Transmissibility of Future Interests in Pennsylvania

Dale F. Shughart
"It is argued by the Attorney General that a critical examination of this statute will lead to the conclusion, that the legislature, in prescribing the punishment for escape, intended to fix the maximum penalty to be inflicted at not to exceed the term which the convict was serving at the time of his escape, and to leave to the discretion of the trial court the punishment not exceeding the maximum . . . . To give this construction to this statute it seems to us would be to legislate upon the subject, and supply what we might conceive to be necessary in order to sustain the constitutionality of the statute. If this be the rule which would guide courts in determining the constitutionality of a statute, the court would have little difficulty in sustaining all legislative acts, because they might supply all such defects or alterations by judicial legislation. We, however, must take this statute as it reads, and when so taken, the punishment is fixed arbitrarily, and is not in any sense left to the discretion of the trial court . . . ." (16 Idaho 737 at 749, 750, 102 Pac. 374, at 377, 378). (Italics added).

The statute involved in the case of State v. Johnsey, 387 Pac. 729, 46 Okla. Cr. App. 233 (1930) was very similar to the Pennsylvania act. That statute provided that any person who escaped from or broke the state prison, should upon conviction be punished by imprisonment for a term not exceeding double the term for which he was originally sentenced.

Notwithstanding the discretionary features of the act before it, the Court of Criminal Appeal of Oklahoma, relying upon In Re Mallon, supra, held that the classification set up in the act was unreasonable and that the act violated the provisions of the Fourteenth Amendment of the Constitution of the United States.

Because the decision of the Supreme Court of Pennsylvania, upholding the Pennsylvania Statute, was felt to be in conflict with this decision of the Oklahoma Court, the Supreme Court of the United States issued a writ of certiorari for the purpose of reviewing the question, and, as indicated above, affirmed the views expressed by the Pennsylvania Court.

William Wood.

TRANSMISSIBILITY OF FUTURE INTERESTS IN PENNSYLVANIA

It is the purpose of this note to discuss the extent to which Pennsylvania will permit the alienation of contingent future interests. Each method of alienation or transfer will be treated separately to discover what progress has been
made in permitting alienation of such interests. In doing this it must be borne in mind that, "at common law no interest that was not an 'estate' in the narrow sense of that term was alienable inter vivos." The future interests about which we are speaking were not within that definition of "estates." Later, after the statute of Quia Emptores, most interests were considered alienable but still contingent remainders, springing and shifting uses, rights of entry for condition broken and possibilities of reverter were still inalienable. The reason given was that they were not "estates" as that term was used at common law and the transfer of a possibility of becoming an estate was champertous.

**VOLUNTARY ALIENATION**

With this background we turn to the case law of Pennsylvania to note the changes that have been made from the common law of England.

Vested interests have been held to be alienable inter vivos everywhere. Pennsylvania is considered by writers as being among the jurisdictions that have reached the conclusion that future interests are alienable without the aid of a statute. A leading case on the assignment of a contingent remainder is *Whelen v. Phillips.* To quote the language of the court at page 322:

"But, without inquiring as to the present status of the law elsewhere, it may be confidently asserted that in this state a person sui juris, owning a contingent remainder in land, or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the former does not stand towards him in a trust relation, and in making the purchase acts in good faith."

Some of the cases speak of vested remainders being alienable when in reality they mean vested interests in contingent remainders. What is meant by this anomalous phrasing is that if the person to take is ascertained, but the interest is contingent as to the event, then it is considered a vested interest in a contingent remainder. What has occurred in these cases is that the courts have confused the word "vested" and define it to mean transmissible. An example of such confusion in terms is the case of *Chess's Appeal.* In that case a contingent interest was considered vested and therefore transferable. The qualifi-

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1. Leach, Cases and Materials on Future Interests, 175.
2. Supra 1, and Williams, Real Property 398-400.
5. 151 Pa. 312. See also Wickersham's Appeal, 18 W.N.C. 36; Richardson's Estate, 236 Pa. 136; Phillips's Estate, 205 Pa. 511.
6. See cases post note 8.
cation that the contingency must not be as to the person to take runs through most of the cases in such a way that we may consider it as the law of this state that a contingent interest is alienable inter vivos so long as the contingency is not as to the person to take.

