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COMMENTS

STALE FUTURE INTERESTS: CAN TEXAS PASS A CONSTITUTIONAL REVERTER ACT?

ROBERT H. SHEPPARD

An early resident of Boston was asked to sell a portion of his land which was across the street from his residence facing the Boston Common. Concerned that a structure could be built on the lot which would prevent him from viewing his cattle grazing on the Common, he included in the grant a provision that no building exceeding thirteen feet in height ever be constructed on the lot. While this restriction was reasonable at its creation, it is unsettling to note that in the mid-twentieth century the same lot was occupied by a structure no taller than thirteen feet.¹ More disturbing is the knowledge that, absent legislative action, this restriction will continue in perpetuity, despite the probability that a more expedient and conventional use could be made of the land.² At the root of the problem is the fact that the original grant was that of a defeasible fee, and not a fee simple.³

One of the defeasible fees is the determinable, or base fee, which is recognized in Texas law.⁴ The reversionary interest involved in a determin-

1. See A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 20 (1959); Fike, *Problems Relating to Stale Reverters and Restrictions*, 38 *NEB. L. REV.* 150, 157 (1959).

2. See Fike, *Problems Relating to Stale Reverters and Restrictions*, 38 *NEB. L. REV.* 150, 157-58 (1959).

3. See A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 20 (1959); Fike, *Problems Relating to Stale Reverters and Restrictions*, 38 *NEB. L. REV.* 150, 157 (1959).

4. See *Glenn v. Holt*, 229 S.W. 684, 685 (Tex. Civ. App.—El Paso 1921, no writ). The determinable fee is predicated upon the common law doctrine that the fee simple interest in property must exist in some person. If that person grants less than a fee simple interest to another, the portion not granted remains in the grantor or his designees. *Id.*; see C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 94-95 (1962). Similarly, it is possible to grant a very specialized fee interest, called a determinable fee, in which the grantor conveys a fee limited or conditioned upon the occurrence or non-occurrence of a designated event. What remains in the grantor in this instance is not an estate in land, but rather the expectancy of an estate, termed a possibility of reverter. Should the limiting contingency upon which the life of the fee is predicated either occur or not occur as appropriate, fee title immediately reverts to the grantor. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 95-96 (1962); see *Caruthers v. Leonard*, 254 S.W.779, 781-82 (Tex. Comm'n App. 1923, judgment adopted); *James v. Dalhart Consol. Independent School Dist.*, 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ). See generally A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 44-45 (1959); Annot., 77 A.L.R. 344, 345-46 (1932); Annot., 51 A.L.R. 1473 (1927). The possibility of reverter is distinguished from the right of re-entry, which is

able fee is termed the possibility of reverter, and is considered in Texas to be inheritable, devisable, and assignable.⁵ Thus, the effect which a possibility of reverter has upon the land to which it is annexed is enlarged and prolonged because of the alienability of the interest in Texas.⁶

In response to the problems caused by the unchecked use of the determinable fee as a conveyancing device, at least fourteen states have passed legislation intended to mitigate or eliminate some of the more undesirable effects of the possibility of reverter.⁷ Despite the good intentions evidenced

the reversionary interest formed concurrently with the grant of a fee simple upon condition subsequent. Aside from conceptual differences between the two, the clearest difference in practice is the requirement of an affirmative act to regain the fee with a right of re-entry. This is unnecessary with a possibility of reverter, as fee title is forfeited and automatically reverts to the holder of the possibility of reverter. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 97-98 (1962).

5. *Caruthers v. Leonard*, 254 S.W.779, 782 (Tex. Comm'n App. 1923, judgment adopted) (possibility of reverter alienable); *James v. Dalhart Consol. Independent School Dist.*, 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (possibility of reverter alienable); *Watts v. City of Houston*, 196 S.W.2d 553, 556 (Tex. Civ. App.—Galveston 1946, writ ref'd) (possibility of reverter alienable and devisable); *Myrick v. Leddy*, 37 S.W.2d 308, 309-10 (Tex. Civ. App.—Austin 1931, no writ) (possibility of reverter alienable and devisable); *Diamond v. Rotan*, 124 S.W. 196, 200 (Tex. Civ. App. 1909, writ ref'd) (possibility of reverter inheritable). See generally 2 TEXAS L. REV. 254, 254-55 (1924); Annot., 16 A.L.R.2d 1246, 1247 (1951); Annot., 77 A.L.R. 344, 345 (1932).

6. The *inter vivos* alienability of the possibility of reverter was confirmed with the passage of TEX. REV. CIV. STAT. art. 1296 (Vernon 1962). This statute was enacted to abrogate legislatively the common law rule forbidding creation by deed of a freehold estate to commence in futuro and to keep Texas aligned with the more liberal and modern tendency of allowing freer alienation of land interests. See *Turner v. Montgomery*, 293 S.W. 815, 816 (Tex. Comm'n App. 1927, judgment adopted). It is ironic that in its quest for a more permissive alienability of *this* land interest, the legislature has inadvertently stifled the practical alienation of greater interests in land than were so encumbered under the common law presumption that possibilities of reverter were only inheritable, and not assignable or devisable. Cf. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 520-25 (discussing the effect free alienation of the possibility of reverter has on compounding the problems of land alienability).

7. See CONN. GEN. STAT. ANN. §§ 45-97 to 98 (West 1960); FLA. STAT. ANN. § 689.18 (West 1969); ILL. ANN. STAT. ch. 30, §§ 37e, 37f (Smith-Hurd 1969); IOWA CODE ANN. §§ 614.24, .25 (West Supp. 1977-1978); KY. REV. STAT. ANN. §§ 381.218, .221, .222 (Bobbs-Merrill 1972); ME. REV. STAT. ANN. tit. 33, §§ 103, 105 (West 1965); MD. REAL PROP. CODE ANN. §§ 6-101 to 105 (Michie 1974 & Supp. 1976); MASS. ANN. LAWS ch. 184A, § 3 (Law. Co-op 1977), and ch. 260, § 31A (Law. Co-op 1968); MICH. STAT. ANN. §§ 26.46, .49(11)-.49(15) (Callaghan 1974); MINN. STAT. ANN. § 500.20 (West 1947); NEB. REV. STAT. §§ 76-2,101 to 2,105 (1976); N.Y. REAL PROP. LAW § 345 (McKinney 1968); OHIO REV. CODE ANN. §§ 5301.45-.56 (Banks-Baldwin 1971); R.I. GEN. LAWS § 34-4-19 (Bobbs-Merrill 1970). Although these fourteen statutes vary in their approach and effect, there are four general characteristics which, standing alone or in combination, are present in most of the acts. The first is imposition of a limitation period during which the contingency must occur or else the possibility of reverter is extinguished. See MINN. STAT. ANN. § 500.20 (West 1947) (thirty-year period, but only prospective in application); NEB. REV. STAT §§ 76-2,102 to 2,105 (1976) (thirty-year period applying both prospectively and to interests already in being). The second utilizes savings clauses which allow continua-

by the passage of these reverter acts, and despite the potential benefits to the public, several of these acts have been declared void on constitutional grounds.⁸ The question whether the Texas Legislature should consider the passage of a reverter act requires an examination of the issues which have been raised in the adjudication of similar acts in sister states. The determination must also be made in light of the vagaries and peculiarities of Texas constitutional and case law.

