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Validity of the Nebraska Reverter Act

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VALIDITY OF THE NEBRASKA REVERTER ACT

I. INTRODUCTION

The Nebraska Reverter Act[1] operates retrospectively to abrogate both possibilities of reverter in the future and also possibilities of reverter created *before* the statute in an attempt to aid the marketability of titles to real estate. The purpose of this comment is to analyze the many questions raised by the act upon which its constitutionality may one day be litigated. Following a discussion of the problem that the Reverter Act was intended to remedy and a review of legislative history, the following questions will be discussed:

(1) Does the Reverter Act take property unconstitutionally?
(2) Does the Reverter Act repeal existing Nebraska law?
(3) Does the Reverter Act unconstitutionally impair the obligations of contracts?
(4) Is the Reverter Act unconstitutional on the ground that it constitutes special legislation?
(5) Are the provisions of the Reverter Act capable of severance if a portion of the Act is held unconstitutional?

Possibilities of reverter[2] and rights of entry for condition broken[3] have become means of imposing restrictions on the use of land. These restrictions, being outside the operation of the

[1] NEB. REV. STAT. §§ 76-299 - 2,105 (Supp.1959).

[2] "[A] possibility of reverter is a reversionary interest because it is something which the instrument leaves in the grantor, hence it is a future interest left in the grantor . . ." A right of entry for condition broken ". . . is not something left in the grantor. It is a right to re-enter—hence a power of termination. It is a contingent right of re-entry and is not an interest in the premises." Fike, *Problems Relating To Stale Reverters and Restrictions*, 38 NEB. L. REV. 150 at 155 (1959).

[3] A possibility of reverter is a future interest created in the grantor of a determinable fee. A right of entry is a future interest created in the grantor of a fee on condition subsequent. A possibility of reverter takes effect automatically upon the occurrence of the event on which the determinable fee is limited whereas a right of entry does not take effect automatically, but only when the holder of the right brings legal action to recover the land upon the forfeiting event. See *Equivalence of Right of Entry and Right of Reverter*, 18 OHIO ST. L. J. 120 (1957).

rule against perpetuities,[4] outlive their usefulness and impair both the alienability and the development of land.[5]

The law allows these restrictions primarily because it feels that a property owner should be permitted to place whatever restrictions he so desires on his property when he conveys it.[6] The restrictions may be imposed for a variety of reasons. The owner of a large tract may wish to convey a part of it and protect his enjoyment of the part retained. Thus he may insert restrictive covenants in the grant, or reserve easements appurtenant to the land retained. The grantor may make a gift to a charitable corporation to be used in a particular way, and may desire to get the land back if the use should ever cease.[7] One of the most common uses of reverter clauses is found in the sale of lots in new urban subdivisions. The land may be restricted only to residence purposes; or the character, value, and location of buildings to be erected may be restricted in great detail.

The restrictions, however, tend to become obsolete. For example, in Lancaster County a restriction limited an entire addition to residential and church purposes. At the time, the addition consisted entirely of homes and a church. Years later the city's growth changed the surrounding territory so that it became commercial in nature and is now suitable only for business purposes. The church, wanting a new location, was unable to sell the property to a group wishing to convert the church building into a community theatre because of the reverter provision in the deed restricting the land to church purposes only.[8]

Thus title remains forever subject to being defeated in the event that the restrictions are violated. These restrictions become

[4] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS, § 1239 (2d ed. 1956). In England the right of re-entry is subject to the rule against perpetuities. See Gray, THE RULE AGAINST PERPETUITIES, §§ 310, 312 (4th ed. 1942).

[5] The problem has been discussed and remedial legislation recommended. See Fike, *supra* note 2; Williams, *Restrictive Covenants With Reverter Clauses,* 31 NEB. L. REV. 201 (1951). Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248 (1940).

[6] See Simes, *Elimination of Stale Restrictions on the Use of Land,* A.B.A. PROC. *Real Property Law* (1954).

[7] *E.g.* "I convey Blackacre to X Church for so long as it shall be used for church purposes, but title will revert to the grantor if it ceases to be so used."

