

EQUIVALENCE OF RIGHT OF ENTRY AND RIGHT OF REVERTER

A possibility of reverter is a future interest created in the grantor of a determinable fee. A right of entry for condition broken is a future interest created in the grantor of a fee on condition subsequent.¹ It is commonly said that a possibility of reverter takes effect "automatically" upon the occurrence of the event on which the determinable fee is limited² whereas a right of entry for condition broken does not take effect "automatically", but only when the holder of the right of entry has effected a forfeiture following a breach of the condition subsequent.³ The automatic nature of a possibility of reverter is said to be important for a number of situations some of which are as follows:

1. On the occurrence of the event upon which a determinable fee is limited, the holder of the possibility of reverter automatically becomes seised of the fee. His wife, therefore, gains an inchoate right of dower immediately. But on a breach of a condition subsequent the wife of the holder of the right of entry acquires an inchoate right of dower only after her husband has effected a forfeiture.⁴ If the husband dies before effecting a forfeiture, his wife never acquires a right of dower.

2. Statutes of limitation relating to the recovery of real property begin to run against the holder of a right of entry only after he has effected a forfeiture of the prior estate.⁵ The implication is that the statutes begin to run against the holder of a possibility of reverter upon the occurrence of the event on which the determinable fee is limited.

3. Creditors are generally allowed to reach any property interest of the debtor which is alienable *inter vivos*.⁶ After the occurrence of the event on which a determinable fee is limited,

¹ A right of entry may spring into existence when a condition subsequent is attached to either a fee simple, a fee tail, a life estate or a term for years. 1 SIMES AND SMITH, *FUTURE INTERESTS* §252 (1956). In this paper, however, a right of entry will be used to refer only to the future interest which exists in conjunction with a fee on condition.

For alternate terminology see 1 RESTATEMENT, *PROPERTY*, Introductory note to Ch. 4 (1936); RESTATEMENT, *PROPERTY*, §155 (1936); 1 SIMES AND SMITH, *FUTURE INTERESTS* 270, n. 1 (1956).

² 1 AMERICAN LAW OF PROPERTY 427 (Casner ed. 1952); RESTATEMENT, *PROPERTY* §23 (1936); 1 SIMES AND SMITH, *FUTURE INTERESTS* 330 (1956).

³ 1 AMERICAN LAW OF PROPERTY 418 (Casner ed. 1952); RESTATEMENT, *PROPERTY* §24, Comment b (1936); 1 SIMES AND SMITH, *FUTURE INTERESTS* 272 (1956).

⁴ CAREY AND SCHUYLER, *ILLINOIS FUTURE INTERESTS* 70-71 (1941); 1 AMERICAN LAW OF PROPERTY 643 (Casner ed. 1952); 1 SIMES AND SMITH, *FUTURE INTERESTS*, 326 (1956).

⁵ 1 AMERICAN LAW OF PROPERTY 426 (Casner ed. 1952).

⁶ 1 AMERICAN LAW OF PROPERTY 538 (Casner ed. 1952); RESTATEMENT, *PROPERTY* §§166, 167 (1936); 4 SIMES AND SMITH, *FUTURE INTERESTS* 210 (1956).

the holder of the possibility of reverter is automatically invested with the fee. A fee is obviously alienable. But even after breach of the condition subsequent, the holder of the right of entry who has not effected a forfeiture has only a right of entry. Rights of entry are generally not alienable, even after breach of the condition subsequent.⁷

Although the foregoing list does not include all the situations where it is said to be important to know whether a future interest takes effect automatically, it does include some of the situations very commonly mentioned.

Do solutions to the problems listed above *really* depend on whether the future interest takes effect automatically rather than by forfeiture? If not, it becomes unnecessary to distinguish between rights of entry and possibilities of reverter in deciding whether a widow has dower, whether a creditor has any rights or whether a statute of limitation has run. If it is found that there is no need to distinguish between possibilities of reverter and rights of entry in solving *other* problems, there arises a question of the desirability of retaining the distinction. Before beginning an investigation to determine whether important consequences attach to the fact that a future interest is designated a right of entry rather than a possibility of reverter, it seems appropriate to review briefly the nature of these interests and the language needed for their creation.