THE CONSTITUTIONAL CONFLICT

The issues that would be raised by the passage of a reverter act evince a conflict within the framework of the Texas Constitution and the case law which interprets it. Essentially, a reverter act would match the principles of inviolability of contracts, due process, and the right to own and dispose of property as one sees fit, against the general welfare and advancement of society by the exercise of the police power of the state.⁹

The Prohibition Against Retroactive Laws, Remedies, and Limitations on Action

Any statute enacted for the purpose of rectifying the problems caused by stale reverters would be less than fully effective if it did not act upon interests already in existence, as well as those contemplated for the future.¹⁰ Because of attempts to act upon reverters created in the past, however, the statutes of several jurisdictions have faltered upon constitutional grounds.¹¹ Individual property and vested rights are protected by the Texas

tion of reverters which otherwise would be extinguished by a statute's retroactive application. See ILL. ANN. STAT. ch. 30, § 37f (Smith-Hurd 1969) (allowing reverter which already would have expired to be enforced within one year of act's effective date); MD. REAL PROP. CODE ANN. § 6-102 (Michie Supp. 1976) (preservation of certain pre-existing interests possible if intent to do so is recorded within three years of act's passage). The third incorporates a requirement for recording. See OHIO REV. CODE ANN. § 5301.51 (Banks-Baldwin 1971) (reverter not extinguished if intent to enforce periodically recorded). The fourth provides measures to lessen or mitigate the harshness of the action. See KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972) (abolition of possibility of reverter and replacement with right of re-entry); MICH. STAT. ANN. § 26.46 (Callaghan 1970) (no condition annexed to grant enforceable if it does not provide actual and substantial benefit to the party in whose favor the condition runs).

8. *Biltmore Village, Inc. v. Royal*, 71 So. 2d 727, 729 (Fla. 1954) (en banc) (retroactive application unconstitutional); *Board of Educ. of Central School Dist. No. 1 v. Miles*, 207 N.E.2d 181, 186, 259 N.Y.S.2d 129, 137 (1965) (retroactive application unconstitutional).

9. See Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437, 1437-38 (1964); cf. A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 14-15 (1959) (conflict between individual right to dispose of property and societal need to limit right).

10. Compare MINN. STAT. ANN. § 500.20 (West 1947) (pre-existing reverters unaffected) with NEB. REV. STAT. §§ 76-2,102 to 2,105 (1976) (eventual elimination of all stale reverters by express retroactive effect).

11. *Biltmore Village, Inc. v. Royal*, 71 So. 2d 727, 729 (Fla. 1954) (en banc) (retroactive

Constitution from infringement by retroactive laws.¹² Generally, all existing rights are protected under this clause.¹³ Inasmuch as they may affect material rights, all laws existing at the time a contract is made become a part of the contract by incorporation.¹⁴ Subsequent passage of different statutes cannot infringe upon those rights which have once properly vested under the laws existing at the time the contract was made.¹⁵ Therefore, on its face, this constitutional provision prohibits the retroactive application of a reverter act.

While legislation generally may not act retroactively upon vested *rights*, it is clear that laws acting retroactively upon *remedies* are not prohibited unless they remove the remedy altogether or render it impractical or overly cumbersome to pursue.¹⁶ A statute may abrogate a remedy in existence at

application unconstitutional); Board of Educ. of Central School Dist. No. 1 v. Miles, 207 N.E.2d 181, 186-87, 259 N.Y.S.2d 129, 136-37 (1965). *Contra*, Trustees of Schools v. Batdorf, 130 N.E.2d 111, 114 (Ill. 1955) (application to pre-existing interest upheld); Atkinson v. Kish, 420 S.W.2d 104, 109 (Ky. 1967); Town of Brookline v. Carey, 245 N.E.2d 446, 448 (Mass. 1969); Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 N.W.2d 904, 907 (Neb. 1971).

12. TEX. CONST. art. I, § 16 states that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made." Discarding the provision against ex post facto laws, which refers only to criminal and penal matters, Bender v. Crawford, 33 Tex. 745, 751 (1871); see *Ex parte* Scott, 471 S.W.2d 55, 55-56 (Tex. Crim. App. 1971), what remains is a prohibition against the taking or impairment of vested rights acquired under existing laws, or the addition of further obligations or duties with respect to transactions into which the contracting parties have already entered. International Security Life Ins. Co. v. Maas, 458 S.W.2d 484, 490 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.); Turbeville v. Gowdy, 272 S.W. 559, 561 (Tex. Civ. App.—Fort Worth 1925, no writ) (dictum). All retroactive legislation, however, is not per se unconstitutional. Legislation transcends constitutional propriety only when its antecedent operation destroys or impairs vested rights. McCain v. Yost, 155 Tex. 174, 178, 284 S.W.2d 898, 900 (1955); McGinley v. McGinley, 295 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1956, no writ); see Hamilton v. Flinn, 21 Tex. 713, 716 (1858).

13. Mellinger v. City of Houston, 68 Tex. 37, 45, 3 S.W. 249, 253 (1887). Thus, in Hutchings v. Slemmons, 141 Tex. 448, 454-55, 174 S.W.2d 487, 490-91 (1943) a parol contract for the sale of land, entered into before the effective date of a statute bringing that activity under the Statute of Frauds, was upheld, although the negotiations resulting in a sale were not completed until after the effective date of the legislation. Similarly Duffey v. Cross, 175 S.W.2d 637, 641 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.) held that a statute making it the duty of a state official to ascertain payments due to the state as a party to mineral leases could not abrogate the respective rights as they accrued to the lessor and lessee of the lease at the time the lease was drawn prior to passage of the act.