[8] This case is discussed in 38 NEB. L. REV. 150 at 156 (1959).

a clog on the alienability of land. The price to society is the hindrance to the marketability and improvement of real estate.

II. LEGISLATIVE HISTORY

The Nebraska Legislature first sought to curtail the validity of reverter clauses in 1957. However, L. B. 200, sponsored by the State Bar Association, was killed in the judiciary committee. The bill attempted to set a cut-off date beyond which reverter rights would not be recognized or maintainable in law. The committee felt that while there was some merit in the purpose of the bill, its passage might result in an unjust limitation of the right of a grantor to place such a reverter clause in an instrument transferring title.[9]

Similar legislation, however, was soon recommended. According to a recent Nebraska Law Review article:[10]

> L. B. 200 . . . met with a sudden and violent death . . . and it was this circumstance which prompted the request for this paper . . . titles are impaired by stale . . . restrictions which affect marketability. . . . It is proper for legislatures to require those owning interests in . . . restrictions which burden title, to be required to give some record notice of the continued existence of such rights or suffer them to be extinguished. . . . just as the Rule against Perpetuities had to come into play to curtail unbridled freedom with respect to alienability of land titles, so must there come into play some limiting rule to rid us of . . . the further creation of . . . restrictions . . . to further clog . . . our titles. . . . The only satisfactory solution lies in well-drawn legislation.

The legislature on May 15, 1959, passed L. B. 360, which is known as the Nebraska Reverter Act.[11] The bill provides in effect that possibilities of reverter or rights of re-entry for breach of condition subsequent shall be valid for not longer than thirty years from the date of the creation thereof. If a right of reverter has come into existence prior to the adoption of the act, the person holding such reverter interest has one year from the ef-

[9] "It was felt that it is safer, even though cumbersome, to rely on the legal remedies of clearing title by a quiet title action or by waiver of interested parties. Therefore the bill was indefinitely postponed by a vote of 6 ayes and 1 not voting." Statement on L.B. 200 by Donald S. McGinley, Chairman, Judiciary Committee, April 10, 1957.

[10] Fike, *Problems Relating to Stale Reverters and Restrictions,* 38 NEB. L. REV. 150 at 151 (1959).

[11] L.B. 360 [NEB. REV. STAT. §§ 76-299 - 2,105 (Supp.1959)] is nearly identical to L.B. 200 except that L.B. 360 specifically provides that it does not apply to leases, mortgages, and grants to railroads or public utilities.

fective date of the act to assert it or his right of action is forever barred. The act does not apply to leases, mortgages, and grants to railroads or public utilities.

Only two states, Illinois[12] and Florida,[13] have adopted retrospective statutes[14] similar to the Nebraska law. The Illinois statute provides a time limitation of forty years[15] while the Florida statute limits possibilities of reverters to a duration of twenty-one years.[16] The Illinois statute, attacked on the ground that it was an *ex post facto* law, was held to be constitutionally valid by the Illinois Supreme Court.[17] The Florida statute, however, was held to be unconstitutional on the grounds that it impairs the obligation of contracts and takes property without due process of law.[18] Connecticut, Maine, and Rhode Island have statutes which set time limits for the existence of possibilities of reverter and rights of re-entry, but these statutes all operate prospectively.[19]

III. DOES THE REVERTER ACT TAKE PROPERTY UNCONSTITUTIONALLY?

Whether the act effects an unconstitutional taking hinges on two questions:

(1) Is the interest taken *vested* or *property*; or does the act merely operate as a statute of limitations to set a cut-off date beyond which the remedy of recovering mere expectant interests is barred?

(2) If *property* or *vested* interests are involved, are they taken in an unconstitutional manner?

The Illinois Supreme Court held valid a retroactive statute[20] which operates identically to the Nebraska Act, on the ground

12 ILL. REV. STAT. c. 30 §§ 37b-h (1947).

13 Fla. Laws, § 689.18 (1951).

14 Validity of retroactive statutes in general is discussed in Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

15 The Illinois limitation was originally fifty years, but was amended in 1959 to forty years. See July 8, Laws 1959, S.B. No. 128 § 1.

16 Fla. Laws, § 689.18 (1951).

17 Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d. 111 (1955). The case is criticized in U. ILL. L. F. 298 (1956).

