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Future Interests - Devolution of a Possibility of Reverter in Colorado

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COMMENTS

FUTURE INTERESTS—DEVOLUTION OF A POSSIBILITY OF REVERTER IN COLORADO. *School Dist. No. Six v. Russell,* 396 P.2d 929 (Colo. 1964).

". . . unto the said party of the second part [a school district] its heirs and assigns forever . . .[1]

"It is understood and agreed that if the . . . land is abandoned by the said second parties and not used for School purposes then the . . . land reverts to the party of the first part."[2]

This inept language was aptly construed by the Supreme Court of Colorado in an opinion which is noteworthy both for what is expressed and for what is necessarily to be inferred from the decision.

If the deed had said, "unto the said party of the second part its heirs and assigns, so long as the land is used for school purposes, and no longer, whereupon it shall revert to the party of the first part and his heirs," the grantee would have had a fee simple with a special limitation and the grantor would have had a possibility of reverter.[3]

If the deed had said, "unto the said party of the second part its heirs and assigns, but if the land is abandoned by the said second party and not used for school purposes then the party of the first part and his heirs shall have the power to terminate the estate hereby granted," the grantee would have had an estate in fee simple subject to a condition subsequent, and the grantor would have had a power of termination.[4]

The actual deed was a hybrid. "If" is the language of condition; "reverts" is the language of limitation. The court recognized this difficulty, and avoided subjecting itself to the compulsion of words that were so obviously inappropriate. Instead, it relied upon the purpose of the grantor, and a sophisticated rule of construction quoted from the American Law of Property:

> If the purpose is to compel compliance with a condition by the penalty of forfeiture, an estate on condition arises, but if the intent is to give the land for a stated use, the estate to cease when that use or purpose is ended, no penalty for a breach of condition is involved, since the purpose is not to enforce performance of a condition, but to convey

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[1] This portion of the deed was not quoted in the court's opinion but may be found in the Brief of Plaintiff in Error, Appendix A, p. 1.
[2] School Dist. No. Six v. Russell, 396 P.2d 929, 930 (Colo. 1964).
[3] RESTATEMENT, PROPERTY § 44 (1936).
[4] *Id.* § 45.

> the property for so long as it is needed for the purpose for which it is given and no longer. Therefore, in spite of language of condition, if the prevailing purpose is to create a collateral limitation of this kind, and not to enforce a condition by a threatened forfeiture, a fee on limitation results."[5]

Under this rule the court determined that the deed had created "an estate in fee simple determinable,"[6] that is a fee simple with a special limitation, and that the grantor had therefore retained a possibility of reverter, not a power of termination. The court did not mention instances in which a contrary result would be reached under this rule, but it would seem that the "liquor clause" cases would be good examples.

Having thus classified the reversionary interest as a possibility of reverter, the court took occasion to refer to its 1939 decision in *Union Colony Co. v. Gallie*[7] and to correct its "language which has created confusion and uncertainty in the law with regard to the problem here presented."[8] This return to orthodoxy was not to have been expected, because in 1963[9] the court quoted with apparent approval some of the confusing language in *Union Colony Co. v. Gallie*.

What difference did it make in this case whether the reversionary interest was a possibility of reverter or a power of termination? The answer to this question is very important, but it must be inferred. In 1942 the court had held[10] that a one-year statute of limi-

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[5] 396 P.2d at 931-32. The part of the opinion which includes this quotation did not appear in the court's original opinion dated November 30, 1964. The modified opinion of December 21, 1964, however, included the quoted paragraph.
[6] *Ibid.*
[7] 104 Colo. 46, 88 P.2d 120 (1939).
[8] 396 P.2d at 932.
[9] Cole v. Colorado Springs Co., 381 P.2d 13 (Colo. 1963).
[10] Wolf v. Hallenbeck, 109 Colo. 70, 123 P.2d 412 (1942).

tations[11] barred the assertion of a power of termination. Here, in spite of the School District's contention that the statute was a bar, and the admitted fact that more than a year had elapsed between the cessation of use and the bringing of the action, the court sustained the possibility of reverter. The necessary inference is that, as such, it was not affected by the statute. This had never before been decided. It is not here expressed, but there is no other way to account for the decision, and it explains the decisive importance of the court's classification of the interest. If it had been a power of termination it would have been barred by the statute; since it was a possibility of reverter it was not barred. The result can of course be justified by the fact that a possibility of reverter is automatic and requires no act upon the part of the one who has it; a power of termination must be asserted. The statute says, "No action shall be commenced or maintained to recover . . . or to enforce . . . or to compel. . . ."[12]

This leaves for consideration what is perhaps the most interesting part of the decision, namely, the devolution of the possibility of reverter from the time of the grantor's death in 1930.

