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Real Property--Statute Extinguishing Reverter Declared Unconstitutional (Board of Educ. v. Miles, 15 N.Y.2d 364 (1965))

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The dissenting opinion indicated that it is very difficult to establish degrees of election interference, and that if reliance is placed upon mere technicalities, no definite standard can be developed upon which to predicate future results.

Available statistics indicate that of 212 re-run elections held because of employer misconduct, the objecting union was successful in only thirty per cent, and that of the total votes cast, the union picked up only an additional two per cent.[26] It would appear from these statistics that re-run elections are not an adequate remedy for the aggrieved union. The Board has contended in the past that regardless of the length of delay before a re-run election, the employer's prior unfair labor practices are never quite forgotten, and that these practices influence the free choice of employees in any subsequent election.[27] Considering that the instant case reduces the availability of the bargaining order to instances of "aggravated" unfair labor practices by the employer, one can conclude that it represents a setback for unions in the courts. However, *Flomatic* was decided on narrow factual grounds, and will have an effect in only a small percentage of cases. When the facts are more substantial, and indicate more aggravated types of unfair labor practices by the employer, Board bargaining orders will be issued.

As a result of the instant case the employer and the union are on more equal bargaining terms. The goal of the NLRA was to equalize the bargaining position of both contestants, and the instant case is a refinement in that direction. The bargaining order will be issued only when the Board is fairly convinced that the employer's practices will be a continued influence in preventing the union from establishing their representative position in a second election.

REAL PROPERTY — STATUTE EXTINGUISHING REVERTER DECLARED UNCONSTITUTIONAL. — Plaintiffs had been holders of property subject to a possibility of reverter, which ripened in favor of defendants. Subsequently, plaintiffs sought a declaration that they owned the property in fee simple absolute and that the defendants,

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a moderate unbalancing of an election by an employer such as there was in this case, there is no adequate justification for putting the union in a position to unbalance it the other way to an extreme degree." *Id.* at 80.

[26] Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C.L. REV. 209, 212 (1963). For an evaluation of the NLRB remedies generally, see McCulloch, *An Evaluation of the Remedies Available to the NLRB*, 15 LAB. L.J. 755 (1964).

[27] See Pollitt, *supra* note 26, at 223; Note, 72 YALE L.J. 1243, 1250, 1257 (1963).

by failing to comply with the statutory requirement[1] of filing a declaration of intention to preserve their interest, were barred from asserting it. The Court of Appeals *held* that the filing requirement, as retroactively applied in the instant case, was an unconstitutional impairment of the obligation of contract that could not be justified under the state's police power. *Board of Educ. v. Miles,* 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

A possibility of reverter is a device whereby a grantor can control the subsequent use of the land which he transfers.[2] If the land is used for any purpose other than that designated by the grantor, the reverter occurs and the grantor or his heirs are vested with a possessory estate in the land.[3] No set formula is required to create such a limitation, and any words expressing the grantor's intention will suffice.[4] The restriction may endure forever because the event named as terminating the estate may never occur in fact.[5] Since the use of the land is limited, the marketability of the title is impaired.[6] The problem is especially acute in New York City where these restrictions may prevent the full development and use of land consistent with neighboring property.[7]

Several solutions to this problem have been suggested. One approach has been legislation providing for the extinguishment of claims against, and interests in land which arose out of transactions occurring many years before.[8] Under such a plan, a claimant's rights may be retained if a preserving notice is recorded within a specified time period.[9] Legislation of this kind may be divided into two categories.[10] The first, is in the form of a statute of limitations on claims.[11] The second requires the owner in possession to show record title in fee simple absolute in himself or in his grantors

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[1] N.Y. REAL PROP. LAW § 345.

[2] The grantor's reversionary interest has been made alienable, devisable and descendable. N.Y. REAL PROP. LAW § 59.

[3] 1958 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (B) 16-17.

