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The Possibility of Reverter in Colorado - cont.

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The Possibility of Reverter in Colorado

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(Continued from May Issue)

There was a strong dissenting opinion filed in this case by the Chief Justice, Mr. Marshall. A splendid review of the case by Louis H. Rubin may be found in 9 Boston University Law Review, p. 291.

It will be noted in this Ohio case that the court decided there was no possibility of reverter and that the title to the lot, and buildings thereon appurtenant thereto, remained in the grantees, the trustees of the church, although the land was no longer used for church purposes. In contrast to this case is another Ohio case—the *Board of Education v. Hollingsworth* (1936), 56 Ohio Appellate Reports 95, in which the habendum clause *did* contain the phrase "and no longer." In that case the same court decided that the title to the property upon the disuse of the purposes for which it was granted became reinvested in the grantor. It will also be noted in this latter case that the deed contained no provision for reversion nor did it preserve unto the grantor a right of re-entry. The facts and decision of the Hollingsworth case are as follows:

Where the Habendum Clause Contains the Words "And No Longer": In 1936, the Ohio Court of Appeals, in the case of *Board of Education v. Hollingsworth*, 56 Ohio Appellate Reports 95, decided that a deed conveying to a Board of Education a small lot of ground and containing a clause, "To have and to hold * * * so long as the same shall be occupied as a site for a schoolhouse and no longer," clearly expresses an intention on the part of the grantor to provide for a reverter and forfeiture and conveys a tenure limited to the continued use for school purposes.

The facts were that the Board of Education filed an action to quiet title to a small lot of ground which had for many years been used by it for school purposes. Some four years previous to the filing of this action such use had been discontinued, the Board of Education, by appropriate resolution, found that the lot was no longer needed for such purposes and thereupon the lot was ordered sold.

At the sale Hollingsworth bid for the premises, and the same were sold to him. He paid $25.00 on the purchase price, but later took the position that the Board of Education did not have any title to the premises in question which it could convey, and, therefore, that he was not bound by his bid, but was, on the contrary, entitled to the refund of his deposit. He filed an answer to this effect, and alleged therein that he had acquired title from the heirs of one of the original grantors of the land

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and prayed that title to the premises be decreed in him. The lower court sustained Hollingsworth and the Board of Education thereupon appealed. This Appellate Court took the position that the judgment of the lower court in favor of Hollingsworth should be affirmed. The Appellate Court held, in sustaining the lower court, that the deed conveyed not an absolute fee to the Board of Education, but merely a tenure limited to the continued use for school purposes. The Appellate Court in its opinion said:

"The question is considered in the cases of *In Re Matter of Copps Chapel M. E. Church,* 120 Ohio St. 309, 166 N. E. 218; *Schwing v. McClure et al., Trustees,* 120 Ohio St. 335, 166 N. E. 230; *Licking County Agricultural Society v. County Commissioners,* 48 Ohio App. 528, 194 N. E. 606; *Schurch v. Harriman,* 47 Ohio App. 383, 191 N. E. 907. See also: 13 Ohio Jurisprudence 961; 16 Ohio Jurisprudence 394, 396.

"In the *Church case* the court distinguishes lessee of *Sperry v. Pond,* 5 Ohio 387, in which the language used was much the same as that employed in the instant case, in that the following expression appears in the deed: 'so long as they should continue to use and improve the same for the express purpose of grinding, and no longer.' In the *Pond case* the language used was held sufficient to express the intention of reverter and forfeiture.

"In the *Church case* similar words, omitting the words 'no longer,' were held not to express such intent. The question, as in in wills, is what was the intention of the one who executed the instrument, as such intention is gained from the words used? While we agree with Judge Marshall in his dissenting opinion, that the words 'no longer' add nothing to the strength of the words used to express a reverter, we feel justified in adopting the same line of demarcation used by the Supreme Court in distinguishing the *Pond case* from the *Church case,* and in concluding that the language used in the instant case clearly expressed an intention on the part of the original grantor to provide for a reverter and forfeiture.

'We are strengthened in our view of the law by the conclusion of the American Law Institute in its Restatement of the Law of Property. We quote from Tentative Draft No. 2, pages 21, 22:

"Section 54. Language sufficient to create an estate in determinable fee simple.