18 Biltmore Village v. Royal, 71 So.2d 727 (Fla. 1954). This case is criticized in 55 COLUM. L. REV. 235 (1955).

19 These statutes are discussed in 38 NEB. L. REV. 150 at 159 (1959).

20 ILL. REV. STAT. c. 30 §§ 37b-h (1947).

that a reversion is merely a contingent, not a vested interest; hence it is not a property right and is not taken unconstitutionally. In *Trustees of Schools of Township No. 1 v. Batdorf*,[21] school districts anticipating the sale of property formerly used for school purposes brought a quiet title action to have reverter restrictions in the deed declared invalid under the Illinois Reverter Act.[22] Defendants objected on the grounds that the statute was *ex post facto* legislation and violated both the state and federal due process clauses.[23] The trial court held the statute unconstitutional. On appeal, however, the Illinois Supreme Court held it constitutional. The court was aided by a series of Illinois decisions which spelled out the status of future interests in Illinois. These cases established a possibility of reverter as being incapable of alienation, devise or partition[24] and "until the limiting contingency occurs it is . . . no more than an expectation . . . subject to change, modification, or abolition by legislative action."[25]

Would Nebraska follow Illinois and uphold the Reverter Act? The Nebraska Supreme Court has treated a possibility of reverter as being so remote and speculative that it could not be considered in determining the value of land taken in condemnation proceedings.[26] In *Nebraska v. County of Cheyenne*[27] the court stated:

> Until the determining event the proprietor of a determinable estate has all the rights and privileges of an absolute owner. The former owner retains at most a mere possibility of reverter should the event happen upon which the estate is limited. A possibility of reverter is not an estate in land but is only the possibility of being an estate. It cannot have a value until it can be determined that the event upon which the estate is limited will happen and when it will occur.

If a possibility of reverter has no value the Nebraska court might agree with Illinois that it does not constitute an existing interest sufficient to be a property right.

[21] 6 Ill.2d 486, 130 N.E.2d 11 (1955).

[22] ILL. REV. STAT. c. 30 §§ 37b-h (1947).

[23] U. S. CONST. art. I, § 10 and amend. XIV.

[24] Regular Predestinarian Baptist Church of Pleasant Grove v. Parker, 373 Ill. 607, 27 N.E.2d 522 (1940). Hart v. Lake, 273 Ill. 60, 112 N.E. 286 (1916).

[25] Prall v. Burckhart, 299 Ill. 19, 132 N.E. 280 (1921).

[26] Nebraska v. County of Cheyenne, 157 Neb. 533, 60 N.W.2d 593 (1953).

[27] *Id.* at 536, 60 N.W.2d at 595. *But cf.* Addy v. Short, 47 Del. 157, 89 A.2d 136 (1952).

The *American Law of Property*,[28] however, states that:

> [T]he very fact that a possibility of reverter is called a "possibility," shows that it is not regarded as vested. However, the modern view is that, although it is contingent, *it is an existing interest, not a mere possibility* that an interest will arise in the future. (emphasis supplied).

When the grantor retains a possibility of reverter at the time he conveys the deed, the property right retained, according to the *American Law of Property*,[29] is part of the fee simple.[30] While the possibility might have no value until the contingency occurs, it must still be regarded as a property right if it is part of the fee simple.

In *Biltmore Village v. Royal*[31] the Florida Supreme Court held a Florida statute,[32] purporting to cancel all reverter provisions which had been in effect more than twenty-one years, unconstitutional as applied to the owner of a possibility of reverter arising under a deed which specified that if the grantee failed to comply with the restrictions the property should revert to the grantor. The court, not overlooking the savings provisions of the statute allowing the holder of a possibility of reverter one year from the date of enactment to institute suit to enforce his right,[33] felt that this provision afforded no remedy to the grantor

[28] 1 AMERICAN LAW OF PROPERTY § 4.12 (Simes ed. 1952).

[29] *Id.*

[30] W. BARTON LEACH, FUTURE INTERESTS 21 (2d ed. 1940), states: "The possibility of reverter is a reversionary interest arising out of the fact that the grantor gave away a smaller estate than he owned."

