

GRANTS OF EASEMENTS AND ESTATES DISTINGUISHED:
ALIENABILITY OF POSSIBILITY OF REVERTER

In re Wyatt's Claim

74 Ohio L. Abs. 450, 141 N.E.2d 308 (Ohio App. 1955)

In November 1901, J. B. Wyatt executed to the Western Ohio Railway Company a warranty deed to a strip of land which was part of a 90 acre tract held in fee by the grantor. A condition in the deed provided that if the grantee failed to use the premises for railway purposes, "the estate hereby granted [Emphasis Added] . . . shall cease and determine and the title . . . shall revert . . . [to] the grantor [,] his heirs and assigns without further act or deed." In March 1902, J. B. Wyatt conveyed the fee in the 90 acre tract by warranty deed to John H. and J. D. Barnes and the grant excepted "the right and title of the Western Ohio Railway Company' . . ." In 1932 the Railway Company forfeited its interest in the strip of land and the owners of the 90 acre tract treated the strip of land as their own.¹ However, when the Department of Highways appropriated the land for public use, the sole devisee of J. B. Wyatt's estate asserted ownership and claimed the proceeds of the appropriation. The court of appeals found that the deed to the Railway Company conveyed only a "limited title to a right of way or an easement" and that the deed of the 90 acre tract divested the grantor of all interest in the premises.

Relatively little difficulty should be encountered in distinguishing between a fee simple determinable and an easement, but the importance of such a distinction cannot be overemphasized. Consideration will be given herein to the method of distinguishing between the grant of an easement and that of a fee simple determinable, the importance of the distinction with respect to division of property rights in the land, and the related problem of alienation of the future interest resulting from the creation of a fee simple determinable.

The court failed to distinguish between an easement and a fee simple determinable and other courts have displayed difficulty in similar conveyances.² Indeed, some courts have stated flatly that the grant of a strip of land for railway purposes conveys only an easement even though the instrument purports to convey an estate in fee.³ Some real property authorities have contended that as a result of the Statute *Quia Emptores* it is impossible to create a fee simple determinable,⁴ but the fact remains

¹ The facts do not indicate that the doctrine of adverse possession was applicable and no consideration will be given to that issue.

² Annot., 132 A.L.R. 142 (1941).

³ *E.g.*, *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208 (1905); *supra* note 2.

⁴ See Powell, *Determinable Fees*, 23 COLUM. L. REV. 207 (1923) and Vance, *Rights of Reverter and the Statute Quia Emptores*, 36 YALE L. REV. 593 (1927).

that most jurisdictions, including Ohio, have recognized such estates.⁵

The Ohio Supreme Court indicated a guide for distinguishing between the grant of an easement and that of an estate in fee in *Hinman v. Barnes*⁶ which involved an instrument entitled "CONTRACT FOR RIGHT OF WAY" and granted a strip of land "to be used as a perpetual right of way for railroad purposes only." The court said, ". . . nothing further appearing than that the granting clause . . . refers to 'land,' a fee is . . . conveyed; and . . . where the granting clause refers only to a 'right,' such an instrument conveys only an easement." The court then pointed out that if an examination of the whole instrument indicated a contrary intent, such intent would be given effect. Relying on the reference to a right of way in the title and the limitation in the granting clause the court held that an easement was conveyed. Thus it would appear that if the instrument is ambiguous, *i.e.*, refers sometimes to "right" and other times to "land," the struggle for the intention of the parties begins, but when there is reference only to "right" or only to "land," then an easement or an estate in fee is conveyed. The deed in the instant case to the Railway Company was unambiguous, the reference was always to land, *i.e.*, premises or estate.

While the court in the *Hinman* case referred to the distinction between a fee and an easement, the reasoning is clearly applicable in the principal case because the vital distinction is between an easement and an estate. The *Restatement of Property* provides:

An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that the estate shall automatically expire upon the occurrence of a stated event.⁷

Since the deed to the Railway Company by the terms of the granting clause purported to create an estate in fee but further provided that "the estate . . . shall revert . . . [to] the grantor" if the premises were not used for railway purposes, the *Restatement* definition of a fee simple determinable is satisfied. Presumably the *Copps Chapel*⁸ doctrine is not applicable. In that case a conveyance which met the requirements of the *Restatement* definition was held to convey an estate in fee because there was no express provision for a reverter to the grantor upon occurrence of the condition.⁹

⁵ SIMES AND SMITH, THE LAW OF FUTURE INTERESTS §283 (2d ed. 1956); *Bartholomew v. Rothrock*, 20 Ohio L. Abs. 513 (Ohio App. 1935).

⁶ 146 Ohio St. 497, 66 N.E.2d 911 (1946).

⁷ RESTATEMENT, PROPERTY §44 (1936).

⁸ *In re Matter of Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N.E. 218 (1929).

⁹ *Bartholomew v. Rothrock*, *supra* note 5, where the court found a fee simple determinable relying on the presence of a reverter clause to distinguish the *Copps Chapel* case. See *Miller v. Village of Brookville*, 152 Ohio St. 217, 89 N.E.2d 85 (1949) where the court emphasized the absence of a reverter clause in holding that a fee simple determinable was not conveyed.

Comparing the definition of an easement with that of the fee simple determinable will serve to point out the differences in the rights of the grantor and grantee under the two interests. The Ohio Supreme Court has described an easement as follows:

An easement implies necessarily a fee in another, and it follows that it is a right . . . to use the land for a special purpose, and one not inconsistent with the general property in the land of the owner of the fee. . . .¹⁰

The owner of an easement can enjoy only the rights covered by the easement, while the owner of a fee simple determinable enjoys all the rights of an owner in fee until the determining condition occurs. Thus, when oil is discovered, the owner of a fee simple determinable is entitled to drill and remove the oil¹¹ whereas the owner of an easement would have no right to the oil.¹²

Another important reason for making the distinction is the necessity that rules of construction developed by the courts for determining the intention of the grantor in a deed be uniformly applied in order to insure maximum stability of real property interests. In the absence of ambiguity certain phraseology in a deed results in the grant of a certain property interest and deeds are drafted in light of such guides.

