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REAL PROPERTY-DETERMINABLE FEE-ALIENABILITY OF POSSIBILITY OF REVERTER

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REAL PROPERTY—DETERMINABLE FEE—ALIENABILITY OF POSSIBILITY OF REVERTER—In 1895, Scofield conveyed a small portion of his farm to the defendant, Town of Charlotte, by quitclaim deed which provided: “. . . to be used by said town for school purposes, but when said Town fails to use it for said school purposes it shall revert to said Scofield, his heirs and assigns, but the Town shall have the right to remove all buildings located thereon. The Town shall not have the right to use the premises for other than school purposes.” The title to the farm vested in plaintiff by mesne conveyances. The land in question was used for school purposes until 1936, and as a storehouse for school supplies until sale of the school house to the defendant, *B*, in 1944. Plaintiff filed a bill in equity to enjoin interference by the defendant Town with the land and sale by it of the building; and, after rejecting the defendants’ contention that the possibility of reverter which vested in the plaintiff was not alienable, the trial court granted the relief prayed for in the bill. On defendant’s exception to the decree, *held*, affirmed, the estate created by the quitclaim deed was a determinable fee,

and the possibility of reverter was alienable. *Collette v. Town of Charlotte*, (Vt. 1946) 45 A. (2d) 203.

A possibility of reverter arises in the grantor when he has conveyed a determinable or qualified fee to another in terms which, expressly or by necessary implication, require that the fee created shall automatically terminate upon the occurrence of a stated event.¹ Conveyances to churches and schools for a limited purpose with an express provision for reversion to the grantor and grants to another "so long as," "as long as," or "until" are typical instances where this estate and interest arise.² The determinable fee must be distinguished from a fee subject to a condition subsequent, the essential difference being that the latter estate does not terminate on the occurrence of the named event, but the grantor or his heirs have a power to terminate the estate granted upon breach of the condition.³ This power of termination is often referred to as a right of entry for breach of condition, and sometimes improperly designated as a possibility of reverter. Today, a possibility of reverter is alienable *inter vivos* or by will;⁴ but, except by release, or conveyance with a reversion, or between the heirs of the grantor, the power of termination is not alienable.⁵ This curious doctrine which permits alienation of the possibility of reverter and denies a right to convey a power of termination when it is apparent that the economic interests are identical has been a contributing factor in prompting many states to enact statutes permitting alienation of any estate or interest in property,⁶ and at least nine

¹ I PROPERTY RESTATEMENT, §44 (1936); 2 *id.* § 154 (1936); I SIMES, FUTURE INTERESTS, §§ 177-179 (1936); Powell, "Determinable Fees," 23 COL. L. REV. 207 (1923); Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 (1940).

² For cases involving express provision for reverter see: principal case; *Shell Petroleum Corp. v. Hollow*, (C.C.A. 10th, 1934) 70 F. (2d) 811; *Lyford v. Laconia*, 75 N. H. 220, 72 A. 1085 (1909); *North v. Graham*, 235 Ill. 178, 85 N. E. 267 (1908); *Calhoun v. Hays*, 155 Pa. Super. 519, 39 A. (2d) 307 (1944); for those in terms of "so long as" "as long as," or "until" see: *Board of Chosen Freeholders of Cumberland County v. Buck*, 79 N. J. Eq. 472, 82 A. 418 (1912); *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524 (1892); 137 A.L.R. 639 (1942).

³ I PROPERTY RESTATEMENT, § 45 (1936); 2 *id.* § 155 (1936); I SIMES, FUTURE INTERESTS, §§ 159, 160 (1936); principal case, 45 A. (2d) 203 at 205 (1946).

⁴ 2 PROPERTY RESTATEMENT, § 159 (1936); 3 SIMES, FUTURE INTERESTS, § 715 (1936); *Irby v. Smith*, 147 Ga. 329, 93 S. E. 877 (1917); *Calhoun v. Hays*, 155 Pa. Super. 519, 59 A. (2d) 307 (1944); *Fall Creek Township v. Shuman*, 55 Ind. App. 232, 103 N.E. 667 (1913); *Battistone v. Banulski*, 110 Conn. 267, 147 A. 820 (1929); *Stewart v. Blain*, (Tex. Civ. App. 1913) 159 S.W. 928 (1913); 77 A.L.R. 344 (1932).

⁵ 2 PROPERTY RESTATEMENT, §§ 160, 161 (1936); 3 SIMES, FUTURE INTERESTS, § 716 (1936); *Rice v. Boston & Worcester Ry. Corp.*, 12 Allen (94 Mass.) 141 (1866); *Trustees of Calvary Pres. Church v. Putnam*, 249 N.Y. 111, 162 N.E. 601 (1928); *O'Donnell v. Robson*, 239 Ill. 634, 88 N.E. 175 (1909); *Strothers v. Woodcox*, 142 Iowa 648, 121 N.W. 51 (1909); *Ruch v. Rock Island*, 97 U.S. 693 (1878).