"An estate in determinable fee simple is created by any limitation which, in an otherwise effective conveyance of land:

"(a) Is effective to create an estate in fee simple, and

"(b) Effectively provides that upon the happening of a stated event the estate shall automatically terminate in favor either of the conveyor or of his successor in interest."

In the first of these two Ohio cases the clause was considered to be merely declaratory of the purpose for which the land was conveyed, and the recital was not held to have the effect of limiting the estate granted or rendering it liable to divestiture upon departure from the use specified.

In the second Ohio case the habendum clause limited the purpose and granted an estate for such time as it was so used and no longer. This specified condition created a determinable or qualified fee, subject to termination and reversion upon cessation of that use. It was the intention and purpose implied that the title should revert to the grantor upon a failure to use the land for a school.

In neither of the two above-mentioned Ohio cases did the deed of conveyance contain a provision of reverter, or retain in behalf of the grantor a right of re-entry. It was otherwise in the earliest Colorado case, *Cowell v. Colorado Springs* (1876), 3 Colorado 82, affirmed, on appeal, in 100 U. S. 50. There land was conveyed by a deed, granting an estate in fee and containing the following condition:

"Witnesseth, that the said party of the first part, for and in consideration of the sum of $250.00, to it in hand paid by the said party of the second part, and also for the further consideration of the agreements between the parties hereto, for themselves, their heirs, successors, and legal representatives, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort, in or upon the premises hereby granted, or any part thereof; and it is herein and hereby expressly reserved by the said party of the first part, that in case any of the above conditions concerning intoxicating liquors are broken by the said party of the second part, his assigns or legal representatives, then this deed shall become null and void, and all right, title and interest of, in, and to the premises hereby conveyed shall revert to the said party of the first part, its successors and assigns, and the said party of the second part by accepting this deed for himself, his heirs, executors, administrators and assigns, consents and agrees to the reservations and conditions aforesaid."

Evidence was given tending to show that after the execution and delivery of the deed, the grantee had sold and disposed of intoxicating liquors as a beverage, in a place of public resort upon the premises granted.

The court held that the condition was valid, binding upon the grantee and was not repugnant to the estate granted, and that, as the

condition was broken, the grantor might at once maintain ejectment, without previous entry, demand or notice.

The United States Supreme Court, in 1876, affirmed the judgment in 110 U. S., p. 55, the court in its opinion, speaking through Mr. Justice Field, saying:

> "The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of the plaintiff to maintain the action without previous entry or demand of possession.
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> "The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character. Sheppard's Touchstone 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap factories, distilleries, livery stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.
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> "The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.
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> "A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the

grant by the Court of Appeals of New York in *Plumb v. Tubbs*, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended. 14 Kan. 61. See also *Doe v. Keeling*, 1 Mau. & Sel. 95, and *Gray v. Blanchard*, 8 Pick. (Mass.) 283.

"We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See also *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Cornelius v. Ivins*, 2 Dutch. (N. J.) 376; *Ruch v. Rock Island*, 97 U. S. 693."

It will be noted that in the first Ohio case, the Copps Chapel case, the court adjudged the title to be vested completely in the grantee, and that no right at all remained in the grantor, not even a possibility of reverter in case of condition broken. Without doubt a prospective purchaser of the church lot could have obtained from the trustees a marketable title in fee simple absolute.

But, in cases like the second Ohio case—the Board of Education—and the Colorado case of Cowell, Colorado Springs, upon condition the broken title, immediately leaves the grantee and reinvests in the grantor. Nothing need be done by the grantor. The grantee has no title to sell. The grantor has a marketable title in fee simple absolute to sell, and if he is denied possession he may, as stated in the Colorado case, "at once maintain ejectment, without previous entry, demand or notice." and we may note here, as stated above, section 54, subsection (b), of the Restatement of the Law of Property that "upon the happening of a stated event the estate shall *automatically* (italics supplied), terminate in favor of the conveyor or of his successor in interest."