"Unless the contingency is one which affects the capacity to take, a contingent remainder or other contingent interest is transferable, even though not in the technical sense vested."9

Even though a contingent remainder is contingent as to the person to take an attempted transfer may act as a contract to convey so that if and when it vests, equity will compel a transfer.10 There would seem to be no valid reason preventing such a transfer by estoppel in this state since it has been held that an expectant heir or devisee in the lifetime of the testate or intestate may sell his expectant interest.

"An heir, or an expectant devisee or legatee, may in the lifetime of the intestate or testate, in equity, sell or assign his expectant or contingent interest, whatever it may turn out to be upon the death of the person from whom it may come, which contract if made upon valuable consideration, a court of equity will enforce."11

Other cases12 have stated that the same rule applies to an attempted direct conveyance of a contingent interest and an executory contract to convey, both being enforceable in equity if and when the interest vests. Since the attempted conveyance acts as a contract to convey, to be enforceable in equity there must be valuable consideration and a seal will not be sufficient.13

"Equity will support assignments of contingent interests and expectancies; things which have no present actual existence but rest in possibility, not indeed as a present positive transfer operating in praesenti; for that can only be of a thing in esse, but as a present

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9 Brooke's Estate, 214 Pa. 46—citing Gray on Perpetuities, Section 118. The case also cited 4 Kent 262, 511 with approval, "It is settled that all contingent interests of inheritance ... where the person who is to take is certain, are transmissible by descent and are devisable and assignable."


11 Power's Appeal, 65 Pa. 443. —language following quotation above, "If so, there can be no reason why a father should not make such a contract with a son, which would entirely bar all his claim as an heir to any part of his parents' estate." Mechanics Nat. Bk. v. Buckman, 56 Pa. Super. Ct. 285, dealing with personal property.


13 Baylor v. Commonwealth, 40 Pa. 37, not operative as a contract since without actual consideration.
contract to take effect and attach as soon as the thing comes in esse."\(^{14}\)

The result in Pennsylvania then would seem to be that contingent interests where the person is ascertained are freely alienable; and where the person is not ascertained such a conveyance acts as a contract to convey which will be enforced in equity.

Possibilities of reverter also have been held to be alienable.\(^{15}\) There seems to be no valid reason why they should not be when other contingent interests are so considered. They are not subject to the rule against perpetuities so that there should be some means to alien and free a holder of the fee from the nuisance.\(^{16}\)

In the early case of *McKissick v. Pickle*,\(^ {17}\) Chief Justice Gibson held that a right of entry for breach of condition could be sold on execution. By analogy we can say if this is true it would also be alienable voluntarily. In his opinion he stated that the reason for the contrary view was that, permitting alienation would "favor maintenance and promote litigation."\(^ {18}\) His reply to this was that the law of maintenance has never been adopted in this state, and

"This is a fair case for the application of the maxim, 'cessante ratione cessat ipse lex'."

The courts have from a very early date held that contingent remainders passed by descent so long as the person to take was ascertained. This was decided in the early case of *Kelso v. Dickey*,\(^ {19}\) the court saying:

"The contingency on which the legatees were to take was not a contingency attached to their capacity to take, such for example, as their living to a certain time, but an event independent of them, and not affecting their capacity to take or transmit the right to their legal representatives; and such a contingent interest has frequently been decided to be vested so as to be transmissible to representatives."\(^ {20}\)


\(^{15}\)Slegal v. Lauer, 148 Pa. 236.

\(^{16}\)Simes, Future Interests 150.

\(^{17}\)16 Pa. 140. Although the rule laid down dealt with right of entry for breach of condition, the interest involved was in reality a possibility of reverter. There appeared the further fact that the reservation was to 'heirs and assigns' which also weakens the case, as authority for a general rule. Despite these factors we may consider it as holding for the proposition above set forth and it has been so regarded.


