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justiciable.¹⁴ The courts are faced with the wisdom of exercising their power of law-making in this particular instance. Eleven courts have found it wise to reject a child's cause of action against his parent's paramour for alienation of affections. Four courts have found it wise to maintain it, the weight of authority growing ever more burdensome on the plaintiff.

Arthur M. Schaffer.

PROPERTY · RIGHT OF SURVIVORSHIP—ERROR OF USE OF JOINT TENANCY.—The case of *Jones v. Kelley*¹ illustrates one of the dangers of using a joint tenancy where the grantor's intention is to create only a right of survivorship. The plaintiff, a married woman, wanted to purchase a home with her separate property so that her husband would have a home if she predeceased him. Her intention was not to give her husband a present right in the property but only a right of survivorship. To accomplish this, she had the property conveyed to herself and her husband as joint tenants. One week before the husband died he conveyed his interest in the property to the defendant, his daughter. After the husband's death the wife brought an action to quiet title against the defendant. The court held that the husband took his interest in the property subject to a resulting trust in the plaintiff, and quieted title in the plaintiff.

Cases frequently arise where the owner of property wishes to give another a present right to the future ownership of that property if the other survive him. During the owner's life there is no necessity for the other person to have a vested estate in the land. The owner wishes to retain the fee during his life, and to give the other only a present right to have it on his death if that other party is still living. If the other party predeceases the owner, the fee simple is to remain in the owner or his heirs. The problem is how to give the other party such a right of survivorship without giving him a present vested estate in the land.

Under the English common law, an attempt to create an interest which would carry out this intent—a freehold to begin *in futuro*—would have been void. A freehold estate could only be created by livery of seisin, which was an immediate transfer of possession. Thus the owner could not both keep the land and create a future freehold interest in it in another. He could create remainders, which would become possessory in the future, but a remainder required a possessory estate to be transferred to another at the same time. "For a limitation to be a remainder it had to be limited by the same act of conveyance that created a present estate; to begin immediately on termination of the prior estate and not in derogation of it."² Consequently *A* could not create an interest in *B* which would leave the possession in *A* for a period of time, and on the occurrence of a specified future event give the fee to *B*.³

After the Statute of Uses⁴ a freehold estate could be limited to commence in the future without also creating a prior estate. Livery of seisin was no longer the only mode of transferring interests in the land. Under the new modes of conveyancing, the bargain and sale and the covenant to stand seised, the title was transferred by

¹⁴See note 10 *supra*; also CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921)

¹121 A.C.A. 145, 262 P.2d 859 (1953)

²Fraser, *Future Interests in Real Property in Minnesota*, 4 MINN. L. REV. 307 (1920)

³For historical background see 1 AMERICAN LAW OF PROPERTY c.6 (1952), 2 TIFFANY, REAL PROPERTY §§ 356-360, 386, 389-390 (3d. ed. 1939), 1 SIMES, LAW OF FUTURE INTERESTS §§ 149-158 (1936), RESTATEMENT, PROPERTY, INTRODUCTION TO FUTURE INTERESTS (1936)

⁴27 Hen. VIII c.10 (1935)

operation of law rather than by transferring the possession. It was now possible for the owner to convey a present right to the future ownership upon the occurrence of some future event. Thus *A* could, by bargain and sale, convey to *B* to have possession from and after the day *B* marries. *A* would continue to have the fee; *B* would have a springing use. On the happening of the future event—*B*'s marriage—*B*'s interest would become a possessory estate in fee simple; if *B* never married, his interest would fail and *A*'s fee would become absolute.

It is quite clear that where the Statute of Uses is a part of the law of a state a springing use could be used to carry out the desired intention to create a right of survivorship. Although there is some doubt as to whether the Statute of Uses exists as a part of the California common law,⁵ the problem has been solved by the adoption of the Field Codes.⁶ Under the provisions of the California Civil Code⁷ the same future interests can be created in California that could be created under the English law after the Statute of Uses. Estates to begin in the future are expressly authorized by Civil Code sections 767 and 773. Section 767 provides that:

"A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time."

Section 773 provides that:

" . . . a freehold estate . . . may be created to commence at a future day. . . ."