[31] 71 So.2d 727 (Fla. 1954).

[32] Fla. Laws, § 689.18 (1951).

[33] This provision is identical to NEB. REV. STAT. § 76 - 2,103 (Supp.1959) which states: "If by reason of a possibility of reverter created more than thirty years prior to the effective date of this act, a reverter has come into existence prior to the time of the effective date of this act, no person shall commence an action for the recovery of land or any part thereof based upon such possibility of reverter, after one year from the effective date of this act.

"If by reason of a breach of a condition subsequent created more than thirty years prior to the effective date of this act a right of re-entry has come into existence prior to the time of the effective date of this act, no person shall commence an action for the recovery of the land or any part thereof based upon such right to entry or re-entry after one year from the effective date of this act, unless entry or re-entry has been actually made to enforce said right before the expiration of such year."

if the restriction was not broken within one year from the act. Thus the grantee would be able to acquire clear title to the property one year after passage of the act, and then break the restriction.

The Florida court termed the right of reversion a "vested right." The expression "vested right" within the meaning of constitutional guarantees against infringement or impairment[34] is not usually restricted to any narrow meaning peculiar to the law of real property, but rather embraces all interests which it is proper for the state to recognize and protect.[35]

Minnesota recently held valid a marketable title statute[36] in the case of *Wichelman v. Messner*.[37] The statute provided that a title searcher is not bound by the record of instruments which would otherwise create restrictions on the title, unless such instruments were recorded within a fixed period of time.[38] This case, however, would not appear to be authority for upholding the validity of § 76-2,103[39] of the Nebraska Act. The court stated: "Marketable title acts merely require filing notice rather than commencing action; hence they may apply to vested future interests."[40] The court noted in dicta:

> Retrospective legislation in general, however, will not be allowed to impair rights which are vested and which constitute property rights.[41] . . . If § 541.023[42] *automatically* barred a

[34] U. S. CONST. amend. XIV, § 2; NEB. CONST. art. I, § 3 (1875).

[35] See the discussion in 11 AM. JUR., *Constitutional Law* § 370 (1937).

[36] MINN. STAT. § 541.023 (1945).

[37] 250 Minn. 88, 83 N.W.2d 800 (1957).

[38] The Minnesota statute utilizes the framework of a statute of limitations. The action is barred as against a claim of title based upon a source of title which source has then been of record at least forty years. Compare the Nebraska Marketable Title Act, NEB. REV. STAT. §§ 76-288-98 (Reissue 1958) which states a factual situation in which one is deemed to have a marketable title free and clear of all interests, with a proviso that such old interests may be kept alive by the recording of a simple preserving notice. The Minnesota statute in effect distinguishes the old interest by barring any remedial steps in relation thereto, while the Nebraska statute seems to directly destroy such old claims and interests. The validity of the Nebraska statute has never been tested.

[39] See *supra* note 33.

[40] Wichelman v. Messner, 250 Minn. 88, 115, 83 N.W.2d 800, 821 (1957).

[41] *Id.* at 107, 83 N.W.2d at 816.

[42] MINN. STAT. § 541.023 (1945).

> vested right retroactively without providing an opportunity to protect that interest, the . . . argument that vested . . . rights cannot be barred would have considerably more force.[43] (emphasis by the court).

The Minnesota court distinguished the operation of its marketable title statute from the Florida statute as follows:[44]

> [T]he provisions of the Florida statute should be distinguished from those of the Minnesota Marketable Title Act in that the Minnesota act requires that the owner of the outstanding interest shall merely be required to file his notice of claim, after which the right to enforce the claim may continue to exist indefinitely. In other words, we do not have before us a statute which operates to bar the claimant's remedy before he has had an opportunity to assert it.

Unlike Illinois, Nebraska has regarded possibilities of reverter as being alienable.[45] Simes and Smith[46] argue that a possibility of reverter should be regarded as alienable because:

> (1) The possibility of reverter is difficult to distinguish from the reversion, which is clearly alienable. To make one interest alienable and the other inalienable would give rise to difficult problems of construction in classifying interests.
> (2) The recent cases tend strongly to favor alienability.
> (3) No good reason is perceived why a possibility of reverter should not be alienable if an executory interest can be conveyed.

