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Future Interests and Estates -- 1954 Tennessee Survey

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FUTURE INTERESTS AND ESTATES—1954 TENNESSEE SURVEY

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Worthier Title—A Rule of Property: In *Cochran v. Frierson*[1] the Supreme Court affirmed the rule of *Robinson v. Blankenship*[2] that the doctrine of worthier title is still a rule of absolute property law in Tennessee, and not a rule of construction. The *Blankenship* case is nationally recognized as representative of the early English doctrine which was abolished by statute in England in 1833.[3] The doctrine has been modified by the majority of American courts which hold that it is a rule of construction.[4]

In the *Cochran* case, *A*, the owner of land in fee simple, executed a deed in 1886 which conveyed to her daughter, *B*, an estate for life, then to *B's* surviving issue per stirpes, and in default of such issue the land was to "revert" to *A*, "or her heirs."[5] *A* died in 1920 leaving *B*, her only child, as her sole heir and next of kin. *B* died in 1950 without having had any children, and leaving a will devising the land in fee simple to certain devisees. A partition suit was filed by some of the nephews and nieces of *A* against other nephews and nieces, all of whom would be heirs at law of *A*, determined after the death of *B* in 1950. The devisees of *B* were allowed to intervene, and the actual litigation is between the devisees of *B* and the nephews and nieces of *A*. The nephews and nieces contended that the deed created a life estate in *B* and alternative contingent remainders; that one alternative contingent remainder was to the surviving issue per stirpes of *B*, another to *A*, and another to the heirs of *A;* that since the first two alternatives failed to vest at the expiration of the life estate, the third alternative should be regarded as vesting the fee simple in those who would be *A's* heirs if she had died in 1950 after the death of *B*. Holding for the devisees of *B*, the Supreme Court held that under the 1886 deed *A* retained a reversion subject to a contingent remainder in the surviving issue of *B*, that at *A's* death in 1920 this reversion descended to *B*, thereby vesting in *B* a fee simple estate; and on *B's* death without surviving issue, the title passed under *B's* will to her devisees.

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1. 195 Tenn. 174, 258 S.W.2d 748 (1953).
2. 116 Tenn. 394, 92 S.W. 854 (1906).
3. 3 & 4 WM. IV, c. 106, § 3 (1833); see Cochran v. Frierson, 195 Tenn. 174, 258 S.W.2d 748, 750 (1953).
4. 1 AMERICAN LAW OF PROPERTY § 4.19, n. 7 and cases there cited (Casner ed. 1952).
5. 195 Tenn. 174, 176, 258 S.W.2d 748, 749 (1953).

The essential requisite for the creation of a reversion is that a person transfer a lesser estate than that which he owns. Where a person, owning in fee simple, conveys a life estate and a contingent remainder in fee simple, the grantor automatically has a reversion which will be divested when the contingent remainder becomes a vested remainder.[6] Suppose *A*, owning land in fee simple, conveys to *B* for life, remainder to the heirs of *A*. What is the status of the title? Clearly the rule in *Shelley's* case is not applicable, because the remainder is not to the heirs of the life tenant. On its face the limitation seems to create a life estate in *B*, a contingent remainder in the heirs of *A*, and a reversion in *A* subject to being divested when and if the contingent remainder should become vested. In English feudal law, however, it was said that the acquisition of title by descent was a *worthier*[7] title than one acquired by purchase—*i.e.* by deed or will. Applying this principle to the example given, it was held that *A* owned an absolute reversion in fee simple, and that the deed did not create a contingent remainder at all. It was said to be worthier that the heirs of *A* should take by descent from him rather than by the deed. In a civilization where commercial transactions in land were only very seldom, the chances were not unlikely that *A's* heirs would take by descent too!

Sometimes this doctrine is referred to as the rule that a grantor cannot create a remainder in his own heirs. Actually the rule is not limited to remainders. It applies to all types of interests, present and future. In states where it has been modified from a rule of property to a rule of construction, it has been extended to personal property, tangible and intangible, and to transfers in trust as well as to direct transfers.[8] In its modern form in most states the rule may be stated thus: When an inter vivos conveyance of real property contains a limitation to the heirs of the conveyor, or an inter vivos conveyance of personal property contains a limitation to the next of kin of the conveyor, such limitation is construed, in the absence of additional language showing a contrary intent, as void, and there is a reversionary interest in the conveyor. In those states it is said that the

6. 1 SIMES, FUTURE INTERESTS § 45 (1936).

