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Future Interests - Possibilities of Reverter - Constitutionality of Retroactive Limitation

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FUTURE INTERESTS—POSSIBILITIES OF REVERTER—CONSTITUTIONALITY OF RETROACTIVE LIMITATION—The township school trustees brought actions under the Reverter Act [1] to have the possibilities of reverter contained in the deeds to two currently unused school tracts declared invalid. In each case the trial court held that the possibility of reverter was alienable and that the Reverter Act was unconstitutional, being an ex post facto law and in violation of the due process clauses of the state and federal Constitutions. On appeal, *held,* reversed. Since possibilities of reverter in Illinois are merely expectancies subject to change, modification, or abolition by legislative action, the act does not result in an unconstitutional taking of property. *Trustees of Schools of Township No. 1 v. Batdorf,* 6 Ill. (2d) 486, 130 N.E. (2d) 111 (1955).

Although legal writers have commented upon the difficulties in clearing titles caused by right of entry and possibility of reverter clauses[2] and have advocated statutes to restrict the use of these clauses,[3] there has been little legislation in this field.[4] Judicial decisions limiting the effect of restrictive covenants when the restrictions are no longer of any economic value to those persons whom they are intended to benefit[5] will presumably increase the resort to conveyances in fee simple determinable and fee subject to condition subsequent by persons who have primarily non-economic reasons for restricting the use of property.[6] When such an increase is compounded by the drastic penalty of forfeiture suffered by the landholder who fails to

[1] Section 4 of the act provides that no possibility of reverter or right of entry, whether created before or after passage of the act, shall be good for more than fifty years. Section 5 provides that if the limiting contingency has occurred in any possibilities of reverter created more than fifty years prior to passage of the act, an action for recovery of the land must be brought within one year of the act's passage. Ill. Rev. Stat. (1955) c. 30, §§37e and 37f.

[2] Clark, "Limiting Land Restrictions," 27 A.B.A.J. 737 (1931); Cook, "Rights of Entry, Possibilities of Reverter, Resulting Trusts and the Rule Against Perpetuities," 15 TEMP. L.Q. 509 (1941).

[3] Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 (1940); SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 236 (1953).

[4] The Massachusetts, Michigan, and Minnesota statutes are representative of the legislation presently in existence. All operate prospectively. Mass. Laws Ann. (1955) c. 184, §22; Mich. Comp. Laws (1948) §554.46; Minn. Stat. (1953) §500.20.

[5] E.g.: Hurd v. Albert, 214 Cal. 15, 3 P. (2d) 545 (1931); Osius v. Barton, 109 Fla. 556, 147 S. 862 (1933).

[6] These include provisions that land be used for church purposes, First Universalist Society v. Boland, 155 Mass. 171, 29 N.E. 524 (1892), that liquor not be sold on the property, Cowell v. Springs Co., 100 U.S. 55 (1879), and, of course, the normal building and use restrictions ordinarily provided for by covenants.

comply with the conditions and limitations[7] it will inevitably cause more state legislatures to place limitations on the use of these clauses. Although the Illinois statute is not unique in its retroactive provisions, the principal case is the first to uphold the constitutionality of such a statute.[8] In finding that there was no taking of property, the court was aided by a series of Illinois decisions which clearly spelled out the status of these future interests. These cases decided that a possibility of reverter is incapable of alienation, devise or partition[9] and "until the limiting contingency occurs it is . . . no more than an expectation . . . subject to change, modification or abolition by legislative action."[10] With this background, the court in the principal case was clearly justified in holding that the possibility of reverter is not a property right, and, consequently, that there was no unconstitutional taking of property under the statute. This background indicates, however, that other state courts might not find the retroactive provisions of such an act constitutional. The modern trend is to the effect that powers of reverter are alienable.[11] It is difficult to see how an interest which may be sold, given or devised can be held not to be "property."

An additional constitutional problem, suggested by but not discussed in the principal case, is the validity of the statutory classification. The court made no finding as to whether the limiting contingency in the deed had actually occurred prior to passage of the act. It declared that if it had not occurred, the fifty year limitation abolished the right of action; if it had occurred, the provision that an action must be brought within one year from passage of the act abolished it. The construction of the latter provision as being merely a statute of limitations which was within the legislature's power to change at will seems to be based on a fallacious assumption as to the status of the parties after the occurrence of the contingency provided for in a possibility of reverter. Upon the happening of the contingency the holder of the possibility of reverter immediately becomes the owner in fee simple and the prior owner, at best, an adverse pos-

7 There are only a few cases where American courts have applied equitable principles to rights of entry and possibilities of reverter and did not allow forfeiture where there was no longer any economic benefit in the restriction. See 53 MICH. L. REV. 246 (1954).

8 A Florida statute passed in 1951 applied a twenty-one year limitation to rights of entry and possibilities of reverter, but this statute, unlike the Illinois act, exempted conveyances to charitable organizations. Fla. Stat. (1955) §689.18. Because of the retroactive provisions, the Florida Supreme Court declared the whole act unconstitutional. Biltmore Village v. Royal, (Fla. 1954) 71 S. (2d) 727. This decision is criticized in Hammond, "Limitations Upon Possibilities of Reverter and Rights of Entry," CURRENT TRENDS IN STATE LEGISLATION 589 at 629 (1954) (Univ. of Mich. Law School, Legislative Research Center).

9 Regular Predestinarian Baptist Church of Pleasant Grove v. Parker, 373 Ill. 607, 27 N.E. (2d) 522 (1940); Hart v. Lake, 273 Ill. 60, 112 N.E. 286 (1916). The Reverter Act expressly reiterates the fact that these interests are inalienable and not devisable. Ill. Rev. Stat. (1955) c. 30, §37b.

10 Principal case at 491, citing People ex rel. Franchere v. Chicago, 321 Ill. 466, 152 N.E. 141 (1926); Prall v. Burckhart, 299 Ill. 19, 132 N.E. 280 (1921).

11 See 4 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §1860 (1956).

sessor. It is arguable that since the holder of the possibility of reverter upon the happening of the contingency is a non-possessory owner in fee simple with the same rights of any other non-possessory owner, any legislation forcing him to act against an adverse possessor sooner than other owners discriminates against him solely because of the manner in which he acquired his fee simple title.[12]

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[12] If a court determined, as the Illinois court did, that possibilities of reverter could be modified by the legislature at will, this would not be a valid objection where the limiting contingency occurred after passage of the act but it would seem to present an argument for the holder of a fee which reverted prior to the act's passage. However, it must be remembered that the courts have been very liberal in upholding allegedly discriminatory statutes where there is a valid economic basis for distinguishing between different classes. See ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 551 (1939).