The language of section 767 indicates quite clearly that the legislature intended to abolish the early common law restrictions on the creation of estates to begin in the future. By dispensing with the necessity of a precedent estate, this section enables the creation of a statutory "future estate" equivalent to the springing use under the Statute of Uses. Although the California authorities are not numerous, they have unanimously agreed that Civil Code section 767 authorizes the creation of estates to begin in the future.⁸ In *Hawes v. Stebbins*⁹ the California Supreme Court held void a pre-1872 deed purporting to convey the fee but reserving a life estate in the grantor. The court indicated, however, that a deed would be valid under Civil Code section 767. The case of *Chandler v. Chandler*¹⁰ also involved a deed purporting to convey the fee subject to a life estate in the grantor. The court held that such a conveyance could not operate as a grant under the common law but could be given effect by a court of equity. The court again indicated that the common law restrictions on estates to begin *in futuro* were abolished by Civil Code section 767. *Blakeman v. Miller*¹¹ is cited as a leading case on this point. In that case the court stated that: ". . . the technical rule against the creation of future estates applied only to legal estates and even as to them is now abolished," citing sections 767 and 773.

In view of the language of sections 767 and 773 and the cases applying these

⁵*McCurdy v. Otto*, 140 Cal. 48, 73 Pac. 748 (1903); *Chandler v. Chandler*, 55 Cal. 267 (1880), *Hawes v. Stebbins*, 49 Cal. 369 (1874).

⁶March 21, 1872.

⁷See CALIF. CIV. CODE §§ 696, 767, 768, 769, 773, 775, 778.

⁸*Barry v. All Persons*, 158 Cal. 435, 111 Pac. 249 (1910); *Ripperden v. Weldy*, 149 Cal. 667, 87 Pac. 278 (1906), *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705 (1905), *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587 (1902), *Bury v. Young*, 98 Cal. 447 (1893), *Hawes v. Stebbins*, 49 Cal. 369 (1874) (dictum), *Lowe v. Ruhlman*, 67 Cal.App.2d 828, 155 P.2d 671 (1945); *Merritt v. Rey*, 104 Cal.App. 700, 286 Pac. 514 (1930) (dictum), See also *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867 (1896); *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300 (1895).

⁹49 Cal. 369 (1874).

¹⁰55 Cal. 267 (1880)

¹¹136 Cal. 138, 68 Pac. 587 (1902).

sections, there can be no doubt that a freehold estate can be created to begin at a future time. Although no case directly in point has been found, there would seem to be nothing to prevent the creation of such a "future estate" to begin upon a condition precedent, that is, upon the occurrence of an event which may or may not occur at some future time. So long as the estate must either vest or fail upon the occurrence or non-occurrence of an event within the period allowed by the rule against perpetuities, such a contingent estate should be valid.

The courts of other jurisdictions have also held valid the creation of estates to begin in the future. In *Abbott v Hollway*¹² the grantor conveyed the fee to his wife with the provision that "in case I survive my wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make provision for the support of my said wife if she shall survive me." Although this was perhaps an unfortunate choice of language to express the grantor's intent, the court held that it was effective to create a contingent estate to commence in the future. *Thomas v Williams*¹³ involved a deed purporting to convey to the conveyee "all rights of survivorship in and to the following tract. . . The intent of this deed being to convey to said second party all of said land if he survives said first party; otherwise, said land to be vested in the first party in case he survives said second party . . ." The court held that the grantee received by the deed a present contingent right in the nature of a contingent fee, and that, while the enjoyment was postponed until the contingency happened, the right passed on delivery of the deed. In the case of *Papke v Pearson*¹⁴ the grantor's intention was similar to that of the wife in *Jones v Kelley*. The plaintiff wanted to give his home to his housekeeper if she survived him. The plaintiff had no intention to convey any present rights but only a right of survivorship. He was mistakenly advised to create a tenancy in common. On the housekeeper's death the grantor sued to reform the deed to create a joint tenancy. The court pointed out that this would not carry out the grantor's intention. The court reformed the deed to create a contingent future estate in fee simple, stating that only in this way could the right of survivorship be created without giving a present estate which the conveyor did not intend to give. It should be noted that these Minnesota cases were decided under statutes almost identical to those now in force in California. The Supreme Court of Michigan has also held valid the creation of a contingent future estate under a statute similar to Civil Code section 767. In *Bassett v. Budlong*¹⁵ a husband conveyed to his wife on the express condition that: "in case of the decease or death . . . of [the grantee] at any time before the decease or death of the [grantor], then . . . the said premises . . . shall revert back unto the [grantor]." The court held that the husband did not intend to part with the title unless or until the contingency of his death before the death of his wife should occur. Since that event did not occur, the estate never vested in the wife. Again, the grantor's choice of language was unfortunate but the court recognized the validity of a contingent future estate. The Massachusetts court has also recognized the validity of a contingent future estate. In *West v West*¹⁶ the husband conveyed to his wife for "her comfortable support in case of [his death]" reserving the use in him for life and in case the grantee should die first, the land was to revert to the grantor. The court held that there was no intention to give the grantee any present or absolute