⁶ Ala. Code Ann (1940) tit. 47. § 13; Ariz. Code Ann. (1939) § 71-105; Ark. Dig. Stat. (Pope, 1937) § 1795; Cal. Civ. Code (Dearing, 1941) § 699; Colo. Stat. Ann. (Michie, 1935) c. 40, § 1; Del. Rev. Code (1935) §§ 3658, 3659; D.C. Code

states specifically to authorize alienation of the power of termination or right of entry for breach of condition.⁷ A number of states still deny the grantor of a determinable fee the right to alienate his possibility of reverter and rule that the interest passes to his heirs by representation or descent;⁸ but the weight of authority permits alienation.⁹ Inconsistencies in property law are no rarity; but, in the case of the possibility of reverter and power of termination, it would seem that either both or neither should be alienable. That both should be alienable is the more sensible rule is apparent in view of the fact that neither interest is subject to the rule against perpetuities and both have the same economic effect on the defeasible fee granted in the first instance. Where executory interests and reversions are freely alienable, a possibility of reverter or power of termination should enjoy the same status.¹⁰

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(1940) tit. 45, c. 8, § 815; Ga. Code Ann. (Park, 1933) § 29-103; Idaho Code Ann. (1932) § 54-109; Ind. Stat. Ann. (Burns, 1933) § 56-103; Kan. Gen. Stat. (Corrick, 1935) §§ 67-202, 67-208, 77-201 (8); Ky. Rev. Stat. (1944) § 381.040; Mass. Ann. Laws (Michie, 1943) c. 184, § 2; Mich. Comp. Laws (1929) § 12955; Minn. Stat. (Mason, 1940) § 8065; Miss. Code Ann. (1942) § 831; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 6695; Mo. Rev. Stat. Ann. (1942) § 3401; Neb. Rev. Stat. (1943) § 76-209; N.M. Stat. Ann. (1941) 75-103; N.Y. Real Prop. Law (McKinney, 1945) § 59; N.D. Code (1943) § 47-0218; Ohio Gen. Code Ann. (Page, 1938) § 10512-4; Okla. Ann. Stat. (1941) tit. 60, § 30; Pa. Stat. Ann. (Purdon, 1930) tit. 21, § 3; S.D. Code Ann. (1930) § 51.0220; Tenn. Code Ann. (Williams, 1934) § 7597; Tex. Civ. Stat. Ann. (Vernon, 1925) art. 8282; Va. Code Ann. (Michie, 1942) § 5147; W. Va. Code (Michie, 1943) § 3529; Wis. Stat. (1945) §§ 230.35, 235.01; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 97-104. Decisions are against alienation of power of termination under both New York and West Virginia statutes; See also N.D. Code (1943) § 47.0902 and S.D. Code (1939) § 51.1301 which provide against transfer of right of entry except to the owner of the property affected thereby.

⁷ Cal. Civ. Code (Deering, 1941) § 1046; Conn. Gen. Stat. (1930) § 5033; Idaho Code Ann. (1932) § 54-502; Md. Ann. Code (Flack, 1939) art. 93, § 332; Mich. Stat. Ann. (1937) § 26.851; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 6839; N.J. Rev. Stat. (1937) § 46:3-7; N.M. Stat. Ann. (1941) §§ 75-118, 75-119; R.I. Gen. Laws Ann. (1938) c. 433, § 10.

⁸ *Magness v. Kerr*, 121 Ore. 373, 254 P. 1012 (1927); *Pure Oil Co. v. Miller-McFarland Drilling Co., Inc.*, 376 Ill. 486, 34 N.E. (2d) 854 (1941); *Yarbrough v. Yarbrough*, 151 Tenn. 221, 269 S.W. 36 (1924); *Cookman v. Silliman*, 22 Del. Ch. 303, 2 A. (2d) 166 (1938); *Union Colony Co. v. Gallie*, 104 Colo. 46, 88 P. (2d) 120 (1939); 109 A.L.R. 1148 (1937); 135 A.L.R. 576 (1941).

⁹ See note 4, *supra*.

¹⁰ O'Connell, "Estates on Condition Subsequent and Estates on Special Limitation in Oregon," 18 ORE. L. REV. 63 at 78 (1939); Ferrier, "Determinable Fees and Fees Upon Conditions Subsequent in California," 24 CAL. L. REV. 512 (1936); 3 SIMES, FUTURE INTERESTS, §§ 715, 716 (1936); PROPERTY RESTATEMENT, Tentative Draft 4, §§ 201, 202 (1936).