Future Interests--Alienability of a Possibility of Reverter in Kentucky

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nized that the Federal courts have moved in the opposite direction). A may not raise an objection to the venue of the claims asserted by B against C.

4. When A asserts several claims against C arising out of the transaction or occurrence that is the subject matter of A's claim against B, or vice versa, the claims must independently satisfy the venue statutes.

5. When A sues B and C, and B serves several cross-claims against C which arise out of the transaction or occurrence which is the subject matter of A's claim, the cross-claims are ancillary to A's claim, and the statutory venue of the cross-claims need not be met.

J. ARNA GREGORY, JR.

FUTURE INTERESTS—ALIENABILITY OF A POSSIBILITY OF REVERTER IN KENTUCKY

In the recent case of Austin v. Calvert, the Kentucky Court of Appeals held that a possibility of reverter may be conveyed in this state. The opinion lacks clarity both in reasoning and terminology, however, and the purpose of this note is to constructively criticize the case with the hope that a clearer understanding of the problem will be gained.

In 1918, Austin conveyed an acre of land to a school board by a deed which provided: "... and said land reverts to the donor when it ceases to be used for a school house." In 1921, the Calverts acquired by deed from Austin the fee simple absolute title to a 29 acre tract which included the school house area. In 1931, the school board abandoned the one acre plot and the Calverts claimed fee simple ownership of it. Austin's heirs claimed that his 1918 deed to the school board created a possibility of reverter in him because the school board took a determinable fee, and that his future interest did not pass to the Calverts in his 1921 deed because it was a mere contingency and could not be aliened or sold. The Court of Appeals decided correctly that the interest was alienable, but failed to decide what kind of interest it was, and held that it could be conveyed regardless of whether it was a possibility of reverter, a reversion, or a "possibility of reversion." Although this conclusion is sound as a general proposition, it may lead to considerable confusion in future cases because the court based its decision on certain statutes which it considered con-

1 262 S.W. 2d 825 (Ky. 1953).
trolling, but which may not be controlling at all unless the kind of future interest is properly designated. In addition, the Court of Appeals has said by dictum prior to this case that a possibility of reverter is not alienable for the very reason urged by the Austins.2

Before proceeding to an analysis of statutes in question, as cited and construed by the court, it may be helpful to point out that the future interest involved in this case clearly satisfies the generally accepted definition of a possibility of reverter. A possibility of reverter is defined as "the undisposed of interest remaining in the grantor, or in the heirs of the devisor when the owner of land in fee simple absolute has conveyed or devised it in determinable fee, in fee simple conditional, or in determinable fee simple conditional."3 In contrast a reversion is defined as "the remnant of an estate continuing in the grantor, undisposed of, after the grant of a part of his interest."4 Actually, a "possibility of reversion" fits neither of these definitions and is at best a confusing misnomer since it does not identify any well-defined type of future interest.

In concluding that the future interest was alienable regardless of what it was called, the court relied primarily on Kentucky Revised Statute 881.210, which provides that rights of reversion may be sold or conveyed. An earlier Kentucky case and a decision of the United States Court of Appeals (Sixth Circuit)5 were cited to support the interpretation that "any interest or claim to real estate" may be conveyed under this statute. The conclusion was drawn that Austin had at least a "claim" to the school tract when he conveyed to the Calverts. A careful examination of these cited cases indicates, however, that in each one an additional and different statutory section, since revised,6 was relied upon. At the time of the earlier decisions, there was a statute which provided that "any interest or claim" to real estate was alienable,7 but this statute is no longer in effect. It is interesting to note that this statutory provision authorizing the conveyance of any "claim" in real estate was still in effect in 1921 when the deed in the instant case was executed, but this significant fact was not mentioned in the opinion and cannot be relied on as being decisive of the case.

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1 Young v. C. and O. R.R. Co., 291 Ky. 262, 163 S.W. 2d 451 (1942); Walker v. Irvine's Ex'r, 225 Ky. 639, 9 S.W. 2d 1020 (1928).
2 Simes, LAW OF FUTURE INTERESTS 320 (1936).
3 Quoted in Copenhaver v. Pendleton, 155 Va. 462, 155 S.E. 802, 806 (1930).
4 Nutter v. Russell, 60 Ky. 163 (1860); Kentucky Coal Lands Co. v. Mineral Development Co., 295 F. 255 (6th Cir. 1924).
5 The prior statute was 2 STANTON'S REV. STAT. c. 80, sec. 6 (1867). It was revised in 1942. According to NOTES AND ANNOTATIONS TO THE KENTUCKY REvised STATUTES 1372 (1944), this statute is now covered by KY. REV. STAT. 382.010.
6 Supra note 6.
Thus, insofar as Kentucky Revised Statute 381.210 is concerned, it would seem clear that the court should have decided whether the future interest in question was a possibility of reverter or a reversion, since the statute on its face authorizes the conveyance of the latter type interest only.

