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CONSTITUTIONAL INVIOLABILITY OF POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY IN FLORIDA

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The recent session of the Florida Legislature has turned its attention to the problem of possibilities of reverter and rights of entry for condition broken.[1] Because those interests are held in this country to be outside the operation of the rule against perpetuities,[2] they have become the means of imposing restrictions on the use of land which outlive their usefulness, impairing both the alienability and the development of land.[3] They cannot be terminated judicially, and while they can be released, it is often difficult to locate the owner and still more difficult to induce him to part with his interest for a reasonable price.[4] Differentiating between the retention of a reversionary interest when property is dedicated to charitable and public institutions[5] and the employment of reverter and forfeiture clauses to impose use restrictions in private conveyances, the Legislature has sought to curtail the validity of the latter by a retroactive statute[6] which invites grave doubts of its constitutionality.

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1. Fla. Laws 1951, c. 26927, effective July 1, 1951.

2. Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1919); First Universalist Society v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Institution for Savings v. Roxbury Home, 244 Mass. 583, 139 N.E. 301 (1922). See GRAY, THE RULE AGAINST PERPETUITIES §§ 310, 312 (4th ed. 1942); SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS §§ 12, 13 (1951). The rules differ in England. The possibility of reverter is regarded as inconsistent with *Quia Emptores* (St. Westm. III, 18 Edw. I, c. 1, 1290) abolishing subinfeudation, Gray, *op. cit.* § 32. The right of entry for condition broken is subject to the rule against perpetuities. *In re* Da Costa, 1 Ch. 337 [1912]; *In re* Hollis' Hospital, 2 Ch. 540 [1899].

3. The problem has been discussed and remedial legislation recommended. Comment, 43 ILL. L. REV. 90 (1948); Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1931); Cook, *Rights of Entry, Possibilities of Reverter and the Rule against Perpetuities*, 15 TEMP. L. Q. 509 (1941); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940). One state court has refused to grant possession where the purpose of the restriction was no longer attainable, and one has said it would do so in a proper case. Letteau v. Ellis, 122 Cal. App. 2d 291, 10 P.2d 496 (1934); see Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918). The problem has been dealt with by statute very recently in two states, Massachusetts by a prospective statute in 1946, and Illinois by a retrospective statute in 1947. MASS. ANN. LAWS c. 184, § 23 (Supp. 1946); ILL. REV. STAT. c. 30, §§ 37b-37h (1947). For current developments, see 1947 ANNUAL SURVEY OF AMERICAN LAW 871; 1948 ANNUAL SURVEY OF AMERICAN LAW 703.

4. The preamble of the Florida Statute declares that "holders of such possibilities of reverter have charged and are charging unconscionable fees for releasing such reverter provisions."

5. The act does not apply to conveyances to "any Governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or non-profit corporation or society." Sec. 5.

6. The various commentators mentioned in note 3, *supra*, suggest that abolition must be by prospective legislation. See Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1931). The legislation in question was not sponsored by the Florida Bar. See Wigginton, *Report of Legislative Committee*, 25 FLA. L. J. 190 (1951), and text of sponsored bills, *ibid.*, 192.

While the interests affected are denominated "reverters" and "forfeitures," reference is doubtless made to the possibility of reverter and right of entry for condition broken as those terms are defined in the few Florida cases and in standard texts.[7] The right of the grantor in either case is now made unenforceable after twenty-one years. The statute disposes in separate sections of conveyances which have been in effect more than twenty-one years,[8] all other conveyances which became effective before July 1, 1951,[9] and conveyances which become effective after that date.[10] The statute also substitutes for the traditional remedy, which consisted of an action for possession of the land, a right to enjoin enforcement of the use restrictions by bill in equity.[11]

It should be noted that, aside from the statute, there are other rules of law which narrow the field in which possibilities of reverter and rights of entry can be employed. If the limitation or divesting condition is imposed as a direct restraint on the power of alienation, it is void under the rule against restraints on alienation.[12] Restrictions on use and occupancy, however, are not direct restraints on alienation; but use restrictions which enforce discrimination based on race, color or previous condition of servitude, although not illegal, have been declared no longer judicially enforceable in a recent decision by the Supreme Court of the United States.[13]