14. Hutchings v. Slemmons, 141 Tex. 448, 453-54, 174 S.W.2d 487, 490 (1943); Langever v. Miller, 124 Tex. 80, 83, 76 S.W.2d 1025, 1026-27 (1934); Spires v. Mann, 173 S.W.2d 200, 203 (Tex. Civ. App.—Eastland 1943, writ ref'd); Purser v. Pool, 145 S.W.2d 942, 943 (Tex. Civ. App.—Eastland 1940, no writ).

15. Purser v. Pool, 145 S.W.2d 942, 943 (Tex. Civ. App.—Eastland 1940, no writ); see Langever v. Miller, 124 Tex. 80, 87, 76 S.W.2d 1025, 1029 (1934).

16. Langever v. Miller, 124 Tex. 80, 86-87, 76 S.W.2d 1025, 1028-29 (1934); DeCordova v. City of Galveston, 4 Tex. 470, 474 (1849); see Holt v. Wheeler, 301 S.W.2d 678, 680 (Tex. Civ. App.—Galveston 1957, writ dism'd).

the time of a contract, but only if a new and reasonable remedy is provided.¹⁷ The underlying rationale is that the parties are presumed to have contracted with the knowledge that the legislature has the power to change remedies.¹⁸

The distinction between rights and remedies could be of potential importance in dealing with the possibility of reverter. In this respect the provisions of the Kentucky reverter statute are illustrative.¹⁹ That statute provides that fees simple determinable and possibilities of reverter are abolished, and that they will be enforced as fees simple upon condition subsequent and rights of re-entry, respectively.²⁰ While the statute claims to have "abolished" the determinable fee and possibility of reverter, it has not abolished the rights involved. Rather, it has preserved the right to have the restriction annexed to the grant obeyed and the concurrent right to receive the reversion of the estate should the grantee fail to obey the restriction. The statute has only changed the remedy from forfeiture to affirmative re-entry.²¹ The salutary effect of this portion of the Kentucky statute is that it both preserves the rights in the grantor and concurrently abolishes the forfeiture of the fee in the grantee.²² While the requirement of affirmative assertion adds a burden to the holder of the former possibility of reverter, it does not make the assertion of the remedy so impractical or unreasonable as to fall within the constitutional prohibition against changing remedies.²³

17. See *Langever v. Miller*, 124 Tex. 80, 87, 76 S.W.2d 1025, 1029 (1934); *DeCordova v. City of Galveston*, 4 Tex. 470, 480 (1849). See generally Annot., 96 A.L.R. 853 (1935).

18. See *Beaumont Petroleum Syndicate v. Broussard*, 64 S.W.2d 993, 997 (Tex. Civ. App.—Beaumont 1933), *appeal dismissed*, 123 Tex. 408, 73 S.W.2d 92 (1934) (act in question no longer operative).

19. See KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972).

20. KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972) provides that:

The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry.

21. Cf. KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972) (transforming possibilities of reverter into rights of re-entry).

22. See KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972). That forfeitures are not favored by the courts is well-evidenced by the litigation of defeasible fees in Texas. The state's judiciary has often strained logic and the English language to construe as rights of re-entry obvious forfeiture provisions in defeasible fees. See Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 TEXAS L. REV. 158, 166-67 (1948). This same distaste for forfeitures of determinable fees is nationwide in scope. See Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 259-71 (1940). The maxim that forfeitures are not favored is well established in pure contract law. See 3A A. CORBIN, CORBIN ON CONTRACTS §§ 748, 754 (2d ed. 1960).

23. Compare *Langever v. Miller*, 124 Tex. 80, 86-87, 76 S.W.2d 1025, 1028-29 (1934) (remedy may be changed if new one not impractical or unreasonable) and *Holt v. Wheeler*, 301 S.W.2d 678, 680 (Tex. Civ. App.—Galveston 1957, writ dismissed) with KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972) (changing possibilities of reverter to rights of re-entry).

While the Kentucky statute appears well suited for Texas, it would be subject to challenge on several grounds. The first involves the fact that the rule allowing remedies to be changed by the legislature does not apply when the parties to a contract have contracted with express reference to a remedy for breach.²⁴ Such a remedy expressly stated by contract is a vested property right.²⁵ Further, where a contract secures to one party a specific remedy whereby he may enforce his right without resort to the courts, such a contractual remedy is not subject to statutory changes.²⁶ This exception is valid, however, only where the remedy contracted for by the parties is consistent with public policy.²⁷ A clear statement by the legislature declaring that forfeitures of determinable fees violate public policy could render the contractual remedy exception valueless as an argument against the passage of a Kentucky-type reverter act.²⁸

The second challenge to a statute transforming the forfeiture remedy into a right of re-entry could go to the very nature of the reverter itself. As a determinable fee ends automatically upon the occurrence or non-occurrence of a specified event,²⁹ the forfeiture aspect of a determinable fee could be viewed as a legally insignificant event which simply marks the natural expiration of the estate in the grantee.³⁰ Thus, it is conceivable that any action purporting to change the remedy from a forfeiture to a re-entry proceeding is moot, as there is no remedy upon which to act in the first

24. See *Doyle v. Second Master-Bilt Homes, Inc.*, 453 S.W.2d 226, 229 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 692-93 (Tex. Civ. App.—Dallas 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928).

25. *Doyle v. Second Master-Bilt Homes, Inc.*, 453 S.W.2d 226, 229 (Tex. Civ. App.—Fort Worth, 1970, writ ref'd n.r.e.); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 692-93 (Tex. Civ. App.—Dallas 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928).

26. *Frank v. State Bank & Trust Co.*, 263 S.W. 255, 256 (Tex. Comm'n App. 1924, judgment adopted), *rev'd on other grounds*, 10 S.W.2d 704 (Tex. Comm'n App. 1928, judgment adopted); *Chapin v. Frank*, 236 S.W. 1006, 1010 (Tex. Civ. App.—San Antonio 1921), *aff'd sub nom. Frank v. State Bank & Trust Co.*, 263 S.W. 255 (Tex. Comm'n App. 1924, judgment adopted), *rev'd on other grounds*, 10 S.W.2d 704 (Tex. Comm'n App. 1928, judgment adopted) (on rehearing).

27. *Doyle v. Second Master-Bilt Homes, Inc.*, 453 S.W.2d 226, 229 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Frick-Reid Supply Corp. v. Meers*, 52 S.W.2d 115, 118-19 (Tex. Civ. App.—Amarillo 1932, no writ); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 692-93 (Tex. Civ. App.—Dallas 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928).