According to the *American Law of Real Property*[47] English courts objected to alienability of future interests because contingent future interests were regarded as mere expectancies and it was feared that the free alienability of future interests would stir up litigation. But today a future interest should be alienable because *contingent future interests are now regarded as existing estates.* Also, the notion that a rule permitting the free alienability of future

[43] Wichelman v. Messner, 250 Minn. 88, 115, 83 N.W.2d 800 (1957).

[44] *Id.* at 116, 83 N.W.2d at 822.

[45] NEB. REV. STAT. § 76-107 (Reissue 1956): "The conveyance of an existing future interest, whether legal or equitable, is not ineffective on the sole ground that the interest so conveyed is future or contingent." This statute would appear to encompass possibilities of reverter and rights of entry. RESTATEMENT, *Property,* § 165 (f) (1956) declares: "When a statute declares any interest is devisable . . . this provision is to be construed as applying not only to reversions, remainders, and executory interests, but also to powers of termination and possibilities."

[46] SIMES AND SMITH, FUTURE INTERESTS, § 1860 (2d ed. 1956).

[47] 1 AMERICAN LAW OF REAL PROPERTY, § 466 (Simes ed. 1952).

interests would stir up litigation is obsolete. People do not purchase contingent interests of doubtful validity.

Since Nebraska has regarded a possibility of reverter as being alienable it would appear that a reverter interest is a property right. It is difficult to see how an interest which may be sold, given, or devised can be held not to be property. However, the Nebraska Reverter Act[48] declares that a possibility of reverter is a future interest and is not alienable. If a reversionary interest ceases to be a property right merely because § 76-299 declares it inalienable, the statute appears to take property without due process of law.[49]

The Reverter Act, § 76-2,101,[50] declares that a possibility of reverter owned by a corporation ceases to exist upon dissolution of the corporation. Simes, however, feels that to the extent that the assets continue to be within the control of the corporation's successors, a possibility of reverter should be treated as any other asset.[51] In *Addy v. Short*[52] the Delaware Supreme Court held that a possibility of reverter was not extinguished by the dissolution of the corporation, but that it was an *actual property interest* belonging to the corporation.

Hence if a possibility of reverter *is* a property right, § 76-2,101 appears to take without due process, property which belongs to the stockholders or creditors of the dissolved corporation.[53]

Even if the Nebraska Supreme Court should choose to follow the precedent established by the Illinois court,[54] the *Batdorf* de-

[48] The Reverter Act, NEB. REV. STAT. § 76-299 (Supp.1959), provides: "Possibilities of reverter or rights of entry or re-entry for breach of condition subsequent are hereby declared to be future interests and shall not be alienable or devisable; and no conveyance shall operate in favor of the grantee or persons claiming under such grantee."

[49] U. S. CONST. amend. XIV, § 2. NEB. CONST. art. I, § 3 (1875).

[50] NEB. REV. STAT. § 76 - 2,101 (Supp.1959), provides: "When a corporation is dissolved or ceases to exist, any possibility of reverter and any right of entry or re-entry for breach of condition subsequent heretofore or hereafter reserved by or to the corporation and affecting land in this state ceases and determines."

[51] SIMES AND SMITH, *op. cit. supra* note 46, § 1861.

[52] 8 Del. 157, 89 A.2d 136 (1952). *But compare* Nebraska v. County of Cheyenne, 157 Neb. 533, 60 N.W.2d 593 (1953).

[53] 2 TIFFANY, REAL PROPERTY, § 315 (2d ed. 1939): ". . . lands belonging to . . . a corporation . . . are like other assets, distributed among the stockholders, after payment of debts."