\(^{19}\)W. & S. 279.
Later cases\textsuperscript{20} seem to indicate that all future contingent interests pass by descent where the person to take is ascertained. This is the view of at least one text writer.\textsuperscript{21}

An anomalous situation exists in this state in the case of descent to a widow. At common law and under the early statutes a widow had no dower, "unless the husband is seized in fact or in law of the freehold as well as the estate of inheritance, during coverture."\textsuperscript{22} Under this rule she would take no dower interest in any future interests held by her husband. The Intestate Act of June 7, 1917, P.L. 429, Section 3 abolishes dower rights and substitutes therefore certain rights in lieu thereof. The applicable part of this section is as follows,—

"The widow shall be entitled to the same share in an estate in remainder 'vested' in interest in the husband during his lifetime, although the particular estate shall not terminate before the death of the husband."\textsuperscript{23}

A fair construction of the clause would result in holding that a widow would get no interest in contingent interests held by her husband even though it be of the type held descendible. The widow had no right to such at common law and has been given none by the statute. The result although we have been unable to find any cases so holding, would seem to be that such descendible contingent interests would pass to the heirs of the intestate exclusive of the widow. Transmissibility by will seems to follow the same rules as those applicable to descent.\textsuperscript{24} The rule is that such interests will pass unless the contingency is as to the person to take.\textsuperscript{25}

\section*{Involuntary Alienation}

Pennsylvania seems to have reached the result that future interests are alienable involuntarily to a certain extent without the aid of any statute.\textsuperscript{26} A right of entry for breach of condition was held to be thus alienable by Chief Justice Gibson in the case of \textit{McKissick v. Pickle}.\textsuperscript{27}

"If an interest in the land remained in the grantor, (right of entry) notwithstanding the grant, it may be sold by the Sheriff, for in this

\textsuperscript{21} Simes, Future Interests, 723.
\textsuperscript{22} Shoemaker v. Walker, 2 S. & R. 554. By the act of April 8, 1833, P. L. 315, the widow had dower only in lands of which the husband died seised.
\textsuperscript{23} Single quotes mine. Vested "in interest" can not mean transmissible. See Section 4 for a similar provision as to the husband. Cf. Hitner v. Ege, 23 Pa. 305.
\textsuperscript{24} Estate of Rebecca Moss, 80 Pa. Super. Ct. 323 for collection of authorities.
\textsuperscript{25} Stewart v. Neely, 139 Pa. 140, note explanation given supra, note 17.
\textsuperscript{26} Simes, Future Interests 736.
state all possible contingent titles in land accompanied with a real interest may be seized in execution and sold by the Sheriff."

Following the dictum in the case above, other cases have held that contingent future interests were saleable on execution. The earliest case stating that a contingent interest was alienable in execution was that of Humphrey's Lessee v. Humphrey. The court here admitted that it was a hard case, but went on to state:

"The law was made to answer purposes of commercial people and to secure payment of just debts, and meant to comprehend all possible titles contingent, or otherwise, in lands where there was a real interest, but not such as that of an heir apparent. If a different rule prevailed, anyone by carving his real property into estates tail, might protect them against his children's debts."

A leading case on this subject is that of Robbin's Estate. This case holds in substance that any contingent interest that the debtor could alien passes to the assignee for the benefit of creditors. There is also language indicating that this also includes contingent interests and expectancies which might be enforced in equity as an agreement to convey, but this statement is unsupported by the facts of the case. The wisdom of this rule has been questioned since at such sale the debtor may well be deprived of a valuable property right at a sale when the selling price is merely nominal.

In the case of DeHaas v. Bunn, Chief Justice Gibson held that an executory devise in one moiety of a property was saleable in execution along with a vested interest in the other moiety.

Contingent future interests are not subject to attachment before they vest. In one of the leading cases the court repudiated the rule that whatever can pass by assignment is subject to attachment. The court said,—

"In law an assignment is not effectual unless the subject matter of it has actual potential existence . . . . That which has a present and certain existence although its possession and enjoyment may be postponed for a time, may be seized by it, but it cannot grasp expectancies or contingent interests."

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28 Drake v. Brown, 68 Pa. 223; Kenyon v. Davis, 219 Pa. 583
29 Yeates 427. This statement is mere dictum however since the interest sold in execution was a vested remainder.
30 Yeates 427. This statement is mere dictum however since the interest sold in execution was a vested remainder.
31 Simes, Future Interests 736. Both the creditor and debtor may well suffer and the only person benefited is the person who buys, gambling on the chance that the interest will vest.
32 Pa. 355.
34 Patterson v. Caldwell, 124 Pa. 455.
Recent cases have held that an attachment binds all of the property belonging to the defendant which the garnishee has in his hands or which the latter receives up to the time of the trial. Under this rule if there is property in the hands of the garnishee at time of service of the writ, property coming into his hands by the vesting of contingent interests before the trial, would be subject to the attachment. It is difficult to perceive a valid reason for the distinction between seizing contingent interests under the usual writ of execution and for refusing it under a writ of attachment, but such a distinction seems to have been made in the cases.