The constitutionality of the statute, to the extent that it affects interests created by deed executed before July 1, 1951, will turn on the answer to two questions: first, whether or not the interest taken is "property" or "vested"; and second, if it is held to be a species of property, whether or not there has been an unconstitutional taking. An interest which is classed as a "mere expectancy" or *spes successionis* may be terminated without raising constitutional problems.[14] This principle is illustrated in cases upholding statutes which change the law of descent to the disadvantage of an heir apparent, abolish the right of survivorship in existing joint tenancies, and

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7. See Richardson v. Hollman, 160 Fla. 65, 33 So.2d 641 (1948); Sorrels v. McNally, 89 Fla. 457, 105 So. 106 (1925); Case Comment, 1 U. OF FLA. L. REV. 309 (1948); GRAY, THE RULE AGAINST PERPETUITIES §§ 12-13 (4th ed. 1942); SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS §§ 12-13 (1951). While the two types are distinguished by the language used in their creation (Sorrels v. McNally, *supra*), the distinction is immaterial in Florida. Richardson v. Hollman, *supra*.

8. Fla. Laws 1951, c. 26927, § 2, effective June 11, 1951, when the act became a law without the approval of the Governor.

9. *Id.* at § 3.

10. *Id.* at § 4.

11. *Id.* at § 7. Existing causes of action are not affected by this section.

12. Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590 (1916); Freeman v. Phillips, 113 Ga. 589, 38 S.E. 943 (1901); Davison v. Hutchinson, 282 Ill. 523, 118 N.E. 721 (1918); and cases cited in SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 344, notes 19 and 20 (1951).

13. Enforcement by judicial sanction is state action of the type prohibited in the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1 (1948).

14. Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (1948); Stephenson, *Synopsis*, 3 MIAMI L. Q. 40 (1948).

the like.[15] The quality of a possibility of reverter or right of entry in Florida is doubtful, for it has been characterized *obiter* as a mere expectancy[16] and as a transferable interest in the nature of a reversion.[17] At common law, neither type of interest was devisable[18] or alienable,[19] but both could be released.[20] It was asserted that the person entitled to possession, when the original grantor was dead, was that person who would have been the grantor's heir if the grantor had died immediately following the accrual of the right of entry: that he took by right of representation and not by descent.[21] It has also been generally held that the owner of a possibility of reverter is not entitled to protect his interest by an action for waste,[22] or to participate in the proceeds of a sale under power of eminent domain.[23] With such attributes, an interest can be little more than a mere expectancy. The recent growth of the law, on the other hand, has been in the direction of holding these interests devisable and assignable,[24] which gives them a more substantial quality. Florida has recently held a possibility of reverter to be assignable, the case being widely noted as evidence of the modern trend.[25]

If it is assumed that the interest is property, it has been taken unconstitutionally unless the action can be justified by some supervening public necessity. Retroactive statutes may be held unconstitutional on three different grounds: as being the performance of a judicial act by the legislature in violation of the principle of separation of powers; as impairing the obligation of a contract; or as being a taking without due process of law.[26] It may be argued that absolute destruction is too severe; that it would be more just to subject the troublesome interests to condemnation under the power of eminent domain.[27] Where property is taken or its use restricted, with or

15. Applied to statutes abolishing survivorship in joint tenancies, Holbrook v. Finney, 4 Mass. 565, 3 Am. Dec. 243 (1808); Bambaugh v. Bambaugh, 11 S. & R. 190 (Pa. 1824); statute converting estates tail into fees simple, De Mill v. Lockwood, 3 Blatch. C.C. 56 (1853); statute abolishing curtesy, McNeer v. McNeer, 142 Ill. 388, 32 N.E. 681 (1892). See 2 COOLEY, CONSTITUTIONAL LIMITATIONS 794 (8th ed. 1927).

16. "It is not an estate but the mere possibility of having an estate at some future time." Terrell, J. in Sorrels v. McNally, *supra* note 7 at 463, 105 So. at 109.

17. It is characterized as a "reversionary interest" by Terrell, J., in Richardson v. Hollman, *supra* note 7.

18. Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896).