[54] Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955).

cision would probably not control in a situation in which the condition which would cause the property to revert to the grantor would occur *before* the effective date of the Reverter Act. After the *Batdorf* decision was handed down the case was criticized and the view expressed that even in Illinois the constitutionality of the statute might yet be litigated, since the court did not decide whether the limiting contingency actually occurred before or after the Reverter Act became effective.[55] A recent law review article stated:[56]

> If a case were later to arise in which it was more clearly presented that the condition has occurred before the Reverter Act became effective the court might be tempted to re-examine the constitutionality of section 5, feeling that the instant case applied only to section 4.[57]

After the terminating condition has occurred the grantor of a possibility of reverter would have the fee title, and not merely the possibility of regaining the fee.[58]

Another ground that the statute takes property in an unconstitutional manner is that it might serve a private rather than a public purpose. *In re Paileret's Appeal*[59] concerned a statute seeking to abolish irredeemable ground rents by providing for their purchase at a fair price to be determined in a judicial proceeding. The court held the statute unconstitutional because the remedy was more in the interest of the private owner than the

[55] The court stated: "If the abandonment took place after July 21, 1947, the possibilties of reverter are invalid under section 4. If the abandonment took place before July 21, 1947, section 5 bars defendants from asserting any claim based on these possibilities of reverter in this suit which was filed nearly three years after the effective date of this act." Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 490, 130 N.E.2d 111, 114 (1955).

[56] U. ILL. L. F. 298 at 301 (1956).

[57] Section 5 of the Illinois statute is identical to NEB. REV. STAT. § 76 - 2,103 (Supp.1959); see note 33 *supra*. Section 4 of the Illinois statute is identical to NEB. REV. STAT. § 76 - 2,102 (Supp.1959) except that Illinois provides a time limitation of forty years. Section 76 - 2,102 provides: "Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken shall be valid for a longer period than thirty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than thirty years, it shall be valid for thirty years."

[58] 31 NEB. L. REV. 201 at 209 (1951).

[59] 67 Pa. 479, 5 Am. Rep. 450 (1871).

public. Thus while these reversionary interests may constitute an unreasonable restraint on alienation, it may be argued that the nuisance, if any, is private, disturbing only those who derive title under restricted deeds.[60]

IV. DOES THE REVERTER ACT REPEAL EXISTING NEBRASKA LAW?

Under § 76-107[61] future interests are alienable. However the Reverter Act, § 76-299, declares that a possibility of reverter is a future interest but is not alienable.[62] Does § 76-299 then repeal § 76-107 by implication? Although the Nebraska Constitution[63] states that no law shall be amended unless set out in the new law which repeals or amends it, the Nebraska Supreme Court has held that if an act is "complete and independent in itself" it may repeal or amend existing statutes without controverting the constitution.[64]

A law might be regarded as "complete and independent" if (1) the conflict between the two acts arises only incidentally and the later law treats of a different subject, or (2) if the new law provides rules completely regulating the general subject matter with which it is concerned.[65] Under both tests the Reverter Act would appear to be "complete and independent." Would § 76-299 then be held to repeal § 76-107, thus leaving the alienability of future interests other than possibilities of reverter in doubt? Or could a logical basis be found to merely amend the former statute by repeal to exclude possibilities of reverter from the operation of § 76-107?[66]

[60] Compare Miller v. Schoene, 276 U.S. 272 (1928).

[61] NEB. REV. STAT. § 76-107 (Reissue 1958).

[62] *Supra* note 48.

[63] NEB. CONST. art. III, § 14 (1875): ". . . no law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed."

[64] Scott v. Dohrse, 130 Neb. 847, 266 N.W. 709 (1936); State v. Price 127 Neb. 132, 254 N.W. 889 (1934); Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939); Chicago & N.W. Ry. Co. v. County Bd. of Dodge County, 48 Neb. 648, 28 N.W.2d 396 (1947).

[65] See Merrill, *Legislation: Subject, Title and Amendment,* 13 NEB. L. BULL. 95 at 129 and 130 (1935).

[66] The repeal of a statute by implication is not favored, and the rule of implied repeal will not be extended so as to include cases not within the express or implied intention of the legislature. See Schafer v. Schafer, 71 Neb. 708, 99 N.W. 482 (1904). The repugnancy between

A fee simple determinable revests automatically in the person holding the reversionary interest.[67] The Reverter Act, § 76-2,103,[68] seems to distinguish between a reverter and possibilities of reverter. If § 76-2103 means a fee simple determinable it would appear to conflict with the adverse possession statute,[69] since if the fee simple has already been determined, the adverse possession statute should govern. Section 76-2,103 of the Reverter Act demands that action be brought within one year of the effective date of the act, but the adverse possession statute provides for a limitation of ten years.[70] Should the adverse possession be repealed by implication because of the conflict with § 76-2,103?