The importance of proper application of rules of construction is also emphasized by the fact that had the court found that the deed to the Railway Company created a fee simple determinable, the question of alienation of the possibility of reverter¹³ would have arisen and the determination of this issue may have commanded a different result. The deed of the 90 acre tract purported to convey the entire interest of the grantor which would have included his possibility of reverter. However, at common law this interest has generally been held to be inalienable apparently on the theory that the rich and powerful would acquire such future interests and use them to usurp the interests of the poor before the right accrued.¹⁴ The real property authorities and most courts have recognized that the danger is no longer real,¹⁵ but the

¹⁰ *Cincinnati, H. & D. Ry. v. Wachter*, 70 Ohio St. 113, 70 N.E. 974 (1904).

¹¹ *Cf. Brightwell v. International-Great Nor. Ry.* 121 Tex. 338, 49 S.W.2d 437, 84 A.L.R. 265 (1932).

¹² *Cf. Sherman v. Petroleum Exploration*, 280 Ky. 105, 132 S.W.2d 768, 132 A.L.R. 137 (1939).

¹³ Possibility of reverter has been defined as "any reversionary interest which is subject to a condition precedent." *RESTATEMENT, PROPERTY* §154(3) (1936).

¹⁴ "Under color thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." *COKE UPON LITTLETON* §347.

¹⁵ See *e.g.*, *SIMES AND SMITH, THE LAW OF FUTURE INTERESTS* §1860 (2d ed. 1956) and *Roberts, Assignability of Possibilities of Reverter and Rights of Re-Entry*, 22 B.U.L. Rev. 43 (1942); *Jeffers v. Lampson*, 10 Ohio St. 101, 108 (1859)

change in most jurisdictions has awaited legislative action to abrogate the prohibition on alienation.¹⁶

Although there has been no decision on the validity of an inter vivos transfer of a possibility of reverter in Ohio, the interest has been held not to be devisable.¹⁷ It would seem to follow that the outmoded reasoning would apply to an inter vivos transfer as well. Recent common law decisions concerning the issue as an original proposition in other jurisdictions are conflicting. Relying on the modern tendency towards liberal alienation of property interests, the Texas Commission of Appeals upheld the transfer of a possibility of reverter,¹⁸ while, on the other hand, the Minnesota Supreme Court indicated that the change of the common law rule must come from the legislature,¹⁹ and held that the possibility of reverter could not be alienated. The Minnesota decision would seem to be particularly susceptible to attack. Since the reason for the rule has disappeared, the only persons who can be adversely effected by its abrogation are the grantors of such interests. It seems clear that the grantor should not be entitled to the benefit of a meaningless rule in order to defeat his own grant.

An Ohio statute, although not in effect at the time of the grant of the possibility of reverter in the Wyatt case, must nonetheless be considered in connection with the problem of alienation of a possibility of reverter. It provides as follows:

Remainders, whether vested or contingent, executory interests and other expectant estates are descendible, devisable and alienable in the same manner as estates in possession.²⁰

It seems clear that a possibility of reverter is included in the term "expectant estates" but the New York Court of Appeals in construing a similar statute held to the contrary on the ground that a possibility of reverter is a "mere expectancy."²¹ The decision has been criticized²² but the New York Court of Appeals recently held in a case in which the deed was substantially the same as the one to the Railway Company in

where the court referring to the reason behind the rule said in dictum, ". . . in a state of society presenting strongly marked classes, with great inequality of civil rights, and of social rank and consequent influence, and where legal proceedings were very expensive to parties litigant, the rule may have been wise and salutary; but in this age and country, of complete civil and comparative social equality, and of cheap justice, where *champerty* and *maintenance* are obsolete offenses, *quere*—has not the reason of the rule ceased? And ought not the rule itself to disappear with the reason on which it rests?"

¹⁶ See RESTATEMENT, PROPERTY (1936), special note p. 588, where the various statutes of the different states are set forth.

¹⁷ *Bartholomew v. Rothrock*, *supra* note 5.

¹⁸ *Caruthers v. Leonard*, 254 S.W. 779 (Tex. Com. App. 1923).

¹⁹ *Consolidated School District No. 102 v. Walter*, 243 Minn. 159, 66 N.W.2d 881 (1954).

²⁰ OHIO REV. CODE §2131.04 (1953).

²¹ *Upington v. Corrigan*, 151 N.Y. 143, 45 N.E. 359 (1896).

²² SIMES AND SMITH, THE LAW OF FUTURE INTERESTS §1903 (2d ed. 1956).

the *Wyatt* case that the grantee railroad company received a fee simple determinable and the subsequent grant of the possibility of reverter was invalid.²³ Fortunately, most jurisdictions have taken a more liberal view of such statutes. Presumably the fact that the New York statute²⁴ is not as comprehensive as the Ohio statute and was construed prior to the widespread enactment of legislation²⁵ indicating the trend towards liberal alienation mitigates the persuasiveness of the *Uppington* case. It seems obvious that the Ohio legislature intended to make possible the alienation of all real property interests where the sole argument against alienation is champerty and maintenance and presumably the Ohio courts will reflect that intent when the issue is presented.

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²³ *Lipetz v. Papish*, 308 N.Y. 787, 125 N.E.2d 432 (1955).

²⁴ "An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession." N.Y. REAL PROP. LAW. §59.

²⁵ *Supra* note 16.