In considering relevant statutory provisions which are currently effective, the court apparently overlooked Kentucky Revised Statute 382.010. This section is a revision of the obsolete statute already referred to and provides that any interest in real property not in the adverse possession of another may be conveyed. This is Kentucky's general conveyancing statute and like those in many other states, it makes the alienability of any future interest turn on whether it is classified as an interest in land or merely a "claim" or "contingency," as was contended by the appellants in the Austin case. As to this point, there is dictum in at least two Kentucky cases to the effect that a possibility of reverter is not alienable because it is not a "vested" interest and is a mere "possibility." On the other hand, the opinion in the instant case cites a line of Kentucky cases where the court thought that an interest identical to that involved here was alienable. A careful examination of all of these cases leads to the conclusion that the court, prior to the Austin case, has never categorically decided whether a possibility of reverter is an interest in land or a mere contingency. Commissioner Van Sant's dictum in Young v. C. & O. R.R. Co. comes nearer to a precise answer than that given in any of the other cases because he does say that a possibility of reverter is not a vested interest but merely a "possibility," as its title suggests. If "vested interest" is being used in this statement to mean "interest," and "possibility" is the substantial equivalent of "contingency," then in effect the conclusion must be that a possibility of reverter is not an interest in land within the meaning of Kentucky Revised Statute 382.010.

In attempting to reconcile the confusion in the cases on this point, one gets the clear feeling that the court's failure to properly identify the kind of future interest involved results in a failure to determine whether the particular future interest is classified as an interest in land. Such a classification is essential in determining the alienability of the future interest.

Fayette County Board of Education v. Bryan and Jefferson

8 Supra note 2.
9 Keeton v. Wayne Co. Board of Education, 287 Ky. 174, 152 S.W. 2d 595 (1941); Phillips v. Frances, 267 Ky. 203, 101 S.W. 2d 924 (1937); King v. Wurts, 227 Ky. 705, 13 S.W. 2d 1043 (1929); Board of Education for Jefferson Co. v. Littrell, 173 Ky. 78, 190 S.W. 463 (1917).
10 291 Ky. 262, 163 S.W. 2d 451 (1942).
11 263 Ky. 61, 91 S.W. 2d 990 (1936).
County Board of Education v. Littrel12 are good examples of the court’s failure to ultimately classify the future interest. In both cases the court had considerable difficulty distinguishing between a possibility of reverter and a reversion. Although these are two distinctly different future interests, the court attempted to combine them by using the expression “possibility of reversion.” It will be remembered that while a reversion is defined as the undisposed of estate remaining in the grantor after a grant,13 it can arise only where he has conveyed away some interest less than a fee. The possibility of reverter arises only where a determinable fee is created. It is readily apparent that the distinguishing feature between the two interests is that in the case of a reversion, the grantor has not parted with all of his estate, while in the case of a possibility of reverter, the grantor has conveyed all of his estate in fee, retaining only the right to become the possessory owner again if the condition on which the fee is made determinable is breached. If this analysis is followed, it becomes quite clear that a possibility of reverter is not a reversion, and therefore, a statute (Kentucky Revised Statute 381.210) providing for the alienability of a reversion should not be construed to permit the alienability of a possibility of reverter.

Not so apparent is the difference between a possibility of reverter and a power of termination (the modern term for a right of entry for condition broken). Apparently, the Kentucky Court of Appeals has not attempted to differentiate between these two interests. There is even some evidence in the Austin case that the court has confused them with one another. For example, to support its reasoning with respect to the application of the common law rule governing the alienability of a possibility of reverter, the court cited 33 American Jurisprudence, section 209, page 691. This section deals with a power of termination, however, and not with a possibility of reverter. In other words, a failure to properly determine the kind of interest led to a failure to determine whether it was an interest in land and left the question of its alienability unanswered.

A power of termination is defined as “an interest remaining in the grantor or the heirs of the devisor of land which has been conveyed or devised on a condition subsequent.”14 In comparing this definition with that of a possibility of reverter, it should be noted that the only difference is that in one the possessory interest is subject to a condition subsequent, while in the other, it is subject to a condition precedent.