V. IS THE NEBRASKA REVERTER ACT INVALID ON THE GROUND THAT IT IMPAIRS THE OBLIGATION OF CONTRACTS?

The obligation of contracts is protected by both the Federal[71] and the Nebraska Constitutions.[72] Since the "obligations of contracts" within the terms of the Federal Constitution refers to legal obligations which are measured by the law existing at the time the contract is entered into,[73] it must be shown that a valid and lawful contract is in existence which is subject to impairment.[74]

The obligation of a contract is the law which binds the parties to perform their agreement. The obligations of a contract are impaired by a law which "renders them invalid, releases or distinguishes them, or derogates from substantial contractual rights."[75] Once a valid contract has been entered into, state legislation will not be enforced which impairs the obligations of the contracts

the later and former act must be wholly irreconcilable in order to work a repeal of the former. See Central City v. Morquis, 75 Neb. 233, 106 N.W. 221 (1905). *Cf.* Liske v. State, 119 Neb. 640, 230 N.W. 503 (1930).

67 See 31 NEB. L. REV. 201 at 209 (1952).

68 *Supra* note 33.

69 NEB. REV. STAT. § 25-202 (Reissue 1956).

70 *Ibid.*

71 U. S. CONST. art. I, § 10 cl. 1.

72 NEB. CONST. art. II, § 2 (1875).

73 Placek v. Edstrom, 148 Neb. 79, 26 N.W.2d 489 (1947).

74 *Ibid.* See also Hudson County Water Co. v. McCarter, 209 U.S. 394 (1908).

75 Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934).

or destroys the means of enforcing the obligations, where the means of enforcement are part of the contract.[76]

Although reverter rights are not essential to the enforcement of covenants, they are a legal means of enforcement. In *Biltmore Village v. Royal*[77] the Florida Supreme Court, in holding the Florida Reverter Act invalid, said that any legislation which lessens the efficacy of legal means of enforcement is an impairment of an obligation of contract contrary to constitutional provisions.[78]

The Nebraska Supreme Court has stated that a legislative act will not be permitted to operate retrospectively if it impairs the obligations of contracts or interferes with vested rights.[79] Under § 76-2,102 the Nebraska legislature has declared reverter rights, such as the ones involved in the *Biltmore* case to be null and void and of no further effect after they have been in existence for thirty years. The statute thus purports to take away from owners of a reverter interest a property right to which they are by valid contract lawfully entitled. The statute appears to unconstitutionally impair this contract.[80]

VI. IS THE NEBRASKA REVERTER ACT INVALID ON THE GROUND THAT IT CONSTITUTES SPECIAL LEGISLATION?

The Nebraska Constitution provides:[81]

> The legislature shall not pass any . . . special laws . . . granting to any corporation, association, or individual any special privileges, immunity . . . whatever . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

[76] Snyder v. Lincoln, 150 Neb. 581, 35 N.W.2d 483 (1949).

[77] 71 So.2d 727, (Fla. 1954).

[78] *Cf.* Burrows v. Vanderbergh, 69 Neb. 43, 95 N.W. 57 (1903).

[79] City of Omaha v. Glissman, 151 Neb. 895, 39 N.W.2d 828 (1949); Ritter v. Drainage Dist. No. 1 of Otoe and Johnson Counties, 137 Neb. 866, 291 N.W. 718 (1940); Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 144 N.W.2d 600 (1944).

[80] *But see* Placek v. Edstrom, 151 Neb. 225, 37 N.W.2d 203 (1949), *cert. denied*, 338 U. S. 892 (1949) where the court stated that private contract rights must yield to the public welfare where the latter is appropriately disclosed and defined and the two conflict. *Cf.* Thomas v. Sanderlin, 173 N.C. 329, 91 S.E. 1028 (1917).

[81] NEB. CONST. art. III, § 18 (1875).