19. Rice v. Boston & Worcester R.R., 12 Allen 141 (Mass. 1866).

20. Trustees of Calvary Presbyterian Church v. Putnam, 249 N.Y. 111, 162 N.E. 601 (1928).

21. Upington v. Corrigan, *supra* note 18.

22. Dees v. Cheuvrons, 240 Ill. 486, 88 N.E. 1011 (1909).

23. Lyford v. Laconia, 75 N.H. 220, 72 Atl. 1085 (1909); First Reformed Dutch Church v. Crosswell, 210 App. Div. 294, 206 N.Y. Supp. 132 (3d Dep't 1924).

24. RESTATEMENT, PROPERTY §§ 164, 165 (1936); Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946).

25. Richardson v. Hollman, *supra* note 7; Comment, 1 U. OF FLA. L. REV. 309 (1948); 1948 ANNUAL SURVEY OF AMERICAN LAW 703; SIMES, HANDBOOK ON FUTURE INTERESTS 107, n. 31 (1951).

26. Illustrated in Florida cases: (statute outlawing possession of liquor acquired prior to passage of prohibition law), *In re* 7 Barrels of Wine, 7 Fla. 1, 83 So. 627 (1920); (statute outlawing note given for purchase price of a slave), McNealy v. Gregory, 13 Fla. 417 (1869-71).

27. The General Assembly of Pennsylvania, seeking to abolish existing irredeemable ground rents, which constituted a problem in conveyancing not unlike the one under

without compensation, constitutionality depends upon a demonstration that the property, or its use, constitutes a course of danger to the public.[28] While the Legislature has found, as stated in the preamble, that these interests constitute an unreasonable restraint on alienation, it may be argued with authority[29] that the nuisance, if any, is private, disturbing only those who deraign title under restricted deeds either knowingly or relying on the advice of persons not learned in the law. A possible denial of equal protection, suggested by the exemption of conveyances to public and charitable institutions, can be justified by obvious differences and by the public interests advanced by such institutions.[30]

To the extent that the statute is prospective in its operation, none of the constitutional objections advanced above can apply, but there are other problems. An act unconstitutional in part may be unconstitutional as a whole if the Supreme Court finds that the unconstitutional parts are not severable.[31] Since this will depend upon the ascertainment of legislative intent, in which the appellate court may be influenced by many unpredictable factors, it is impossible to forecast the result. It may not be going too far afield to suggest a problem of interpretation. Will a reverter clause inserted in a deed delivered after July 1, 1951, which is not expressly limited to expire in twenty-one years, be void as to the excess or wholly void? The language of the statute is plain; but it must be realized that this is in effect a statutory rule against perpetuities,[32] and the influence of decisions under the common law rule and the statutory rules of other states may lead to a different construction.[33] Until that point has been settled, the conveyancer

consideration, provided for their purchase at a fair price to be determined in a judicial proceeding. The state supreme court (Sharswood, J.) held the statute unconstitutional because the remedy was more in the interest of the private owner than of the public. Paileret's Appeal, 67 Pa. 479 (1871).

28. *In re* 7 Barrels of Wine, *supra* note 26.

29. Pauleret's Appeal, *supra* note 27; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (statute forbidding mining so as to cause subsidence of surface structures used for human habitation). There may be a preponderant public concern in the preservation of the interest of one over the other when there is a conflict of private interests: Miller v. Schoene, 276 U.S. 272 (1928) (statute requiring the destruction of red cedar trees harboring a pest destroying apple orchards); see Dalton Phosphate Co. v. Priest, 67 Fla. 370, 85 So. 282 (1914) (between cattlemen and phosphate miners).

30. Equal protection is not denied where there is a reasonable basis for classification. Tigner v. Texas, 310 U. S. 141 (1940); Peninsular Industrial Ins. Co. v. State 61 Fla. 376, 55 So. 398 (1911).

31. It is often stated that there is a presumption that the legislature intends an act to be effective in its entirety. See Pollack v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895). The Florida cases apparently recognize no such presumption, making the question one of severability. State v. Hilburn, 70 Fla. 55, 69 So. 784 (1915); State *ex rel.* Haley v. Starkey, 18 Fla. 255 (1881); Bucky v. Willard, 16 Fla. 330 (1878).

