137 S.E. 5 (1927).

[26] 173 S.E. 2d at 158, 161-62.

[27] *See* Carney v. Kain, 40 W. Va. 758, 23 S.E. 650, (1890).

of re-entry was inalienable.[28] In addition, the common law principle that an attempt to transfer a right of re-entry extinguished such an interest[29] has not been litigated in West Virginia. The hazard of equating the two interests is therefore evident.

The court's reasoning would seem to indicate that both a right of re-entry and a possibility of reverter would be alienable under West Virginia's conveyance statute.[30] Under the conveyance statute, "Any interest in or claim to real estate or personal property may be lawfully conveyed or devised. . . ." Although the court stated that the question of alienability regarding these two interests was not answered by its decision, just the contrary would seem to be true in view of its opinion.

The court's holding and its basis both serve to substantiate such a conclusion. One view on the question of descent holds that a right of re-entry or a possibility of reverter is not an interest or estate in land capable of descent under the descent and distribution statutes. By rejecting this view and holding that these interests descend under West Virginia's descent and distribution statute, the court in effect has held that a possibility of reverter and a right of re-entry are both interests in real estate and therefore are transferable under the conveyance statute. This conclusion becomes more apparent when one examines the wording of the descent statute, which reads in part "[a]ny real estate of inheritance . . . shall descend . . ." Logically then a court could not hold that a possibility of reverter or right of re-entry could descend under this statute, and still adhere to the position that they are inalienable under the conveyance statute on the ground that neither is an interest or claim in real estate.

Our conveyance statute was inherited from what is today part of the Virginia Code.[31] Both statutes are esentially the same. The language in the Virginia statute was construed by the Virginia Supreme Court of Appeals in *Copenhaver v. Pendleton*[32] to be broad enough to cover the alienation of both a right of re-entry and

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[28] *See* White v. Bailey, 65 W. Va. 573, 584, 64 S.E. 1019, 1024 (1909).

[29] L. SIMES, FUTURE INTEREST § 34 (2d. ed. 1951), *see* Rice v. Boston & Worcester W. R. Corp., 12 Allen 141 (Mass. 1866); Annot., 53 A.L.R. 2d 224 at § 7 (1957).

[30] W. Va. Code ch. 36, art. 1, § 9 (Michie 1966).

[31] VA. CODE ANN. § 55-6 (1950): "Any interest in or claim to real estate, including easements in gross, may be disposed of by deed or will. . . ."

[32] 155 Va. 463, 155 S.E. 802 (1930). For a discussion of this case see 17 Va. L. Rev. 402 (1931).

a possibility of reverter. In addition statutes in other jurisdictions similar to West Virginia's have been construed to render rights of re-entry and possibilities of reverter alienable.[33]

The court left little doubt that a possibility of reverter is considered alienable. Such a conclusion is prompted by its adoption of the *Carney* case in addition to the reasons already enunciated. The court in *Carney* stated that a "possibility of resulting trust" was "somewhat in analogy to a possibility of reverter," and then held that a "possibility of resulting trust" was transferable under the statute of descent. It went on to say that such an interest is transferable by devise or bequest and also by alienation inter vivos.

The issue of the alienability of a right of re-entry would seem to be muddled by Judge Brannon's dissenting opinion in the *White* case, where he stated that our conveyance statute did not apply to a right of re-entry "because it requires some estate or actual interest for the foundation of a claim to come under this statute." However, as pointed out in *Zane,* Brannon reached such a conclusion by following the rule of the New York cases including *Upington v. Corrigan.*[34] By rejecting that rule the court in effect rejected Brannon's conclusions, since the basis of such a conclusion was destroyed.

In addition to maintaining that a possibility of reverter and a right of re-entry are both inheritable under our descent statute, *Zane* also lays important groundwork for a decision affirming the alienability of these interests under West Virginia's conveyance statute. Such a decision would be in accord with a growing tendency to reject all vestiges of the early common law regarding the transferability of these two future interests.

John R. Frazier

Taxation—Employment Agency Fees Deductible as a Business Expense

Petitioner-taxpayer was employed by a corporation as secretary-treasurer. In May 1966 petitioner sought new employment and for this purpose contacted an employment agency, paying their non-refundable fee which amounted to approximately $3000. Through

[33] *See* Fayette County v. Morton, 282 Ky. 481, 138 S.W.2d 953 (1940); Hamilton v. Jackson, 157 Miss. 284, 127 So. 302 (1930); Davis v. Skipper, 125 Tex. 364, 83 S.W.2d 318 (1935). *See also* Annot., 53 A.L.R.2d 224 at §§ 3, 5 (1957).

[34] 151 N.Y. 143, 45 N.E. 359 (1896).