A determinable fee is an estate of indefinite duration which terminates automatically upon the occurrence of some specified event.⁸ Upon the termination of the determinable fee, the holder of the corresponding possibility of reverter becomes vested with the fee. The possibility of reverter must originally have been created in the grantor of the determinable fee or in his successor.⁹

A fee on condition subsequent is of potentially infinite duration.¹⁰ But it is terminated only when (1) a specified event occurs and (2) the holder of the right of entry effects a forfeiture of the fee on condition and thereby invests the fee in himself.¹¹ The right of entry must originally

⁷ 1 AMERICAN LAW OF PROPERTY §4.68 (Casner ed. (1952)); RESTATEMENTS PROPERTY §160, Comment b (1936); 4 SIMES AND SMITH, FUTURE INTERESTS §1862 (1956).

⁸ A determinable fee may be limited on an event certain to occur, *e.g.*, "so long as the oak tree stands . . ." But if the event is certain to occur at or before the death of some designated person [*e.g.*, while May remains a widow] the estate is likely to be considered a life estate. See 1 SIMES AND SMITH, FUTURE INTERESTS 337 (1956); RESTATEMENT, PROPERTY 44, Comment i (1936).

⁹ 1 AMERICAN LAW OF PROPERTY 427 (Casner ed. 1952); RESTATEMENT, PROPERTY §154, Comment b (1936); 1 SIMES AND SMITH, FUTURE INTERESTS 327 (1956).

¹⁰ A fee may be given on a condition subsequent which is certain to occur, *e.g.*, "but when A dies . . ." RESTATEMENT, PROPERTY §45, Illustration 6, (1936). Yet the fee on condition may last forever if the holder of the right of entry fails to effect a forfeiture of the fee within a reasonable time after breach of the condition subsequent. See STATUTES OF LIMITATION, *infra*.

¹¹ See note 3, *supra*.

have been created in the grantor of the fee on condition subsequent or in his successor.¹²

The event which terminates a determinable fee can be identical to the event specified in a fee on condition subsequent. Consequently it is impossible to distinguish the interests by the nature of the event. The only way to determine which of the two interests has been created is by examining the donor's choice of language.

By long settled construction the words "so long as," "during," or "until" are deemed to create a determinable fee, while the words "but if," "provided that," and "on condition that" are deemed to create a fee on condition subsequent.¹³

With this background in mind an attempt will now be made to determine the extent to which the statements in the preceding list are, or may be, inaccurate. The discussion will not be limited to an investigation of the inaccuracies arising from contemporary cases and statutes but will include references to inaccuracies which might arise from future cases when there are no cases in point.

DOWER

A widow's right to dower in the lands of her deceased husband depends in general on the husband's having been seised of the land during coverture.¹⁴ There are many statements to the effect that the holder of a right of entry does not become seised of land merely by virtue of a breach of the condition on which the fee is given but that the fee on condition must first be forfeited.¹⁵ Consequently, if the holder of the right of entry fails to effect a forfeiture before his death his wife acquires no dower. It is assumed, however, that the holder of a possibility of reverter becomes seised of the fee and that his wife thereby gains an inchoate right of dower immediately upon the occurrence of the event limiting the determinable fee.¹⁶

The only cases discovered by the author which hold that a widow acquires no dower in land to which her husband at his death held an unexercised right of entry are in England and Missouri.¹⁷ These cases have all been overruled by statute.¹⁸ Consequently, a wife acquires an

¹² 1 AMERICAN LAW OF PROPERTY 417 (Casner ed. 1952); RESTATEMENT, PROPERTY §155 (1936); 1 SIMES AND SMITH, FUTURE INTERESTS 271 (1956).

¹³ 1 AMERICAN LAW OF PROPERTY §2.6 (Casner ed. 1952); 1 SIMES AND SMITH, FUTURE INTERESTS §§247, 286 (1956).

¹⁴ 1 AMERICAN LAW OF PROPERTY 640 (Casner ed. 1952).

¹⁵ *Ibid.*

¹⁶ See CAREY AND SCHUYLER, ILLINOIS FUTURE INTERESTS 70-71 (1941).