12 173 Ky. 78, 190 S.W. 465 (1917).
13 Supra note 4.
As is often suggested by the authorities, the only practical difference between these interests is that the possibility of reverter becomes possessory automatically upon breach of the condition, while the power of termination becomes possessory only upon re-entry by the owner of it. Although this practical difference may seem to be a minor one, it becomes all important in deciding whether both types of future interests are interests in land and therefore alienable. A right to possession upon breach which becomes possessory automatically may logically be classified as very similar to a reversion which is universally treated as an alienable interest because it is an interest in land. On the other hand, a mere right or power to become the possessory owner, if exercised, seems less like an interest in land.

The courts in a number of other states have, in fact, given this distinction some effect by holding that (in the absence of an explicit statute) the power of termination is not alienable, but that the possibility of reverter is alienable. In commenting on this paradoxical situation, Professor Simes says:

No good reason is perceived why a right of entry for breach of condition should not be alienable nor why any distinction as to alienability should be drawn between it and the possibility of reverter.

The implication in Professor Simes' argument undoubtedly is that there is no valid reason why these two kinds of future interests should not be alienable, except the historical one that they were not considered interests in land at the common law. Like the contingent remainder, they were conceived to be a mere "hope" or "possibility." They were classified as more akin to a chose in action than an estate of ownership. As such, they were subjected to the prohibitions against assignment of a chose which common law courts conceived necessary to prevent champerty and maintenance. This historical classification is reflected in the argument made by appellants in the instant case to the effect that Austin's interest was a mere contingency. In view of the wording of Kentucky Revised Statute 382.010, which is clearly the governing statute, this issue should have been settled by the court once and for all. In this connection, it is pertinent to point out that the trend of modern decisions in other states is to classify at least the possibility of reverter as an interest in land and therefore alienable.

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In summary, it is submitted that the Court of Appeals should not lose another good opportunity to clarify the Kentucky view as to the alienability of both the possibility of reverter and the power of termination, and to do what was not done in the Austin case: explain precisely why such future interests are or are not alienable.

GARDNER L. TURNER

CONSTITUTIONAL LAW—COMMERCE CLAUSE—MUNICIPAL OCCUPATIONAL PRIVILEGE TAXES—PHOTOGRAPHERS

Occupational privilege taxes by municipalities, involved in suits concerning the Commerce Clause of the Federal Constitution, have traditionally been categorized into two classes—peddlers' taxes, and solicitors' taxes. Generally speaking, such taxes on peddlers have been ruled constitutionally valid, while similar taxes or regulations on solicitors have been held to violate the Commerce Clause. This note presents a problem of taxation and regulation in an area which is thought to be between the two categories. Especially noted herein will be the current attempts, failures, and successes of municipal privilege taxes on photographers. In general, it can be stated that the problem settles to a conflict between the police power and the taxing power of the states, and the power of the Federal government to regulate commerce.

1 "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States. . . ."

2 The contended need for taxation and regulation of either the peddlers or the solicitors is based upon several complaints—they create outside competition; they are pestiferous nuisances; they may be dishonest; they are oftentimes financially irresponsible; their trades present many and varied opportunities for fraud and crimes collateral to their admittance into private homes; and local government is unable to collect from these classes revenues under the usual general tax laws. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 111 (1953); 40 AM. JUR. 921 (1942). The tax power and the reserved police power of the states—to further the public health, morals, and safety; to prevent fraud, deceit, and dishonest dealing generally—are bases for imposing some regulation and taxation where the laws are reasonably designed to accomplish these objects. See Breard v. Alexandria, 341 U.S. 622, 640 (1951); State v. Mobley, 234 N.C. 55, 66 S.E. 2d 12, 19 (1951). Allied with the police power basis and the tax power basis for such taxation is the belief that the interstate commerce and interstate business must bear its fair share of the cost of the production and benefits it receives from the local areas. McGoldrick v. Berwind-White Co., 309 U.S. 33, 49 (1940); 4 ARK. L. REV. 473, 474 (1950).

3 In opposition to such arguments put forth by states and cities is the Constitutional protection against erection of trade barriers guaranteed by the Commerce Clause. Certainly the Clause definitely rules out the contended need to protect local merchants from outside competition, and it can be stated generally that the taxation or regulation by the local governments will be upheld only where it is not discriminatory against interstate commerce, or where it does not unduly burden or prohibit the free flow on interstate commerce. Cordell v. Commonwealth, 254 S.W. 2d 484, 485 (Ky. 1953).