It was contended that a possibility of reverter was not "subject to grant, devise or inheritance,"[13] and that only those who would have been the heirs of the grantor at the time of the happening of the limiting event could represent him at that time and thereby acquire the estate. The common law authority for this proposition necessarily relates only to powers of termination upon breach of conditions subsequent, because there is such a paucity of English common law relating to possibilities of reverter that it has been doubted that such an interest could have been created after the statute of Quia Emptores, 1290.[14]

The court expressly rejected this argument and adopted the rule that "the possibility of reverter is cast by descent upon the person's heirs, at the time of his death."[15] An attempt to apply any rule other than that of the statute of descent and distribution[16] might

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[11] COLO. STAT. ANNO. 1935, Ch. 40, § 154 (now COLO. REV. STAT. § 118-8-4 (1963)).

[12] COLO. REV. STAT. § 118-8-4 (1963).

[13] 396 P.2d at 930.

[14] See, *e.g.*, GRAY, THE RULE AGAINST PERPETUITIES § 32 (4th ed. 1942): "In accordance with the doctrine of the foregoing section, no possibility of reverter after a determinable fee has been sustained in England since the Statute *Quia Emptores.*"

[15] 396 P.2d at 932.

[16] The applicable statute, COLO. STAT. ANNO. 1935, Ch. 176, § 1, said, "Any real estate or property having the nature or legal character of real estate . . . shall descend . . . . " COLO. REV. STAT. § 153-2-1 (1963) is the same.

lead a court into consideration of such unfamiliar rules of descent as those pertaining to primogeniture and ancestral lands.

The decision to apply the ordinary rules of descent to possibilities of reverter was all that was said about the devolution of the interest, and the problems of devise and inter vivos conveyance were apparently left unanswered. However, the court did find that one Mary Sander was the owner of the estate which had reverted. In one place it is said that she is "the grantee in a deed from persons who were the heirs and devisees of the said Agnes F. Russell"[17] who was the sole heir of the grantor. In another place it is said "Mary Sander secured a deed from persons who, through inheritance and devise succeeded to the rights originally held by Russell [the grantor] under the possibility of reverter created by him."[18]

It is impossible for the same interest to be acquired both by inheritance and by devise, and whenever a testator appears to devise property to a person who is his heir, it is necessary to consider the applicability of the doctrine of worthier title in order to determine whether the person who took the property took as heir or as devisee. The facts which are needed are, fortunately, included in Appendix B of the Brief of Plaintiff in Error. It contains an abstruct of the chain of title from Herbert A. Russell, the original grantor, to Sander, in whom title is now quieted. The entries are as follows:

March 11, 1890	Deed, Russell to School District.
June 4, 1930	Herbert A. Russell dies intestate, with widow, Agnes F. Russell, as sole heir.
May 20, 1950	Agnes F. Russell dies testate, leaving a brother, David M. Bell, and sister, Jane B. Darling, with residue to Jane B. Darling.
May 12, 1955	Jane B. Darling dies testate leaving her residuary estate to her heirs, Mort W. Darling (husband), and children, Dewey L. Darling, Ray W. Darling, and Satia May Turner.
Aug. 10, 1955	Mort W. Darling dies testate with residuary estate to his heirs, Dewey L. Darling, Ray W. Darling, and Satia May Turner.
June 1960	School discontinued at school site but possession retained by School District.

[17] 396 P.2d at 930.
[18] 396 P.2d at 932.

May 1, 1962	School District files complaint for quiet title.
Nov. 5, 1962	Sander records October 26, 1962 Quit Claim Deed from David M. Bell, Dewey L. Darling, Ray W. Darling, and Satia May Turner.