¹⁷ *Ellis v. Kyger*, 90 Mo. 600, 3 S.W. 23 (1886), and cases cited in PERKINS, PROFITABLE BOOK §§366, 367 (1836).

¹⁸ 3 & 4 WM. IV, c. 105, §3 (1833); MO. REV. STAT. ANN., §340 (1939). By a more recent statute, Missouri has completely abolished dower. MO. PROBATE CODE, §474.10 (1955). Other statutes similar to 3 & 4 WM. are VA. CODE ANN. §64-28 (1950), and W. VA. CODE ANN., §4097 (1955).

inchoate right of dower when the specified event occurs even though the husband has not effected a forfeiture.

It is incorrect to assume that a wife of one who has a possibility of reverter always acquires an inchoate right of dower upon the occurrence of the event on which the determinable fee is limited. Dower generally requires that the husband be seised during coverture.¹⁹ Seisin either in deed or in law is sufficient.²⁰ Seisin in deed requires actual possession.²¹ Seisin in law requires (1) that there be an immediate right to possession, and (2) that the land be possessed by no other person.²² If then the land was in the possession of someone other than the husband during the period between the occurrence of the specified event and the husband's death, the wife gained no inchoate right of dower because the husband never acquired seisin either in deed or in law. This conclusion follows whether the husband had a right of entry or a possibility of reverter.

STATUTES OF LIMITATION

It is generally said that statutes of limitation relating to the recovery of real property do not begin to run against the holder of a right of entry until he has effected a forfeiture of the corresponding fee on condition subsequent.²³ The implication of such statements is that the statutes begin to run against the holder of a possibility of reverter immediately upon the occurrence of the event on which the estate is limited. If the foregoing propositions are unqualifiedly true, the importance of distinguishing between a right of entry and a possibility of reverter is obvious. Upon examination, however, it appears that in many situations where statutes of limitation are involved results do not depend on whether a right of entry or possibility of reverter is found to exist.

Some states have statutes which run against rights of entry and possibilities of reverter even though the specified event has not occurred.²⁴ Some states have statutes which provide explicitly for the running of the statutes either upon the occurrence of the event limiting a determinable

¹⁹ See note 16, *supra*.

²⁰ 1 AMERICAN LAW OF PROPERTY 640 (1952); WILLIAMS, SETTLEMENTS 82 (1876).

²¹ 1 AMERICAN LAW OF PROPERTY 640 (1952); LIGHTWOOD, POSSESSION 5 (1894).

²² *Savage v. Savage*, 85 Cal. 418, 23 P. 890 (1890); *Martin v. Trail*, 142 Mo. 85, 43 S.W. 655 (1897); MAITLAND, THE MYSTERY OF SEISIN, in 3 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 597 (1909); WATKINS, DESCENTS 34 (4th ed. 1837).

²³ 1 AMERICAN LAW OF PROPERTY 602 (Casner ed. 1952); 4 SIMES AND SMITH, FUTURE INTERESTS §1966 (1956).

Whether the statute limits an action "from the time when the cause of action first accrues," *e.g.*, N. H. REV. STAT. ANN., c. 508, §2 (1955) or from the time when the claimant or his predecessor in title was "seised" or "in possession", *e.g.*, S. C. CODE ANN., §10-126 (1952), is deemed irrelevant. 4 SIMES AND SMITH, FUTURE INTERESTS, 239-40 (1956).

²⁴ See *e.g.*, S. D. CODE §33.0228 (1939); TENN. CODE ANN., §28-201 (1955); WASH. REV. CODE §7.28.070 (1951); 4 SIMES AND SMITH, FUTURE INTERESTS §1963 (1956).

fee or upon the breach of the condition subsequent of a fee on condition.²⁵ Additional states have statutes which have been construed as providing equal treatment in such circumstances for both rights of entry and possibilities of reverter.²⁶ And it seems probable that the statutes in many states where the problem has not arisen would be construed to provide equal treatment.²⁷

Even those jurisdictions which hold that the statute of limitation does not run against the holder of a right of entry until he has effected a forfeiture do not allow the holder an indefinite period of time in which to effect a forfeiture. He is limited to a "reasonable" period of time.²⁸ One court has held that any period which does not exceed the period allowed by the statute of limitation is reasonable.²⁹ It is but a short step (not a necessary one, however) to the conclusion that any period which exceeds that allowed by the statute of limitation is unreasonable.³⁰ Thus, under certain circumstances, it would be unnecessary to distinguish between rights of entry and possibilities of reverter even though the statute is deemed to commence running at different times.