28. The legislature has the right and responsibility to fix the public policy of the state. *State v. City of Dallas*, 319 S.W.2d 767, 774 (Tex. Civ. App.—Austin 1958), *aff'd*, 160 Tex. 348, 331 S.W.2d 737 (1960); *Grimes v. Bosque County*, 240 S.W.2d 511, 515 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.). The Florida reverter act contains the express declaration that reverters of unlimited duration are against the public policy of the state. FLA. STAT. ANN. § 689.18(1) (West 1969). In Texas a similar legislative expression that forfeitures of determinable fees are against public policy would prevent parties from contracting for and enforcing this extrajudicial remedy.

29. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 35-36 (1962).

30. *Cf. id.* at 36-37 (reversion to grantor representing automatic and natural expiration of the estate in the grantee).

place.³¹ This challenge, however, like the first, can be resolved by a statement in a Texas reverter act confirming that forfeitures, however they are regarded, are contrary to public policy.³²

Closely related to the concept of retroactive laws is the subject of limitations of actions. As a statute of limitation bears directly upon the remedy involved in any particular action,³³ a reverter act incorporating a limitation period faces many of the same objections which could be raised in connection with the passage of a retroactive law. Thus, an amended statute of limitation may be struck down as unconstitutional if it operates to entirely eliminate a remedy.³⁴ Additionally, when a statute shortens the period in which an action may be brought, it must still allow a reasonable time in which to assert the action before it is barred.³⁵

Many of the reverter statutes passed in other states are essentially statutes of limitation.³⁶ If Texas were to consider such legislation, an act combining the salutary provision of the Kentucky act prohibiting outright forfeitures³⁷ with the beneficial limitation provisions common to many enactments³⁸ would provide the ideal way in which to deal with stale reverters and those yet to be created. In prospective operation such a limitation on the viable life of a reverter would appear to be constitutional. Thus, a statute declaring that the life of a possibility of reverter must be terminated after a designated period of years would serve as notice of both the public policy of the state and of the length of the applicable limitation

31. *But cf.* KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972) (Kentucky legislature acting on forfeiture of determinable fee to transform to right of re-entry).

32. For example, Florida has incorporated into its act express declarations of public policy toward reverters. *See* FLA. STAT. ANN. § 689.18(1) (West 1969). It is the right and responsibility of the Texas legislature to fix this state's public policy. *State v. City of Dallas*, 319 S.W.2d 767, 774 (Tex. Civ. App.—Austin 1958), *aff'd*, 160 Tex. 348, 331 S.W.2d 737 (1960); *see* *Grimes v. Bosque County*, 240 S.W.2d 511, 515 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.).

33. *Home Ins. Co. v. Dick*, 15 S.W.2d 1028, 1031 (Tex. Comm'n App. 1929, judgment adopted), *rev'd on other grounds*, 281 U.S. 397 (1930); *Frank v. State Bank & Trust Co.*, 10 S.W.2d 704, 706 (Tex. Comm'n App. 1928, judgment adopted).

34. *See DeCordova v. City of Galveston*, 4 Tex. 470, 478 (1849); *Beaumont Petroleum Syndicate v. Broussard*, 64 S.W.2d 993, 996-97 (Tex. Civ. App.—Beaumont 1933), *appeal dismissed*, 123 Tex. 408, 73 S.W.2d 92 (1934) (act in question no longer operative).

35. *See, e.g., Jenckes v. Mercantile Nat'l Bank*, 407 S.W.2d 260, 265 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *Williams v. Reed*, 160 S.W.2d 316, 317 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.); *Bunn v. City of Laredo*, 208 S.W. 675, 676 (Tex. Civ. App.—San Antonio 1919), *aff'd*, 245 S.W. 426 (Tex. Comm'n App. 1922, judgment adopted).

36. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 45-97 to 98 (West 1960) (thirty years); FLA. STAT. ANN. § 689.18(3) (West 1969) (twenty-one years); MINN. STAT. ANN. § 500.20 (West 1947) (thirty years).

37. *See* KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972).

38. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 45-97 to 98 (West 1960) (thirty years); FLA. STAT. ANN. § 689.18(3) (West 1969) (twenty-one years); MINN. STAT. ANN. § 500.20 (West 1947) (thirty years).

period.³⁹ Any attempt to circumvent the law by inserting into a deed a possibility of reverter which would run longer than the limitation period would be void ab initio.⁴⁰

There are two grounds for challenge to a limitation statute where its operation is sought to be made retroactive. First, a statute of limitation, like a retroactive change of remedy, may not act upon a non-judicial remedy which is expressly contracted for by the parties. Thus, in *Bunn v. City of Laredo*⁴¹ the Texas Commission of Appeals held that a statute shortening the period in which a suit could be brought upon a vendor's lien was inapplicable to a grant in which the parties agreed upon the remedy of forfeiture without requirement for re-entry or judicial proceedings.⁴² Second, a reverter act which retroactively places a limitation period upon the enforcement of possibilities of reverter runs the risk of barring a remedy before the cause of action accrues. Accordingly, if the limiting occurrence which marks the extinction of the determinable fee has not occurred before the limitation period expires, the holder of the possibility of reverter is stripped of his only remedy.⁴³ It was upon these grounds that the retroactive provisions of the Florida statute were declared unconstitutional in *Biltmore Village, Inc. v. Royal*.⁴⁴

Interwoven throughout the discussion of retroactive laws, changed remedies, and amended limitation periods is the constitutional prohibition against the impairment of contracts.⁴⁵ This particular sanction, however,

39. Although there is disagreement over the optimum length, eight of the fourteen states enacting legislation have chosen a variation upon a thirty-year limitation period. See, e.g., ME. REV. STAT. ANN., tit. 33, § 103 (West 1965); MD. REAL PROP. CODE ANN. § 6-101 (Michie 1974); MICH. STAT. ANN. § 26.49(12) (Callaghan 1974).

40. Even contractual remedies not dependent upon judicial intervention and enforcement must still be lawful and consonant with public policy. *Doyle v. Second Master-Bilt Homes, Inc.*, 453 S.W.2d 226, 229 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Frick-Reid Supply Corp. v. Meers*, 52 S.W.2d 115, 119 (Tex. Civ. App.—Amarillo 1932, no writ); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 692 (Tex. Civ. App.—Dallas 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928). Whether only that portion in excess of the statutory period would be void, or whether the entire reversionary expectancy would be void would be a matter for judicial determination.

41. 245 S.W. 426 (Tex. Comm'n App. 1922, judgment adopted).

42. *Id.* at 428-29.

43. An amended limitation period may be declared unconstitutional if it operates to eliminate a remedy entirely. See *DeCordova v. City of Galveston*, 4 Tex. 470, 478 (1849); *Beaumont Petroleum Syndicate v. Broussard*, 64 S.W.2d 993, 996-97 (Tex. Civ. App.—Beaumont 1933), *appeal dismissed*, 123 Tex. 408, 73 S.W.2d 92 (1934) (act in question no longer operative).