It is apparent that when the grantor, Herbert F. Russell, died intestate on June 4, 1930, his possibility of reverter descended to his only heir, his widow, Agnes F. Russell. When she died, on May 20, 1950, it is to be inferred that her only heirs were a brother and a sister. It is further to be inferred, since the subsequent links in the chain of title do not include the brother, that the possibility of reverter was included in the residuary devise to the sister, Jane B. Darling. Did she take it as a devisee or as an heir?

This depends upon whether the doctrine of worthier title is applicable. In a case in which the doctrine was applied, the Supreme Court of Oregon quoted Blackstone's statement of the rule:

"But if a man . . . devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take descent. . . ."[19]

The rule is applicable even though the heir is named, as in the present case, "to my sister, Jane B. Darling." It has been stated that the "test . . . is to strike out of the will the particular devise to the heir, and then, if without that he would take by descent exactly the same estate which the devise purports to give him, he is in by descent. . . ."[20]

It might appear that in the present case the doctrine would not be applicable because as heir, the sister would have taken only an individed one-half interest in the possibility of reverter (the other half going to her brother), whereas by the residuary clause she was devised the entire interest. However, under the orthodox rule this sort of difference would not prevent the application of the doctrine.[21]

There is, though, another factor in this case which does prevent the doctrine from being applicable. As an heir, she would have inherited with her brother as a tenant in coparcenary,[22] but under the will she took as tenant in severalty. This difference in tenure

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[19] Cordon v. Gregg, 164 Ore. 306, 101 P.2d 414, 415 (1940).
[20] Harper & Heckel, *The Doctrine of Worthier Title*, 24 ILL. L. REV. 627, 635 (1930).
[21] *Id.* at 642.
[22] COLO. STAT. ANNO. 1935, Ch. 176, § 1, the applicable statute on May 20, 1950, provided, "it shall descend . . . in parcenary . . . . " COLO. REV. STAT. § 153-2-1 (1963) is the same.

is enough to take the devise out of the doctrine of worthier title.[23] Therefore, Jane B. Darling took not as heir, but as devisee. Since the title which was quieted in Mary Sander was derived from Jane B. Darling, the decision of this case included, by necessary inference, the first decision that a possibility of reverter was devisable in Colorado.[24]

Nothing pertaining to the devolution of a possibility of reverter would be gained by a further study of the chain of title. The first transfer, on June 4, 1930, required a holding that a possibility of reverter was inheritable in the ordinary manner in Colorado, and this was expressly stated by the court. The next transfer on May 20, 1950, necessarily involved a decision that a possibility of reverter was devisable in Colorado. The decision left unanswered the question as to whether a possibility of reverter could be conveyed by deed in Colorado, because there was no such transfer in this chain of title until November 5, 1962, after the estate had reverted.

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CONSCIENTIOUS OBJECTORS—DEFINITION OF RELIGIOUS BELIEF —A BELIEF WHICH OCCUPIES A PLACE IN THE LIFE OF ITS POSSESSOR PARALLEL TO THAT ORDINARILY FILLED BY AN ORTHODOX BELIEF IN GOD IS A RELIGIOUS BELIEF. *United States v. Seeger*, 85 Sup. Ct. 850 (1965).

Daniel Seeger claimed exemption from military service as a conscientious objector,[1] but left open the question as to his belief in a Supreme Being. He declared, however, that his agnostic philosophy did "not necessarily mean lack of faith in a purely ethical creed."[2] Although the government conceded that Seeger's abhor-

[23] Harper & Heckel, *supra* note 20 at 639-640.

[24] The applicable statute, COLO. STAT. ANNO. 1935, Ch. 176, § 36, said, " . . . shall have the power to . . . devise . . . any or all the estate, right, title and interest in possession, reversion or remainder . . . of, in and to any lands, tenements, heriditaments, annuities or rents charged upon or issuing out of them . . . . " COLO. REV. STAT. § 153-5-1 (1963) says, " . . . may devise . . . real . . . property or any interest therein . . . . "

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[1] 50 U.S.C. App. § 456(j) (1951): Seeger's claim was made under § 6(j) of the Universal Military Training and Service Act:

> Nothing contained in this title [§ § 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

[2] 85 Sup. Ct. at 854.