Other Colorado cases on this subject are *B. and Colorado R. R. Co. v. Colorado E. R. R. Co.* (1906), 38 Colo. 95, 88 Pac. 154; and *Board of Commissioners of El Paso County, et al. v. City of Colorado Springs* (1919), 66 Colo. 111, 180 Pac. 301; *D. & S. Fe Ry. Co. v. School District* (1890), 14 Colo. 327, 23 Pac. 978.

The right of possibility of reverter contrasted with the right of re-entry: There is a practical and a material difference between that

state of the title where the grantor has only a mere possibility of reverter, and where, on the other hand, he holds a right of entry for condition broken. *Attorney General v. Merrimack Mfg. Co.* (1860), 14 Gray 586, 80 Mass. 586. Some courts seem to lose sight of the distinction between the right to re-enter founded upon a condition subsequent, and the right of possibility of reverter which, as stated in *Burlington & C. R. Co. v. Colorado Eastern R. Co.* (1906), 38 Colo. 95, 88 Pac. 154, is founded upon a limitation.

Thus the court in the case of *Sioux City & St. Paul R. Co. v. Singer* (1892), Minn., 15 L. R. A. 751, at 753, declares that where there is a conveyance of an estate in fee with the express condition that intoxicating liquor should not be sold and the conveyance is recorded, then the successive purchasers bought with constructive notice of it. And the court allowed an action of ejectment. "If," said the court, "by reason of the breach of the condition subsequent, the plaintiff had a right to re-enter, it was not necessary that the common law ceremony of a re-entry be performed, as a condition precedent to the prosecution of an action to recover the possession of the property," citing among other cases, *Ruch v. Rock Island* (1878), 97 U. S. 693.

It will be noticed that the court, loose in its language, used the words "condition subsequent," when it really considered the prohibition against liquor selling as a limitation, and allowed ejectment, and not a condition subsequent, which would necessitate action of re-entry. In this connection the most exact language, expressing the distinction between the condition subsequent and the conditional limitation, used by Mr. Justice Bigelow in *Proprietors of the Church in Brattle Square v. Grant and Others, supra,* may be noticed. This distinction is also emphasized and applied in the Colorado case of *B. & Colorado R. R. Co. v. Colorado E. R. R. Co.* (1906), 38 Colo. 95, *supra,* 88 Pac. 154.

Mr. Justice Bigelow on this distinction said in part (pp. 146-149):

> "Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or devisor, and his heirs. Upon a breach of the condition, the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the devisor, who alone had the right to take advantage of a breach. 21 Bl. Com. 156. 4 Kent Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation.

A condition determines an estate after breach upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

"There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the enter interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu;* and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

"One material difference therefore, between an estate in fee on condition and one on a conditional limitation, is briefly this: that

the former leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening in the event or breach of the condition upon which the ulterior gift is to take effect."

In the latter case the court further said: "The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event, that in the latter case the estate reverts to the grantor, or passes to the person to whom it is granted by limitation over, upon the mere happening of the event upon which it is limited, without entry or other act; while in the former the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to revest the estate. The provision for reentry is therefore the distinctive characteristic of an estate upon conditional and when it is found that by any form of expression the grantor has reserved the right upon the happening of any event, to re-enter, and thereby revest in himself his former estate, it may be construed as such. Shep. Touch. 121, 122, Lit. Secs. 329, 330, 4 Cruise Dig. Title 32, c. 25, 4 Kent Com. (6th Ed.) 125, 126. The words 'provided,' 'so that,' and 'upon condition that' are the usual words to make a condition; but

to say that if a certain event happen the grantor may re-enter is equally effectual. And the reason of this rule of construction is, that the stipulation for a right of re-entry would be senseless if the deed were to be construed to create a limitation; because the estate vesting upon the mere happening of the event, the right to enter would of course follow with all other rights of ownership." *(Continued in July Issue)*

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CALENDAR

July 17, 18.....Colorado Banking Institute, Boulder
July 19, 20.....Institute on Trusts, Boulder
September 11.....Meeting District Judges, Colorado Springs
September 12, 13.....Annual Meeting Colorado Bar Association, Colorado Springs
September 22.....Annual Meeting Commissioners on Uniform Laws
Sept. 29-Oct. 4.....Annual Meeting American Bar Association, Indianapolis, Indiana