44. 71 So. 2d 727, 729 (Fla. 1954) (en banc). See generally Annot., 41 A.L.R.2d 1380. A similar retroactive limitation period in NEB. REV. STAT. §§ 76-2,100 to 2,105 (1976) was upheld in *Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 N.W.2d 904, 907 (Neb. 1971). The judicial action in Florida was taken despite the fact that the act contained a savings clause extending for one year beyond the passage of the act the time in which the holder of a reverter could bring an action. FLA. STAT. ANN. § 689.18(6) (West 1969).

45. See TEX. CONST. art. I, § 16 (forbidding passage of laws impairing the obligations of contracts).

is distinguishable from those discussed in connection with retroactive laws, changed remedies, and amended limitations in that it encompasses all legal and valid undertakings, regardless of whether rights have yet vested.⁴⁶ All that is required in order to invoke the contract clause is that the undertaking in question be legally enforceable.⁴⁷ Any law in effect at the time of entering into a contract, and any judicial interpretation of such a law, become part of the contract.⁴⁸ An impairment of a contract takes place, then, when the means available for its enforcement are removed or unduly hindered by statute.⁴⁹ Retroactive application of virtually any type of reverter statute would be subject to challenge on this ground as the means used to deal with stale reverters is to act upon their enforcement legislatively.⁵⁰

Due Process

The due process clause of the Texas Constitution⁵¹ provides the source for further attack upon reverter legislation. Due process requires the exertion of the powers of government in only such manner as the settled maxims of law will permit and with such safeguards as are necessary for the protection of individual rights.⁵² Consequently, all statutes must accord due process of law.⁵³ Fundamental to due process theory is the right of an individual to own and *dispose* of his land as he sees fit, subject only to the legitimate exercise of the state's police power and the condition that the use of his land not be harmful to others.⁵⁴ The effect of prospective applica-

46. *Spires v. Mann*, 173 S.W.2d 200, 204 (Tex. Civ. App.—Eastland 1943, writ ref'd).

47. *See* *Sequestration Cases*, 30 Tex. 689, 697 (1868). Thus, a deed is a contract for purposes of this clause. *See* *Harrigan v. Blagg*, 124 Tex. 117, 123-24, 77 S.W.2d 524, 527 (1934).

48. *Smith v. Elliott & Deats*, 39 Tex. 201, 211 (1873) (judicial interpretation); *Farmers' Life Ins. Co. v. Wolters*, 10 S.W.2d 698, 701 (Tex. Comm'n App. 1928, judgment adopted) (laws in effect). *But cf.* *Storrie v. Cortes*, 90 Tex. 283, 291, 38 S.W. 154, 158 (1896) (holding that overruling of judicial decision in reliance whereon contracts had been made was not impairment of contracts because judicial decisions are not "law").

49. *Langever v. Miller*, 124 Tex. 80, 90-91, 76 S.W.2d 1025, 1031 (1934).

50. *Cf.* *Langever v. Miller*, 124 Tex. 80, 90-91, 76 S.W.2d 1025, 1031 (1934) (contract impaired when means to enforce removed or hampered by statute).

51. *See* TEX. CONST. art. I, § 19.

52. *Beyman v. Black*, 47 Tex. 558, 571 (1877); *White v. White*, 183 S.W. 369, 374 (Tex. Civ. App.—El Paso 1916), *aff'd as modified*, 108 Tex. 570, 196 S.W. 508 (1917); *cf.* *Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 337 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.) (due process synonymous with law of the land).

53. *International & G.N. Ry. v. Mallard*, 277 S.W. 1051, 1053 (Tex. Comm'n App. 1925, judgment adopted).

54. *See, e.g., City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 292 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.); *Houston & North Texas Motor Freight Lines Inc., v. Johnson*, 159 S.W.2d 905, 907 (Tex. Civ. App.—Galveston 1941), *rev'd on other grounds*, 140 Tex. 166, 166 S.W.2d 78 (1942); *Stone v. Kendall*, 268 S.W. 759, 761 (Tex. Civ. App.—Waco 1925, no writ).

tion of any reverter act which would limit one's right to place restrictions on his land might run afoul of this provision.⁵⁵ In a retroactive application, a reverter act could be deemed an unconstitutional deprivation of private property, as its effect would be to extinguish certain property interests after a designated period of years has elapsed.⁵⁶ While the due process clause does not prohibit the deprivation of property,⁵⁷ it is clear that depriving one of property requires adherence to the law.⁵⁸ Further, such deprivation and impairment of property must not be arbitrary or oppressive, and the action must be taken for a public purpose.⁵⁹ It is essential to the success of a reverter act that the statute be carefully drafted so that its operation and effect is well within the due course of law.

55. Compare *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 292 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (right to dispose of property as one sees fit) and *Stone v. Kendall*, 268 S.W. 759, 761 (Tex. Civ. App.—Waco 1925, no writ) (right to dispose of property as one sees fit) with KY. REV. STAT. ANN. § 381.218 (Bobbs-Merrill 1972) (abolishing determinable fee as conveyancing device) and R.I. GEN. LAWS § 34-4-19 (Bobbs-Merrill 1970) (limiting effect of determinable fee to twenty years).

56. Cf. ILL. ANN. STAT. ch. 30, § 37e (Smith-Hurd 1969) (extinguishing possibility of reverter forty years after its creation); IOWA CODE ANN. § 614.24 (West Supp. 1977-1978) (extinguishing reverter if not recorded properly).

57. No person "shall be deprived of . . . property . . . except by due course of the law of the land." TEX. CONST. art. I, § 19 (emphasis added). Additionally, the proper enactment and enforcement of a valid police regulation is not considered to be a taking, although substantial impairment of property, even to the point of extinguishment of a property interest, may result. See *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 356, 233 S.W.2d 286, 290 (1950); *Hatcher v. City of Dallas*, 133 S.W. 914, 918 (Tex. Civ. App.), *rev'd on other grounds sub nom.*, *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 137 S.W. 342 (1911). See generally 29A C.J.S. *Eminent Domain* § 6 (1965) (distinguishing "taking" under eminent domain and actions under the police power).

58. See TEX. CONST. art. I, § 19. That a possibility of reverter is "property" deserving constitutional protection is not a settled point of law. See *Atkinson v. Kish*, 420 S.W.2d 104, 109 n.5 (Ky. 1967) (possibility of reverter not entitled to constitutional protection); *Trustees of Schools v. Batdorf*, 130 N.E.2d 111, 114 (Ill. 1955) (possibility of reverter not entitled to constitutional protection). See generally Comment, *Constitutional Problems Presented by the Retroactive Extinguishment of Forfeiture Restrictions on the Use of Land: Sections 345-349 of the New York Real Property Law*, 27 ALBANY L. REV. 267, 270-71 (1963).