Assume that the statute begins running against the holder of a possibility of reverter upon the occurrence of the specified event and that it begins running against the holder of a right of entry only when the fee on condition has been forfeited. Assume also that exercise of the right of entry is limited by reference to the statute of limitation and that the holder of the right of entry has done nothing which amounts to an election to forfeit the fee on condition subsequent. If then, the event

²⁵ See *e.g.*, ILL. S.H.A., c. 83 §1a (1956); MICH. STAT. ANN., §27.595 (1938); MASS. ANN. LAWS, c. 260 §23 (1956).

²⁶ See *e.g.*, COLO. REV. STAT., c. 118, Art. 8-4 (1953), interpreted in *Wolf v. Hollenbeck*, 109 Colo. 70, 123 P. 2d 412 (1942); CONN. GEN. STAT., §8314 (1949), interpreted in *Nearing v. City of Bridgeport*, 137 Conn. 205, 75 A 2d 505 (1950); and VA. CODE ANN., c. 8, §5 (1950) interpreted in *Sanford v. Sims*, 191 Va. 644, 66 S. E. 2d 459 (1951). See also ILL. REV. STAT., c. 83, §3 (1953) [the predecessor of the present Illinois statute, *supra*, note 25] interpreted in *Starke v. Penn Mut. Life Ins. Co.*, 390 Ill. 619, 61 N. E. 2d 552 (1945).

²⁷ See for example the New Hampshire statute: "No action for the recovery of real estate shall be brought after twenty years from the time the right to recover first accrued to the party claiming it, or to some person under whom he claims." N. H. REV. STAT. ANN., c. 508, §2, (1955).

Compare it with CONN. GEN. STAT., §8314 (1949), which was construed in *Nearing v. City of Bridgeport*, *supra*, note 26 to begin running against the right of entry as soon as the condition subsequent was broken: "No person shall make entry into any lands or tenements but within fifteen years after his right or title to the same shall first descend or accrue . . ."

²⁸ 1 SIMES AND SMITH, FUTURE INTERESTS 310 (1956).

²⁹ *Zazos & Miss. Valley R. R. Co. v. Lakeview Traction Co.*, 100 Miss. 281, 56 So. 393 (1911).

³⁰ *Jeffries v. State for Use of Woodruff Co.*, 216 Ark. 657, 226 S. W. 2d 810 (1950).

specified in the fee on condition subsequent can occur only *once*³¹ there is no need to distinguish between rights of entry and possibilities of reverter. For after the expiration of a period of time determined by reference to a statute of limitation, a determinable fee becomes a fee simple by virtue of the doctrine of adverse possession and a fee on condition can never be forfeited even though technically a right of entry still exists. The fee on condition can never be forfeited because by hypothesis the condition subsequent was capable of occurring only once and a forfeiture for that one breach has already been barred by the lapse of an unreasonably long period of time. If however, the event specified in a fee on condition is capable of occurring more than once,³² the expiration of a period of time corresponding to the period of the statute of limitation will not necessarily prevent a forfeiture from ever occurring. The expiration of time prevents exercise of the right of entry only for past breaches but not necessarily for future breaches.

Many of the events specified in a fee on condition subsequent or in a determinable fee are of a "continuous" nature.³³ These events have on occasion been deemed single and indivisible and on occasion separate and distinct.³⁴

Thus far, the discussion relating to statutes of limitation has been concerned with situations where both rights of entry and possibilities of reverter become *ineffective* at the same time and where this time is computed from the date that the condition subsequent or the event limiting the determinable fee occurred. It is possible, however, that both rights of entry and possibilities of reverter remain *effective* after the occurrence of the specified event for a period exceeding the period of the statute of limitation.