7. Probably the best reason that it was considered worthier by the early English courts was that a title acquired by descent was subject to the incidents of feudal tenure—the inheritance and estate taxes of this period—payable to the feudal lords who so decided.

8. Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919); Whittemore v. Equitable Trust Co. 250 N.Y. 298, 165 N.E. 454 (1929); National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Morris, *The Inter-Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949); RESTATEMENT, PROPERTY § 314 (1940); 1 AMERICAN LAW OF PROPERTY § 4.19 (Casner ed. 1952).

rule is applicable only to inter vivos transfer; that it is obsolete as to wills.[9]

While the *Blankenship* and *Cochran* cases both involved deeds, there does not seem to be any Tennessee case where the rule has been applied to transfers of personal property. In three Tennessee cases,[10] however, there was a testamentary gift of both real and personal property for life, followed by a gift of the remainder in fee simple "to the heirs" of the testator. In these cases the doctrine of worthier title is not mentioned, and the court treats the problem as if it is wholly a problem of construing the testator's intent. In each case the court adopts a rule of construction, different from that generally followed elsewhere, holding that the heirs of the testator should be ascertained as of the date of the expiration of the life estate, and not as of the testator's death.[11] These cases seem to be inconsistent with the *Blankenship* and *Cochran* cases, except that the latter involve transfers by deed, and the former involve transfers by will. Adherence to the principle of the worthier title doctrine as expounded in *Blankenship* would at least seem to require that in the *Felts*[12] case and its predecessors the heirs be determined as of the testator's death rather than as of the expiration of the life estate.[13]

In the *Cochran* case the court refused to adopt the modification made in several states in accord with Judge Cardozo's view in *Doctor v. Hughes.*[14] The principle of that case is that in the absence of a statute abolishing the rule it persists today as a rule of construction, not a rule of property; and that there is a *rebuttable presumption* that an inter vivos gift of a future estate to the heirs or next of kin of the transferor is intended by him to be simply an end limitation creating a reversionary interest in the transferor. Being a rule of construction, this principle should result in the overruling of a demurrer and allow proof that the grantor intended to create a contingent remainder.[15]

A third view, adopted by statute in England in 1833[16] and proposed

9. Morris *supra* note 8; RESTATEMENT, PROPERTY § 314, comments *b* and *j* (1940); 1 AMERICAN LAW OF PROPERTY § 4.19 (Casner ed. 1952).

10. Felts v. Felts, 188 Tenn. 404, 219 S.W.2d 903 (1949); Forrest v. Porch, 100 Tenn. 391, 45 S.W. 676 (1898); Parrish v. Groomes, 1 Tenn. Ch. Rep. 581 (1874).

11. See Trautman, *Future Interests—1953 Tennessee Survey,* 6 VAND. L. REV. 1096, 1111 (1953).

12. *Supra* note 10.

13. See note 11 *supra.*

14. 225 N.Y. 305, 122 N.E. 221 (1919).

15. Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929); Matter of Burchell (Worm v. United States Trust Co.), 299 N.Y. 351, 87 N.E.2d 293 (1949).

16. 3 & 4 Wm. IV, c. 106, § 3 (1833).

by the American Law Institute and the Commissioners on Uniform Laws[17] would abolish the worthier title doctrine both as a rule of property and a rule of construction. This proposed statute would provide that in all cases of an inter vivos gift to the heirs or next of kin of the grantor, the heirs or next of kin would take as purchasers; so under no circumstances would there be an indefeasible reversion in the grantor. This proposed statute has been adopted in Nebraska.[18] A recent Minnesota statute also has the effect of abolishing the doctrine.[19] A Kansas statute provides that the rule is abolished as to wills.[20] North Carolina legislation to the effect that the word "heirs" is presumed to mean children has the effect of avoiding the rule whenever the word "heirs" is construed to mean children;[21] and a statute to the effect that the word "heirs" is presumed to mean heirs at the time of distribution and not at the death of the ancestor would have the effect of avoiding the rule.

While the rule of law adopted by the Tennessee Court that an indefeasible reversion is always created in the grantor seems somewhat rigid, so does the rule of law adopted in England and proposed by the American Law Institute and the Commissioners on Uniform Laws that a gift to heirs as grantees is *always* intended. Both are rigid views at opposite extremes. The principle of *Doctor v. Hughes,* adopted by the courts in many states, that the worthier title doctrine should be a rule of construction, with a rebuttable presumption that the grantor intended to create an indefeasible reversion, seems preferable. The reason it is preferable is that experience seems to teach that often the gift to the heirs at law of a grantor or testator is simply an end limitation, written in by the lawyer-draftsman at the end, after exhausting all of the alternative special beneficiaries whom the transferor had in mind. Under such circumstances the transferor seldom would have a real desire to make a class gift to those who would constitute his heirs at law, with all the possible wide fluctuations which could take place, regardless of whether they are determined as of his death or as of the date of distribution.