[4] 1 TIFFANY, REAL PROPERTY § 220, at 385 (3d ed. 1939); see WALSH, REAL PROPERTY § 86, at 140, § 227, at 416 (2d ed. 1937).

[5] 1 TIFFANY, *op. cit. supra* note 4, at 386.

[6] 1958 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (B) 17.

[7] 1958 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (B) 15-16.

[8] See, *e.g.,* IOWA CODE ANN. § 614.17 (Supp. 1964); MICH. STAT. ANN. §§ 26.1271-79 (1953); MINN. STAT. ANN. § 541.023 (1947); WIS. STAT. ANN. § 330.15 (1958). For a discussion of title marketability acts, see Annot., 71 A.L.R.2d 846 (1960).

[9] Aigler, *Constitutionality of Marketable Title Acts,* 50 MICH. L. REV. 185 (1951).

[10] Aigler, *A Supplement to Constitutionality of Marketable Title Acts—1951-1957,* 56 MICH. L. REV. 225, 229 (1957).

[11] *E.g.,* IOWA CODE ANN. § 614.17 (Supp. 1964); WIS. STAT. ANN. § 330.15 (1958).

for a limited period of years.[12] These statutes are similar to the recording acts since they do not destroy interests and claims directly; rather, it is the failure of the owner to preserve his interests by recording that causes their extinguishment.[13] The intent of these "title marketability" statutes is to make title searches simpler and more reasonable in terms of time and cost.

In New York, the Law Revision Commission published reports in 1951 and 1958 discussing the legislation of other states and the advisability of the adoption of similar provisions.[14] It recommended that the legislature adopt automatic and inexpensive means to free lands of restrictions which have been forgotten or virtually abandoned by their owners. The Commission recommended a statute which would require the recording of these limitations on land, and it was of the opinion that such a statute would be constitutional, since it would be analogous to mortgage recording statutes which had been previously upheld.[15]

The legislation finally adopted to deal with these problems in New York included Sections 345-349 of the New York Real Property Law.[16] The section which the Court invalidated in the instant case required the recording of an intention to preserve possibilities of reverter and rights of re-entry which had been created prior to September 1, 1931.[17] Under the statute, owners of these rights were required to record their intention to preserve on or before September 1, 1961, and to renew the recording every ten years. The law also provided that new restrictions would be recordable not less than twenty-seven years, nor more than thirty years after their creation. The legislation was believed to be beneficial, since it was designed to improve the alienability of real property by clearing land titles which otherwise would have remained encumbered with impractical limitations.[18]

In holding New York Real Property Law Section 345(4) unconstitutional as applied to the facts in the instant case, the Court traced the line of cases which have held that recording acts are constitutional, and conceded that if this were a true recording act it could be applied retroactively to impair the obligation of con-

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[12] *E.g.*, MICH. STAT. ANN. §§ 26.1271-79 (1953); MINN. STAT. ANN. § 541.023 (1947).

[13] Aigler, *supra* note 9, at 199.

[14] 1951 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (P).

[15] 1951 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (P) 29. See Conley v. Barton, 260 U.S. 677 (1923); Vance v. Vance, 108 U.S. 514 (1883), which upheld statutes requiring mortgagees who had not taken possession under mortgages given prior to the enactment of the statute, to refile at stated intervals to preserve their liens.

[16] N.Y. REAL PROP. LAW §§ 346-49 (now embodied in N.Y. RPAPL §§ 1951-55).

[17] N.Y. REAL PROP. LAW § 345(4).