For example, statutes of limitation do not begin running against the holder of a right of entry when the condition subsequent occurs but only when a forfeiture is declared.³⁵ And they do not run against tenants at sufferance until the "landlord" has made an election to treat the "tenant" as a wrongdoer rather than as a "tenant,"³⁶ or until the tenant

³¹ An example of an event capable of occurring only once is, "When St. Paul's Church falls . . ."

³² An example of an event capable of occurring more than once is, "If my widow should ever marry . . ."

³³ 1 SIMES AND SMITH, FUTURE INTERESTS §259 (1956). An example of a continuing breach is use of land for non-church purposes when the deed specifies that the land be used for church purposes.

³⁴ See *e.g.*, *City of New York v. Coney Island Fire Dept.*, 285 N. Y. 535, 32 N. E. 2d 827 (1941), *affirming* 255 App. Div. 286, 18 N.Y.S. 2d 923 (1940), (where a use for non-fire purposes in a conveyance requiring use for fire purposes was deemed by implication to be several distinct breaches) and *Barrie v. Smith*, 47 Mich. 130, 10 N. W. 168 (1881), (where a sale of intoxicating liquors was held to be a single and entire breach).

³⁵ See note 26, *supra*.

³⁶ 1 AMERICAN LAW OF PROPERTY 236 (Casner ed. 1952); 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 178-9 (1947).

has given notice to the landlord of the hostile nature of his possession.³⁷ According to the definition given in the Restatement one who holds over after the occurrence of the event limiting a determinable fee could be considered a tenant at sufferance.³⁸ Thus, in a jurisdiction adopting these views it would be unnecessary to distinguish between a right of entry and a possibility of reverter where the owner of the future interest has done nothing which amounts either to a forfeiture or to an election and the tenant has not put the landlord on notice by his hostile acts.

CREDITORS' RIGHTS

The rights of creditors to a particular property interest generally depend on the alienability of the interest.³⁹ Rights of entry, in the absence of statutes, are generally held inalienable.⁴⁰ Thus even after the occurrence of the event on which the fee on condition subsequent is limited, there is nothing that creditors can reach until a forfeiture is effected. But after the occurrence of the event on which the determinable fee is limited, the holder of the possibility of reverter automatically acquires a fee simple which, of course, is alienable and therefore subject to attachment. It should be noted that creditors are treated similarly with respect to these interests after the specified event has occurred only where the right of entry is alienable. The holder of the possibility of reverter acquires the fee upon the occurrence of the event so that creditors may reach the interest irrespective of the alienability of the possibility of reverter. But since a right of entry remains only a right of entry until forfeiture, creditors can reach it only if it is alienable.

Many states have statutes which provide *explicitly* that rights of entry are alienable.⁴¹ Therefore they would be subject to creditors' claims. Many states have statutes which have been *construed* as making rights of entry alienable.⁴² There are also a large number of states which have no decisions on the alienability of rights of entry.⁴³ At least some

³⁷ 3 AMERICAN LAW OF PROPERTY 792 n. 3 (Casner ed. 1952).

³⁸ "An estate at sufferance is an interest in land which exists when a person who had a possessory interest in land by virtue of an effective conveyance, wrongfully continues in the possession of the land after the termination of such interest, but without asserting a claim to a superior title." RESTATEMENT, PROPERTY §22 (1936).

³⁹ See note 7, *supra*.

⁴⁰ See note 8, *supra*.

⁴¹ CAL. CIVIL CODE ANN., §1046 (1954); CONN. GEN. STAT., §7118 (1949); IDAHO CODE ANN., §§5-502 (1948); MICH. STAT. ANN., §26.851 (1953); MINN. STAT. ANN., §500.16 (1947); N.J. STAT. ANN., §46.3-7 (1940); N. M. STAT. ANN., §70-1-21 (1953); R.I. GEN. LAWS ANN., c. 433, §10 (1938).

⁴² KAN. GEN. STAT. ANN., §§67-202, 67-208, 77-201 (1949), construed in *Shell Pet. Corp. v. Hollow*, 70 F. 2d 811 (C.C.A. 10th 1934); *Ky. Rev. Stat. Ann. §§381.210, 382.010* (1955), construed in *Ky. Coal Lands Co. v. Min. Dev. Co.*, 295 Fed. 255 (C.C.A. 6th 1924); *Miss. Code Ann.*, §831 (1942), construed in *Hamilton v. Jackson*, 157 Miss. 284, 127 So. 302 (1930); *Va. Code Ann.*, §55-6 (1950), construed in *Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324 (1930).