The Nebraska Reverter Act, § 76-2,104, provides:

> [This act] shall not invalidate or affect . . . Any . . . possibility of reverter . . . contained in any grant . . . to any railroad or other public utility for the establishment and operation of a transportation system, communication or transmission lines or public highways.

Even a reasonable classification of persons and corporations may not be upheld unless there are actual differences surrounding the members of the class relative to the subject of the legislation.[82] However, if the class has a substantial attribute which requires legislation which would be unnecessary for those outside the class,[83] differences in circumstances will justify distinctive legislation.[84] Designation of railroads and public utilities are upheld if made pursuant to a public purpose which has a rational basis.[85] In *Boston & Albany Railroad v. Reardon*[86] the court held valid a statute providing that railroad property may not be acquired by adverse possession. The court noted that "the real estate of railroads is in a sense impressed with a public use . . . Their operation to a considerable extent is regulated by public authorities . . ."[87]

The possible denial of equal protection[88] suggested by § 76-2,104 appears justified by the public interest and differences in circumstances on which a reasonable classification may be based.[89]

VII. ARE THE PROVISIONS OF THE REVERTER ACT CAPABLE OF SERVERANCE IF A PORTION OF THE ACT IS DECLARED UNCONSTITUTIONAL?

The Reverter Act, § 76-2,105,[90] purports to save the remainder of the act in the event that any of the provisions are declared

[82] Thorin v. Burke, 146 Neb. 94, 18 N.W.2d 664 (1945).

[83] Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956).

[84] Dorrance v. Douglas County, 149 Neb. 685, 32 N.W.2d 202 (1948).

[85] 16A C. J. S., *Constitutional Law* § 465 (1956).

[86] 226 Mass. 286, 115 N.E. 408 (1917).

[87] *Id.* at 288, 115 N.E. 408 at 410.

[88] U. S. CONST. amend. XIV, § 1.

[89] See Tigner v. Texas, 310 U.S. 141 (1940).

[90] NEB. REV. STAT. § 76-2,105 (Supp.1959) provides: "If any provisions of [this act] or the application of any provision thereto to any property, person, or circumstance is held to be invalid, such provision

invalid. Generally a statute in conflict with the Constitution yields only to the extent of the repugnancy.[91] However, the Nebraska Supreme Court has stated that:[92]

> Where sections constituting an inducement for the passage of an act are unconstitutional, the entire act must fall, notwithstanding the savings clause.

Thus it would appear that if the retroactive portions of §§ 76-2,102 and 2,103 were held unconstitutional, the purpose of the Act, which is to eliminate stale reverters, would be defeated. It is arguable then that these sections were the principal inducement for the entire act, and that the legislature might never have passed the act[93] without the sections.

VIII. CONCLUSION

Due to the definite public interest in removing possibilities of reverter and rights of re-entry as a bar to the marketability of land, it is not inconceivable that the Nebraska Supreme Court would view the curtailed interests as mere expectancies and hold the Reverter Act constitutional either in whole or part, notwithstanding existing authority that a possibility of reverter is a vested interest.

Because of the many grave doubts of constitutionality raised by the act, no assurance of its validity can be given until it is tested and a judicial determination is made. An interpretation by the Nebraska Supreme Court might not provide a final answer. As shown by *Shelly v. Kramer*,[94] the United States Supreme Court might properly review action by state courts involving restriction of real property interests within the state.

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> as to such property, person, or circumstance shall be deemed to be exised from [this act,] and the invalidity thereof as to such property, persons or circumstances shall not affect any of the other provisions of [this act] or the application of such provision to property, persons, or circumstances other than those as to which it is invalid, and [this act] shall be applied and shall be effective in every situation so far as its constitutionality extends."

91 Union Pac. R. Co. v. Sprague, 69 Neb. 48, 95 N.W. 46 (1903).

92 Laverty v. Cochran, 132 Neb. 118, 127, 271 N.W. 354, 359 (1937). See also State v. Junkin, 85 Neb. 1, 122 N.W. 473 (1909); State v. Price, 129 Neb. 433, 261 N.W. 894 (1935).

93 The savings clause is merely an aid to judicial interpretation, and is not an inexorable command. See Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934).

94 334 U.S. 1 (1948).