59. See, e.g., *Marrs v. Railroad Comm'n*, 142 Tex. 293, 305, 177 S.W. 2d 941, 949 (1944) (public use); *Missouri, K. & T. Ry. v. Rockwall County Levee Improvement Dist. No. 3*, 117 Tex. 34, 49, 297 S.W. 206, 212 (1927) (reasonableness); *J.W. Nichols Co. v. White*, 325 S.W.2d 867, 874 (Tex. Civ. App.—Austin 1959, no writ) (reasonableness); *Neel v. Texas Liquor Control Bd.*, 259 S.W.2d 312, 315-16 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.) (arbitrariness). While a reverter act may incidentally extinguish rights in one person and transfer them to another person, the larger public purpose of the statute would justify such result. The substantial benefits of a reverter act would inure to the benefit of the general public, and only incidentally to private individuals. Cf. *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 356, 233 S.W.2d 286, 290 (1950) (public use concerns "general public or portion thereof as distinguished from particular individuals"); *Marrs v. Railroad Comm'n*, 142 Tex. 293, 305, 177 S.W.2d 941, 949 (1944) (taking from one private individual for benefit of another requires "justifying public purpose").

GENERAL WELFARE AND THE POLICE POWER

While a reverter act could be found to violate portions of the constitutional and case law concerning obligations of contracts, due process, retroactive laws, and amended statutes of limitations and remedies, it may still be maintained as a constitutionally proper exercise of the police power.⁶⁰ Although for convenience the somewhat abstract categories of public health, safety, comfort, and general welfare are often used to explain its parameters,⁶¹ the state's police power may extend to areas of concern involving the peace and good order of society,⁶² and to areas necessary to insure the proper economic conditions necessary for an advanced and highly complex society.⁶³

Although the state's powers are considerable, any actions taken under the police power are subject to the limitations that they be reasonable in character,⁶⁴ operation, and effect.⁶⁵ Further, the action must not be executed arbitrarily,⁶⁶ and the exercise of the police power must stem from a genuine public necessity.⁶⁷ Because actions taken under the police power

60. Police power is a somewhat amorphous body of theory and practice which defies easy definition. See *City of West Univ. Place v. Ellis*, 134 Tex. 222, 226, 134 S.W.2d 1038, 1040 (1940). It is generally referred to as a grant of authority from the people to their government for the protection of the health, safety, comfort and general welfare of the public. *City of Dallas v. Smith*, 130 Tex. 225, 229, 107 S.W.2d 872, 874 (1937); *Spann v. City of Dallas*, 111 Tex. 350, 355-57, 235 S.W. 513, 515 (1921); *Nichols v. Park*, 119 S.W.2d 1066, 1068 (Tex. Civ. App.—San Antonio 1938, no writ).

61. See, e.g., *City of Dallas v. Smith*, 130 Tex. 225, 229, 107 S.W.2d 872, 874 (1937); *Spann v. City of Dallas*, 111 Tex. 350, 355-57, 235 S.W. 513, 515 (1921); *Nichols v. Park*, 119 S.W.2d 1066, 1068 (Tex. Civ. App.—San Antonio 1938, no writ).

62. *Ex parte Townsend*, 64 Tex. Crim. 350, 355, 144 S.W. 628, 631 (1911).

63. *Ex parte Townsend*, 64 Tex. Crim. 350, 355, 144 S.W. 628, 631 (1911). In actual practice, the exercise of police power has been upheld as valid in innumerable circumstances. See, e.g., *Paragon Oil Syndicate v. Rhoades Drilling Co.*, 115 Tex. 149, 154, 277 S.W. 1036, 1037 (1925) (regulation of business affairs); *Ex parte Townsend*, 64 Tex. Crim. 350, 374, 144 S.W. 628, 641 (1911) (prohibition and taxation of harmful articles); *Fort Worth Gas Co. v. Latex Oil & Gas Co.*, 299 S.W. 705, 710 (Tex. Civ. App.—Fort Worth 1927, writ ref'd) (regulation of gas and oil ownership and production).

64. See *Ex parte Thomas*, 141 Tex. 591, 597-98, 174 S.W.2d 958, 962 (Tex.), *rev'd on other grounds sub nom.*, *Thomas v. Collins*, 323 U.S. 516 (1943); *Neel v. Texas Liquor Control Bd.*, 259 S.W.2d 312, 315-16 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.).

65. *Missouri, K. & T. Ry. v. Rockwall County Levee Improvement Dist. No. 3*, 117 Tex. 34, 49, 297 S.W. 206, 212 (1927); *Harper v. City of Wichita Falls*, 105 S.W.2d 743, 751-54 (Tex. Civ. App.—Fort Worth 1937, writ ref'd); see *J.W. Nichols Co. v. White*, 325 S.W.2d 867, 874 (Tex. Civ. App.—Austin 1959, no writ).

66. *Williams v. State*, 146 Tex. Crim. 430, 437, 176 S.W.2d 177, 182 (Tex. Crim. App. 1943); *Ex parte White*, 82 Tex. Crim. 85, 91, 198 S.W. 583, 586 (1915); *Neel v. Texas Liquor Control Bd.*, 259 S.W.2d 312, 315-16 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.).

67. *Spann v. City of Dallas*, 111 Tex. 350, 355-57, 235 S.W. 513, 515 (1921); *City of Coleman v. Rhone*, 222 S.W.2d 646, 648 (Tex. Civ. App.—Eastland 1949, writ ref'd); *Stone v. Kendall*, 268 S.W. 759, 761 (Tex. Civ. App.—Waco 1925, no writ).

will often abridge private rights,⁶⁸ the benefits to the public must be of such magnitude as to justify the burden on the individual whose rights have been abridged.⁶⁹

Despite the fact that the Texas Constitution excepts from the general powers of the state those guarantees enumerated in its bill of rights,⁷⁰ the Texas Supreme Court has not construed this provision to prevent a proper and necessary exercise of the police power which reasonably relates to the peace, good order, health, or welfare of the public.⁷¹ Thus, no contract may be interposed between the government and the legitimate ends of the exercise of police power.⁷² Similarly, it has been held that the *reasonable* and *proper* exercise of the police power cannot be challenged successfully using the due process clause.⁷³ Those rights protected by prohibitions against retroactive laws, changed remedies, and amended limitation periods are also subject to the police power.⁷⁴ Thus, it is evident that while a successful point by point rebuttal of each of the potential bill of rights challenges to a reverter act would be a preferable approach, it is not necessary to the justification of an act firmly grounded upon a *proper* exercise of the state's police power.