The worthier title doctrine is important today for estate tax purposes because under the Tennessee rule a reversionary interest is retained which will cause the property to be included in the transferor's gross estate.[22] It is also important if the grantor subsequently marries, or

17. UNIFORM PROPERTY ACT §§ 14-15.
18. NEB. REV. STAT. §§ 76-114, 76-115 (1943).
19. MINN. STAT ANN. § 500.14 subdiv. 4 (West 1947).
20. KAN. GEN. STAT. ANN. § 58-506 (1949).
21. N. C. GEN. STAT. ANN. § 41-6 (1943). See Thompson v. Batts, 168 N. C. 333, 84 S.E. 347 (1915).
22. 26 U.S.C.A. § 811(a), (c) (1948).

if his creditors seek to reach his property, or when the termination of an inter vivos trust is sought.[23]

The Destructibility of Contingent Remainders: The argument in *Cochran v. Frierson*[24] that an alternative contingent remainder was created in favor of those nephews and nieces alive at the death of the life tenant was rejected by the Supreme Court. But if it had been adopted by the court as the construction of the 1886 deed, it would not have helped the nephews and nieces if the doctrine of *Ryan v. Monaghan*[25] and *Lumsden v. Payne*[26] had been asserted. These cases adopt in Tennessee the ancient feudal rule that a contingent remainder is destroyed if it fails to become vested prior to the termination of the prior freehold estate.[27]

Since the abolishment of the fee tail, a contingent remainder must be supported by a life estate in Tennessee.[28] When the life estate is terminated before the contingent remainder becomes vested, the latter is destroyed. In addition to the normal expiration of a life estate, it is frequently terminated in modern times by a conditional event, or by a merger of the life estate into a larger estate. Under common law doctrine there can be no such thing as a fee simple subject to a contingent remainder; but there can be a fee simple subject to an executory interest.[29]

Applying this principle to the argued analysis in *Cochran v. Frierson,* if the deed is construed to create a life estate in *B* with alternative contingent remainders, there is automatically created a defeasible reversion in the grantor which would have been divested when one of the alternative contingent remainders became vested. When the grantor died in 1920, this reversion necessarily descended to *B*, the life tenant, who was also the grantor's sole heir at law. Under the principle of merger, referred to in Blackstone,[30] the life estate is merged into the reversion to make a fee simple, so that the contingent remainder is no longer supported by a life estate, and accordingly is destroyed.[31]

The destructibility rule, applicable only to real estate, makes it

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23. See note 15 *supra.*

24. *Supra* note 1.

25. 99 Tenn. 338, 42 S.W. 144 (1897).

26. 120 Tenn. 407, 114 S.W. 483 (1907).

27. 1 AMERICAN LAW OF PROPERTY §§ 4.59-4.63 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS §§ 98-102 (1936).

28. Notes 25 and 26 *supra.*

29. Note 27 *supra.*

30. 2 BL. COMM. *177.

31. 1 AMERICAN LAW OF PROPERTY § 4.60 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS § 102 (1936).

necessary for the lawyers in Tennessee who draft deeds, wills and trust instruments, to distinguish between contingent remainders and executory interests. The latter are not affected by the rule.

Class Gift or Gift to Individuals: In *Jones v. Donelson*[32] the testatrix made a gift of her estate as follows:

> "I wish my estate to be divided equally between my sister, Mrs. John Donelson and nieces, Mrs. Mary Hooper Donelson Jones, Mrs. Eleanor Randle Hunter, Mrs. Mary Love Doubleday, Mrs. Elizabeth Love Brittain, and Mrs. Grayson Love Hancock. In the event either should pass away, divide estate among remaining ones."[33]

The testatrix was survived by all of the named beneficiaries. The question of construction is whether the testatrix intended for her estate to be divided into six equal shares; or whether she intended for her sister to receive one-half, and for the remaining half to be divided equally among her nieces. The Chancellor adopted the latter construction. The Court of Appeals, Middle Section, reversed and entered a decree deciding that the estate should be divided into six equal shares.