[18] Sparks, *Future Interests*, 33 N.Y.U.L. REV. 1193, 1198 (1958).

tracts.[19] It also distinguished this statute from the standard type of recording act, the purpose of which is to prevent fraud.[20] Focusing on section 345, the Court observed that protection of subsequent purchasers was not within the purview of the statute, and found that the impairment of contractual obligations was, in this case, an unjustifiable exercise of the police power.[21]

With respect to due process, the Court concluded that it would be unjust to allow the possibility of reverter and re-entry interests to be destroyed since persons with these claims might be ignorant of their rights or of the requirements of the statute. It stated:

> If subdivision 4 of section 345 of the Real Property Law be valid under these circumstances, at least, it would be necessary for unascertained persons, perhaps not even in being, to have recorded a declaration of intention to preserve a reverter which would not take effect in enjoyment until an indefinite future time.[22]

Although the Court found that the statute could not be justified under the police power, it has been said that the police power is the least limitable of the powers of government and that it extends to all the great public needs.[23] The United States Supreme Court has stated:

> the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.[24]

Assuming that the promotion of the alienability of land is necessary for the public good, it would appear that the police power is broad enough so that Section 345 of the New York Real Property Law could be encompassed therein. However, if the act were sustained under the police power, the objection remains that property is being taken in violation of due process. This objection has been obviated in other states by providing a reasonable time within which the interest can be protected by means of recording.[25] The statute under discussion in the present case allowed three years for the recording of special limitations which stemmed from documents

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[19] Board of Educ. v. Miles, 15 N.Y.2d 364, 369-70, 207 N.E.2d 181, 184-85, 259 N.Y.S.2d 129, 133-34 (1965).

[20] *Id.* at 368, 207 N.E.2d at 183, 259 N.Y.S.2d at 132-33.

[21] *Id.* at 370, 207 N.E.2d at 185, 259 N.Y.S.2d at 134.

[22] *Id.* at 373, 207 N.E.2d at 186, 259 N.Y.S.2d at 137.

[23] People v. Nebbia, 262 N.Y. 259, 270, 186 N.E. 694, 699 (1933).

[24] Manigault v. Springs, 199 U.S. 473, 480 (1905).

[25] *E.g.*, MICH. STAT. ANN. §§ 26.1271-79 (1953); MINN. STAT. ANN. § 541.023 (1947).

more than thirty years old. The proponents of the act, while anticipating serious objections, nevertheless, felt certain that its constitutionality would be ultimately upheld.[26] As early as 1958, one commentator predicted that although the retroactive aspect of the statute would be attacked as a taking without due process, the opportunity to avoid the taking by the simple act of recording would be sufficient to assure the statute's validity.[27]

It is to be noted that the Court has ruled only on that portion of the law which refers to deeds creating possibilities of reverter executed prior to 1931. The entire statute has not yet been invalidated, but in view of the reasoning in the instant case it is doubtful whether the Court will uphold the statute as it applies to those interests created between 1931 and 1961 (the effective cut-off date of the statute). The prospective provisions of the statute appear to be safe, however, and thus, possibilities of reverter created after 1961 will fail unless recorded.

That restrictions can have valid and worthwhile objectives is not denied, and to condemn all restrictions upon land would be rather short-sighted. On the other hand, there are many restrictions which serve no beneficial purposes and which have been forgotten by the owners of the land and by the holders of the reversionary interests. It is apparent that we should distinguish between antiquated restrictions and those which retain a useful purpose. A recording act is a valid solution since it allows destruction of the former upon the failure to record and allows the retention of the latter by the recordation of an intention to preserve.

TORTS — FIRST RECOGNITION OF "WRONGFUL LIFE" AS VALID CAUSE OF ACTION. — Due to the state's alleged negligence, a female incompetent was sexually assaulted while confined in a mental institution. The plaintiff, conceived as a result of the attack, claimed tort damages primarily for suffering "the stigma of illegitimacy." Ruling solely on the sufficiency of the pleading, the New York Court of Claims *held* that the infant had a valid cause of action against the state. *Williams v. State,* 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).

At common law, life began, from a legal point of view, when the infant stirred in its mother's womb.[1] Gradually, a child *en ventre*

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[26] 1951 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (B) 32.

[27] *Supra* note 18, at 1196.

[1] 1 BLACKSTONE, COMMENTARIES * 129.