The classification of a Texas reverter act as a proper exercise of the state's police power requires a justification that it affects a matter bearing upon the general welfare of the citizens of the state.⁷⁵ The thesis that

68. *Spann v. City of Dallas*, 111 Tex. 350, 355-57, 235 S.W. 513, 515 (1921); *Nichols v. Park*, 119 S.W.2d 1066, 1068 (Tex. Civ. App.—San Antonio 1938, no writ); see *City of Texarkana v. Mabry*, 94 S.W.2d 871, 874 (Tex. Civ. App.—Texarkana 1936, writ dismissed).

69. *Spann v. City of Dallas*, 111 Tex. 350, 355-57, 235 S.W. 513, 515 (1921); see *Nichols v. Park*, 119 S.W.2d 1066, 1068 (Tex. Civ. App.—San Antonio 1938, no writ); *City of Texarkana v. Mabry*, 94 S.W.2d 871, 874 (Tex. Civ. App.—Texarkana 1936, writ dismissed).

70. TEX. CONST. art. I, § 29.

71. See *Bell v. Hill*, 123 Tex. 531, 545, 74 S.W.2d 113, 120 (1934).

72. *Henderson Co. v. Thompson*, 14 F. Supp. 328, 334 (W.D. Tex. 1936), *aff'd*, 300 U.S. 258 (1937); *Lingo Lumber Co. v. Hayes*, 64 S.W.2d 835, 838 (Tex. Civ. App.—Dallas 1933, no writ). If in the course of a valid exercise of police power a contract is incidentally impaired, this impairment is insufficient to defeat the exercise of the power. *Canadian River Gas Co. v. Terrell*, 4 F. Supp. 222, 228 (W.D. Tex. 1933).

73. *Hulen v. City of Corsicana*, 65 F.2d 969, 970 (5th Cir.), *cert. denied*, 290 U.S. 662 (1933); *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 308, 207 S.W. 303, 305 (1918); see *Beaumont Petroleum Syndicate v. Broussard*, 64 S.W.2d 993, 1000 (Tex. Civ. App.—Beaumont 1933), *appeal dismissed*, 123 Tex. 408, 73 S.W.2d 92 (1934) (act in question no longer operative); *Trinity & B.V. Ry. v. Empire Express Co.*, 173 S.W. 217, 220-21 (Tex. Civ. App.—Dallas 1914), *rev'd on other grounds*, 227 S.W. 1102 (Tex. Comm'n App. 1921, judgment adopted).

74. An obligation of a contract is the means made available by the law for its enforcement at the time it was created. *Langever v. Miller*, 124 Tex. 80, 89-90, 76 S.W.2d 1025, 1030 (1934). Shortened periods of limitation, changed remedies and retroactive laws all bear upon the obligation of a contract. Thus, they should also be subject to the police power. Additionally, no prohibition derived from the bill of rights is necessarily immune from the legitimate exercise of police power. See *Bell v. Hill*, 123 Tex. 531, 545, 74 S.W.2d 113, 120 (1934).

75. *Cf. Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 N.W.2d 904, 907-08 (Neb. 1971) (concurring opinion) (relating Nebraska reverter statute to the state's general welfare).

passage of a reverter act would be in the general welfare finds support in the context of the history of Anglo-American property law. Since William I established his tenured society in 1066, the distinguishing feature of the evolution of property law has been the desire to make land more freely alienable and less fettered with restrictions.⁷⁶ Apart from the desirability of continuing this evolution, numerous modern, practical reasons indicate that a reverter act would serve the general welfare. The heavy use of restrictions and limitations in conveyances results in a clogging of titles and loss of marketability.⁷⁷ While this does not result in inalienability per se, it leads to the loss of alienability in any practical sense,⁷⁸ and it effectively withdraws land from commerce.⁷⁹

76. One commentator views the hallmarks of this evolution as D'Arundel's Case, Bracton, N.B. 1054 (1225) (holding that a feudal tenant could alienate lands over the objection of his lord), the Statute *Quia Emptores*, 18 Edw. I, c. 1 (1290) (stripping lords of their power over alienation and barring fines for alienation), and the rule against perpetuities, the foundations for which were evolved during the early 1600's and stated in *The Duke of Norfolk's Case*, 3 Ch. Cas. 1 (1681). Fike, *Problems Relating to Stale Reverters and Restrictions*, 38 NEB. L. REV. 150, 152-54 (1959). Nor can the evolution be said to be complete, as modern British enactments have led to the extinguishment of virtually all legal future interests which would tend to keep property out of commerce. See Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 545-49 (discussing Law of Property Act, 15 & 16 Geo. 5, c. 20 § 1 (1925)). Further, some commentators have recommended the complete abolition, or at least the restructuring, of all future interests. See Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729 (1972).

77. *Trustees of Schools v. Batdorf*, 130 N.E.2d 111, 114-15 (Ill. 1955); *Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 N.W.2d 904, 907-08 (Neb. 1971) (concurring opinion); A. GULIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 16-21 (1959); C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 102 (1962); Fike, *Problems Relating to Stale Reverters and Restrictions*, 38 NEB. L. REV. 150, 157-58 (1959); Comment, *Proposed Restrictions on Possibilities of Reverter and Rights of Entry*, 34 MISS. L.J. 176, 180 (1963); see Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 528; Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437, 1437 (1964).

78. Land may be alienable in a technical sense, but not in practical terms. Thus, land encumbered with the limitation that it remain in the grantee and his assigns "so long as used for school purposes," may be alienated, but the list of potential buyers would be limited to school districts or others similarly situated. Cf. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 251 (1940) (deterrence to potential buyers desiring to put land to use prohibited by condition leads to hindered alienability).

79. See Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437, 1437 (1964). One of the usual ways in which land encumbered with limitations is removed from commerce lies in the refusal of mortgage bankers to lend money against the property for fear that a defeasance will impair the security of the mortgage. See *Trustees of Schools v. Batdorf*, 130 N.E.2d 111, 114-15 (Ill. 1955); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 251-52 (1940). Even when land encumbered with conditions remains in commerce, the natural tendency is for the market value of the lot to remain depressed beyond the first sale. *Id.* at 251 n.14.