In behalf of the sister it was argued that the testatrix intended to constitute her sister "as one class and the nieces as another class, the sister taking one-half and the nieces the other half."[34] The court went to some length to show that this was not a class gift. Characteristics of a class gift are that the will shows that the testator is more interested in a group, as such, rather than particular individuals, and that there is some possibility of a fluctuation in the membership of the group between the execution of the will and either the death of the testator or the time of distribution.[35] Where the beneficiaries are specified by their individual names, the construction preference has become rather firmly established that a gift to individuals is intended, and not to a class.[36] But in some cases this construction preference may be overcome where there is other evidence of intent to create a class gift.[37]

In view of the second sentence of the will in the *Donelson* case as set forth above, it would not seem to make any difference whether the will is construed to create a class gift or a gift to separate indi-

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32. 264 S.W.2d 828 (Tenn. App. M.S. 1954).
33. *Id.* at 829.
34. *Id.* at 830.
35. See generally 5 AMERICAN LAW OF PROPERTY §§ 22.4-22.11 (Casner ed. 1952); SIMES, FUTURE INTERESTS 292 (1951).
36. *Ibid.*
37. *Ibid.*

viduals. Under either construction, only those beneficiaries living at the death of the testatrix could take. The basic ambiguity seems to continue whether you regard the sister and the nieces as a single class, two classes, or as individual beneficiaries. Was it intended that the sister share equally with the nieces? Or was she to receive one-half the net estate?

Mortgage By Life Tenant—Special Improvement Tax: In Morrow v. Person[38] the testator made a gift of land to his widow for life, remainder to his daughter for life, and remainder in fee to the children of the daughter. After the widow's death, the daughter took possession of the land and mortgaged it. This mortgage was foreclosed and the daughter's interest was purchased by the defendant. A part of the land was later sold to *A* for delinquent drainage district assessments. The defendant then purchased the land from *A*. Held, when the defendant purchased the land sold for delinquent special improvements tax, he did not thereby defeat the rights of the remaindermen; the title so acquired by the life tenant will be considered as a redemption and restoration of the rights of the remaindermen as well as of the life tenant; the remaindermen, however, will have to pay their portion of the delinquent assessments.

The apportionment of charges, expenses, and improvements between life tenant and remaindermen or reversioners is often difficult to ascertain and to calculate fairly. Taxes, insurance, mortgage principal and interest, and necessary repairs are indicative of the sources of dispute. The life tenant is usually required to pay current taxes during the period of his ownership, limited to the value of the rents and profits to which he is entitled.[39] But since a permanent improvement adds to the value of the remainder or reversion as well as to the value of the life estate, it is generally held that the special assessment must be apportioned according to the value of the estate of each.[40] The value of the life estate and that of the remainder are determined by first finding the value of the life estate. This is done by computing the present value of an annuity equal to the annual income or rental value of the property for the probable duration of the life of the life tenant, and then subtracting the value of the life estate so found from the present total value of the property. The difference will be the value of the estate in reversion or remainder.[41] The life tenant is

38. 195 Tenn. 370, 258 S.W.2d 665 (1953).

39. 1 AMERICAN LAW OF PROPERTY § 2.19 (Casner ed. 1952); 3 SIMES, FUTURE INTERESTS § 631 (1936).

40. 1 AMERICAN LAW OF PROPERTY § 2.21 (Casner ed. 1952); 3 SIMES, FUTURE INTERESTS § 635 (1936).

41. 1 AMERICAN LAW OF PROPERTY §§ 2.21, 2.25 (Casner ed. 1952).

charged with the entire amount where the life of the improvement is not in excess of the probable duration of the life estate.[42]

The instant case holds in accord with what seems to be a well established principle that the life tenant of land is a trustee for remaindermen. The courts have applied this principle to hold that neither a life tenant nor one claiming under him may allow the property to be sold for taxes, or the satisfaction of an encumbrance, or interest, and later acquire a title adverse to the remaindermen or reversioner by purchasing at the sale himself, or through another.[43]

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42. Wordin's Appeal, 71 Conn. 531, 42 Atl. 659 (1899); Huston v. Tribbetts, 171 Ill. 547, 49 N.E. 711 (1898); Reyburn v. Wallace, 93 Mo. 326, 3 S.W. 482 (1887); Hitner v. Page, 23 Pa. 305 (1854).

43. King v. Sharp, 25 Tenn. 55, 57 (1845); Miller v. Gratz, 3 Tenn. App. 498, 508 (1926); 21 COR. JUR., *Estates* § 74, (1920); 31 C.J.S. *Estates* § 35 (1942).