¹²72 Me. 298 (1881)

¹³105 Minn. 88, 117 N.W. 155 (1908)

¹⁴203 Minn. 130, 280 N.W. 183 (1938)

¹⁵77 Mich. 338, 43 N.W. 984 (1889)

¹⁶155 Mass. 317, 29 N.E. 582 (1892)

estate. If the grantor survived, the grantee was to take nothing; if the grantee survived, she was to have a life estate.¹⁷

Since it is clear that a future estate on the condition precedent of survivorship is valid, the only question remaining is the advisability of using such an estate where the intention is to create only a right of survivorship. A deed conveying such an interest should be construed to give the grantee a present right but not a present vested estate in the land. The effect of this is to leave the grantor with all the rights, powers and privileges of an owner in fee simple, subject only to the contingent right in the grantee. The grantee, being in a position analogous to that of a contingent remainderman, would have no present power to convey anything more than his contingent right. Also, the contingent interest of the grantee should not be subject to the claims of his creditors.¹⁸ A joint tenancy will also create a right of survivorship, but its use is inappropriate where the intention is to create *only* a right of survivorship. Creation of a joint tenancy gives the grantee a present vested estate rather than a contingent future estate. With the joint tenancy there is the ever present danger that the grantee will do an act sufficient to cause a severance and destroy the right of survivorship.¹⁹ This will not only defeat the intention of the grantor but possibly deprive him of one half of the property. *Jones v. Kelley* is a striking example of just that. The court was able to save the grantor's property by implying a purchase money resulting trust. Assuming the parties did intend a trust for the wife, this would apparently have defeated the grantor's purpose had she died first and her heirs inherited her equitable interest. Also her husband could have defeated the wife's equitable interest by a conveyance to a bona fide purchaser without notice.²⁰ The dangers of using a joint tenancy in such cases are clearly apparent. Proof of a resulting trust requires clear and convincing evidence,²¹ which may not be present. And in the case of a conveyance from husband to wife or parent to child, there is a presumption of intent to make a gift rather than a resulting trust.²² In *Papke v. Pearson* there were facts sufficient to justify reformation of the deed, but such facts are not always present.

A contingent future estate being valid in California, it seems clear that it should be used where the intention is to create only a right of survivorship. It avoids the dangers of a joint tenancy and is simply created. A proper granting clause to create such a right of survivorship would be: "A grants to B and his heirs to have possession from and after my death if he survives me." The interest created by this clause is the most appropriate method of giving effect to the grantor's intention when he wishes to grant only a right of survivorship.

Richard E. Gardella.

¹⁷See also 11 A.L.R. 80 (1921) (conveyance conditional on survivorship of grantee); 1 A.L.R.2d 247 (1948) (creation of right of survivorship by instrument ineffective to create estate by entireties or joint tenancy).

¹⁸*Anglo California Bank v. Kidd*, 58 Cal.App.2d 651, 137 P.2d 460 (1943).

¹⁹Severance creates a tenancy in common. *McDonald v. Morley*, 15 Cal.2d 409, 101 P.2d 690 (1940).

²⁰A transferee for value without notice of the trust has rights superior to the equitable owner. *Watson v. Edwards*, 105 Cal. 70, 38 Pac. 527 (1894).

²¹*Moulton v. Moulton*, 182 Cal. 185, 187 Pac. 42 (1902).

²²*Quinn v. Reilly*, 198 Cal. 465, 245 Pac. 1091 (1926); RESTATEMENT, TRUSTS § 442 (1935)