Other factors also indicate the bearing that a reverter act would have upon the general welfare. Many of the benefits sought by grantors who placed restrictions on lands conveyed were either insubstantial at the time of the grant, or have become so through the passage of time.⁸⁰ Additionally, the unchecked use of possibilities of reverter unlimited in time prevents consideration of the fullest and most economical use of the affected land in its present setting.⁸¹ Also of importance is the Texas Constitution's condemnation of perpetuities as "contrary to the genius of a free government."⁸² While possibilities of reverter are usually considered to be excepted from this constitutional application of the rule against perpetuities,⁸³ the case law of the state relating to restraints on alienation of property interests indicates that passage of a reverter act would be within the spirit of the constitutional mandate.⁸⁴

Although there are instances in which determinable fees serve salutary purposes,⁸⁵ the conclusion is inescapable that their continued, unrestrained use is inconsistent with the general welfare of the citizens of the State of

80. The Michigan legislature appears to have had this in mind in declaring that nominal conditions annexed to a grant or conveyance with no intention of actual and substantial benefit to the party in whose favor they are to be performed may be wholly disregarded. See MICH. STAT. ANN. § 26.46 (Callaghan 1974). Where conditions which were once beneficial have become insubstantial by passage of time, they may be similarly disregarded. *Abraham v. Stewart*, 46 N.W. 1030, 1030-31 (Mich. 1890).

81. See Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 253 n.20 (1940) (referring to parallel problems with rights of re-entry); cf. *Letteau v. Ellis*, 10 P.2d 496, 497-98 (Cal. Dist. Ct. App. 1932) (allowing equitable defense of changed conditions to override technical considerations of defeasible fee). See generally A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 20 (1959).

82. TEX. CONST. art. I, § 26.

83. Texas follows the general American approach in excepting possibilities of reverter from the rule against perpetuities. See Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 TEXAS L. REV. 158, 163 (1948).

84. Cf. *Trustees of the Casa View Assembly of God Church v. Williams*, 414 S.W.2d 697, 702 (Tex. Civ. App.—Austin 1967, no writ) (restraint on alienation repugnant to grant of fee); *Ellis v. Andrews*, 324 S.W.2d 917, 920 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.) (unlimited inalienability void); *Diamond v. Rotan*, 124 S.W. 196, 198 (Tex. Civ. App. 1909, writ ref'd) (general restraints on alienation void). One commentator views the effect of defeasible fees as harsher than an outright restraint on alienation: "Whereas . . . [restraints on alienation] . . . constitute merely secondary restraints, preventing the fullest economic utilization of the land by prohibiting transfers to third persons, . . . [restrictions] . . . curtail use by the present owner as well." Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 253 n.20 (1940).

85. See Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 TEXAS L. REV. 158, 163 (1948) (citing the usual construction of the state's oil and gas leases as determinable fees). Practical considerations mandate that many of the provisions of an oil or gas lease be framed in the form of a defeasible fee. In Texas the lessee's interest is considered a fee simple determinable. See 10A G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 5328 (1957 Repl. Vol.). See generally Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 1, 1-9 (1928).

Texas. Despite the difficulties of predicting the future success or failure of a proposal on the basis of case law which has never been called upon to test the proposal, it is reasonable to conclude that passage of a reverter act would be constitutionally proper.

A PROPOSAL

In order to effectively curtail the control of the dead hand over property, yet remain in harmony with prior constitutional and case law in related areas, it is proposed that consideration be given to the introduction and passage of a statute which combines many of the beneficial features of the fourteen acts already in existence in other states. Such an act would provide for an overall limitation period of forty years. A determinable fee and possibility of reverter would be allowed to exist for twenty years. At that time, they would be extinguished and transformed into a fee simple upon condition subsequent and right of re-entry, respectively, and allowed to exist for another twenty years. At the end of this forty-year period, fee simple absolute title would vest in the grantee or his successors. Rights of re-entry created by grant could exist for forty years, and rights of re-entry formed by transformation of a twenty-year-old possibility of reverter could exist for twenty years from the date of transformation. The limitation of a pure determinable fee to twenty years and the limitation of all defeasible fees to forty years would provide a just balance between the public's general welfare and the individual property owner's right to dispose of his property in a manner suitable to him.

In order to allow for an equitable enforcement of the interests formed in the grantor or his successors, it would be imperative that the act provide that rights of re-entry be enforceable in judicial proceedings in which certain legislatively designated equitable defenses could be plead. Those defenses should include laches, changed conditions, and substantial benefit. This provision would provide for preservation of the determinable fee in its pure form for the first twenty years of its existence, but would allow for a mitigation of its harsh effects after twenty years. Thus, while a trivial condition, or one preventing the fullest possible use of the land consistent with the character of the land and the surrounding neighborhood, could be extinguished after twenty years, a beneficial and reasonable restriction on property use would be allowed to continue for up to forty years.

Because a purely prospective application of the above limitation would do nothing to cure the problems caused by unchecked use of the determinable fee grant in the past, it is important that the statute apply retroactively as well. It is equally important in this respect to draft the statute so that the retroactive application of this limitation could be clearly severable from its prospective application. Were the retroactive application of the statute held to be unconstitutional, such careful drafting could avoid the necessity of considering whether the remaining portion should be declared void as well. In application to interests formed prior to the passage of the

act, all possibilities of reverter and rights of re-entry should be deemed to have been constructively formed on the effective date of the statute. Thus, antecedent interests in a past grantor or his successors would be allowed the same forty-year enforcement period as interests formed after the effective date of the act. Any retroactive application of a reverter act will involve indulgence in legal fiction, to a degree, but this approach appears far more reasonable than the approach taken by other states which require antecedent interests to be enforced within one or two years after passage of the legislation.

One of the problems involved in clearing land titles encumbered with limitations is the possibility that the reversionary interest may be held in common by innumerable and geographically widespread persons. A necessary part of the reverter act would be to amend article 1296 of the Texas Revised Civil Statutes, which currently allows free alienation and devise of possibilities of reverter. An amendment which precludes alienation and devise of the reverter could limit the number of persons to whom a prospective purchaser of the land would have to turn in order to have the limitation removed. As a necessary corollary, the act should specifically allow an exception to the prohibition against alienation and devise where the purpose of the alienation or devise would be to merge the reversionary interest with the determinable fee. Finally, recognizing that the use of the determinable fee as a conveyancing device is not *malum in se*, the legislature should prescribe those certain situations in which the provisions of a reverter act would not apply. Pure oil, gas, and mineral leases would certainly fall into this category.

Passage of a reverter act would place Texas in the diminishing forefront of states which recognize that the evolution of property law from its feudal antecedents is not yet complete. Undoubtedly, the passage of a reverter act would accrue to the benefit of the general welfare of the citizens of Texas.