32. The rule against perpetuities, when applied to the duration of trusts restraining alienation, such as trusts to accumulate, spendthrift trusts, indestructible (Claflin) trusts, honorary trusts, etc., which may last longer than the limited period, strikes down the whole trust, not merely the excess. Alexander v. House, 133 Conn. 725, 54 A.2d 510 (1947); Van Eps v. Arbuckle, 332 Ill. 551, 164 N.E. 1 (1928); RESTATEMENT, PROPERTY, § 381 (1944); SIMES, HANDBOOK ON FUTURE INTERESTS c. 24 (1951).

33. When a statute of another state is adopted, the prior decisions of that state construing the statute become rules of construction in the adopting state; for example, a statute specifically relating only to trusts of real property was construed as relating also

will do well to insert a positive limitation whenever there is occason to place a restriction on the use of property.

Important changes are made in the remedies of persons holding possibilities of reverter and rights of entry. Those whose rights have ripened into a cause of action must assert them on or before July 1, 1952, or be forever barred.[34] The period is not unreasonably short and appears to present no problem of constitutionality.[35] As to causes of action accruing after July 1, 1951, a new remedy is provided. Where formerly the owner of the possibility of reverter or right of entry was entitled to recover possession in an action of ejectment, he is now entitled exclusively to a bill in equity to enjoin use of the property in a manner inconsistent with the purpose of the divesting restraint.[36] When this is applied to deeds executed before July 1, 1951, constitutionality depends upon the adequacy of the remedy substituted.[37] Since it may be argued that the grantor is more interested in restricting the use of the land than in recapturing it, the substituted remedy appears satisfactory. The change in remedy does not apply to the enforcement of possibilities of reverter and rights of entry in deeds to public and charitable institutions.[38]

In conclusion, it cannot be said with assurance that the act is unconstitutional either in whole or in part; but there are grave doubts which must await judicial determination. A good argument can be made to show that the curtailed interests are mere expectancies, and that there is a definite public interest in removing them as a bar to the marketability of land; but existing authority is on the other side. If the act should be held unconstitutional because it serves a private rather than a public purpose, remedial legislation requiring these interests to be sold for a fair price, judicially determinable, would also be unconstitutional. While awaiting decision, no

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to trusts of personal property. Canfield v. Security-First National Bank, 13 Cal. 2d 1, 87 P.2d 830 (1939). The same rule is adopted when a statute is regarded as adopting a rule of the common law; for example, a statute legalizing charitable trusts in a state where they were not formerly legal, was held to adopt the common law definition of charity, although the statutory definition was narrower. Chicago Bank of Commerce v. McPherson, 67 F.2d 393 (1932). Since Gray argued that the correct common law rule was to apply the rule against perpetuities to rights of entry, there is a basis for argument that the statute adopts the correct common law view. GRAY, THE RULE AGAINST PERPETUITIES §§ 299-310 (4th ed. 1942). The Eleventh Amendment, which prohibits suits against states by citizens of *other* states, was held to prohibit suits by citizens of the same state in an appeal to history. Hans v. Louisiana, 134 U.S. 1 (1890).

34. Fla. Laws 1951, c. 26927 § 6.

35. A statute that shortens a period of limitations is valid if it allows a reasonable period after its enactment for the assertion of existing claims. Matteson v. Dep't of Labor & Industries, 293 U.S. 151 (1934).

36. Fla. Laws 1951, c. 26927 § 7.

37. A substantial change in the remedies by which property rights, already acquired, are asserted, would be a taking without due process, unless, of course, under circumstances of public necessity which would otherwise justify a direct taking. *Cf.* Sturges v. Crowninshield, 4 Wheat, 122 (U.S. 1819) with Honeyman v. Jacobs, 306 U.S. 539 (1939).

38. Sec. 5 exempts such conveyances from the operation of the entire act.

title can be considered marketable if it is subject to divesting restrictions; but no conveyancer will create possiblities of reverter or conditions subsequent without providing expressly that they will not be effective after twenty-one years.