⁴³ 1 AMERICAN LAW OF PROPERTY 530 (Casner ed. 1952).

of these have general statutes which would probably be construed as making both rights of entry and possibilities of reverter subject to creditors' claims.⁴⁴

At least one state has held that a right of entry is alienable after breach and, therefore, subject to the claims of creditors even though inalienable before breach.⁴⁵

Although rights of entry are generally held inalienable in the absence of statute, most states have statutes which either have been or could be construed as making rights of entry subject to creditors' claims. If the statutes are so construed there is no need to distinguish between rights of entry and possibilities of reverter in problems involving creditors' rights.

CONCLUSION

In *Sanford v. Sims* the judge said, "Technically, perhaps, there is a distinction between a possibility of reverter and a right of entry for breach of a condition subsequent; but the distinction is usually not observed and . . . [they] are treated the same."⁴⁶ Although the judge made no survey of the situations where a distinction between these interests is unnecessary, his conclusion seems correct with respect to the problems considered herein.

To summarize: assuming that the specified event which terminates a determinable fee has occurred or that the condition subsequent of a fee on condition has been broken, *it is unnecessary to distinguish between rights of entry and possibilities of reverter:*

- 1.) in determining a wife's right to dower in these interests where
 - (a.) land was occupied by someone other than the husband in the period between the occurrence of the event and the husband's death; or
 - (b.) dower is by statute expressly given to the wife upon the occurrence of the event specified in a fee on condition subsequent;
- 2.) in determining whether a statute of limitation has run against the holder of one of these interests where
 - (a.) statutes have changed the common law rule so that

⁴⁴ It seems that most states have some general statutes which could be construed as making rights of entry alienable in view of the fact that the following statutes were deemed to have this effect:

"Any person claiming title to real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein, in the same manner and with like effect as if he was in the actual possession thereof." KAN. GEN. STAT. ANN., §67-208 (1949).

"The word 'land' and the phrases 'real estate' and 'real property,' include lands, tenements and hereditaments, and all rights thereto and interest therein, equitable as well as legal." KAN. GEN. STAT. ANN., §77-201 (1949). Construed in *Shell Pet. Corp. v. Hollow*, 70 F. 2d 811 (C. C. A. 10th 1934).

⁴⁵ 4 SIMES AND SMITH, FUTURE INTERESTS 181 n. 91 (1956).

⁴⁶ 192 Va. 644, 647, 66 S. E. 2d 495, 497 (1951).

- the statute "runs" irrespective of whether the holder of a right of entry has effected a forfeiture of the fee on condition subsequent; or
- (b.) the event specified in a fee on condition subsequent may occur only once and exercise of the right of entry for a particular breach is limited by reference to the statute of limitation; or
 - (c.) where the running of the statute is tolled by virtue of a tenant at sufferance holding over;
- 3.) in determining creditors' rights, where rights of entry are held to be alienable. Alienability may result from express statutes, general statutes, or even from case law.

It cannot be denied that a widow's right to dower, creditors' claims to property and the applicability of a statute of limitation sometimes depend on whether an interest is classified as a right of entry or a possibility of reverter. But for these particular problems it seems that the distinction is less significant than generally indicated. It is not unreasonable to suppose, as the court indicated in *Sanford v. Sims*,⁴⁷ that the distinction is unimportant for other problems as well. If further study indicated that this distinction really *did* lack importance for other problems, there would arise a question of the desirability of maintaining "a distinction without a difference."

Even though the distinction were found to be significant for other problems, an important question would remain, *i.e.*, *should* contemporary problems be solved by reference to a distinction based on ancient history?

Many modern statutes indicate an intent to answer the question in the negative. Statutes relating to dower, to alienation and to the limitation of actions are examples of dissatisfaction with the results flowing from the common law distinction.

⁴⁷ See note 46, *supra*.