As for the passing of a contingent interest to the trustee in bankruptcy, it seems that such an interest will pass. The case of Packer's Estate, held, citing DeHaas v. Bunn, that the only interest that would not pass is a bare expectancy. This language is mere dictum, however, since the court held the interest of the bankrupt was vested subject to divest and not contingent.

In discussing the interests that pass to the trustee in bankruptcy the following quotation is pertinent,—

"Whether such an interest in property passes to the trustee in bankruptcy and is subject to sale by him depends upon whether it is 'property which prior to the filing of the petition he (the bankrupt) could have by any means have transferred or which might have been levied upon and sold under judicial process against him.'"

The Suskin & Berry case decided that alienation by estoppel was not sufficient power to transfer so that the interest would pass to the trustee. In the determination of the property that passes to the trustee the cases are governed by the law of the state where the land is located. Since alienability by estoppel is not sufficient power of alienation to cause the interest to pass to the trustee; in this state the only contingent interests which pass are those where the person to take is ascertained. Accordingly the cases in the Federal District

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38Frazier v. Berg, 306 Pa. 317. The case of Penna. Co. v. Youngman, 314 Pa. 277 indicates that if an attachment process is outstanding against a defendant when his contingent interest vests, such interest is subject thereto even though there was no other property to support the attachment. There may however have been other facts than those stated in the opinion. See also Mechanics Nat. Bk. v. Buckman, 36 Pa. Super. Ct. 285.

39Cases supra, note 35.

37246 Pa. 116.

38Suskin & Berry v. Romley, 37 Fed. (2d) 304. Portion in single quotations being taken from Federal Bankruptcy Act, Sec. 70a (5), 11 U. S. C. A. Sec. 110 (a) (5).

39Supra, note 38.

40In Re Landis, 41 Fed. (2d) 702.

41Sale of such interests operate as direct transfer, Wheler v. Phillips, 151 Pa. 312 cited v-7th approval in Long's Estate, 228 Pa. 594. Sale of interests contingent as to the person to take and expectancies operate by estoppel. See cases cited supra, note 12.
Courts of Pennsylvania have stated the rule that only the contingent interests where the person to take is ascertained will pass to the trustee in bankruptcy.\footnote{In Re Twaddell, 110 Fed. 145. The court stated that if the person to take were not ascertained then the interest would not pass. This case applies another well established rule of property in this state that is somewhat peculiar, namely, that the interest was to pass to her "surviving children" and by the rule in this state it means surviving at the death of the testator rather than at the death of the life tenant. Since it meant those surviving at the testator's death the persons were ascertained and the interest was vested. The rule above laid down under this holding is merely dictum. The case presents a good review of the cases on the subject of transmissibility of interests in Pennsylvania.} This to some extent limits the broad rule stated in the Packer case above.

Dale F. Shughart.

THE TEACHERS' TENURE ACT—CONSTITUTIONALITY AND INTERPRETATION

On April 6, 1937, the Governor of Pennsylvania approved Act No. 52, passed by the General Assembly, which is known as the "Teachers' Tenure Act," and which by its terms became effective on the date of approval. Before considering any questions concerning constitutionality or interpretation, it will be appropriate to emphasize the effect of this legislative enactment both from the viewpoint of the individual teacher and the viewpoint of the Board of School Directors, which has given rise to considerable litigation in the various counties of the Commonwealth.

The undoubted intent of the legislature in enacting this Act, which amends the School Code of May 1, 1911, was to make a teacher's tenure of employment stable. The Act prevents the removal of capable and experienced teachers at the political or personal whim of officeholders. Teachers who were employed on the date the Act became effective and those who are fortunate enough to secure a position in the future, are thereby practically assured of a livelihood for the remainder of their lives. It follows that such persons would have no objection to such an enactment. However, the Board of School Directors are deprived of a powerful weapon, which they could previously exercise at will, and are forced to retain teachers who are perhaps their most bitter opponents, both politically and socially. Consequently, the School Directors have attacked the Act from all sides with the hope of discovering some manner in which they may retain use of the weapon which was formerly available.

CONSTITUTIONALITY

Teachers' Tenure Laws have, it seems, uniformly been held valid as against objections based on public policy or violation of constitutional provisions, par-