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THE SUPREME COURT PLAYS AT "THIS IS THE HOUSE THAT JACK BUILT"

I.

If Thomas Jefferson were here to comment on the most recent prohibition case decided by the Supreme Court of the United States on May the fifth to the effect that persons who sell barrels, bottles, corks and labels are subject to prosecution under the prohibition law, he would accuse that august tribunal of playing at "This is the House That Jack Built." In 1800 the Sage of Monticello, in protesting against a Congressional Act to incorporate a company to work copper mines in New Jersey said, "Ships are necessary for defense. Copper is necessary for ships. Mines are necessary for copper. A company is necessary to work the mines, and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'?" Under such a process of filiation of necessities, the sweeping clause makes clean work."

Strange to relate, our Congress and Supreme Court during the last decade have accepted this very philosophy in the vain but glorious attempt to make constitutional prohibition effective. In a series of cases dealing exclusively with prohibition the highest court in the land has laid on the shelf the old fashioned but thoroughly sound John Marshall doctrine of implied powers, and has introduced into our public law the philosophy that each implied incidental power breeds new powers by implication with the inevitable result that there is no point at which the process can be halted.

II.

Before introducing the series of cases exemplifying this vicious doctrine, one fact should be remembered. The state police power is reserved, undefined and residual while the

federal "police power" is delegated, enumerated and circumscribed. Four limitations are inherent in the Eighteenth Amendment: (1) limitation as to subject matter, "intoxicating liquor"; (2) limitations as to relationship, "manufacture, sale, importation, exportation and transportation"; (3) limitation as to purpose, "beverage purposes" and (4) limitations as to methods of enforcement, (a) by "appropriate legislation" and (b) by "concurrent power."

Although the Eighteenth Amendment confers on Congress the power to pass "appropriate legislation" to prohibit "intoxicating liquor" for "beverage purposes," the Congress has gone far beyond the beverage class and the Supreme Court has upheld the legislation. *Case 1.* In *Everard Breweries Company v. Day*,¹ the Supreme Court held that Congress could absolutely prohibit physicians from prescribing malt liquor for medicinal purposes. *Case 2.* In *Lambert v. Yellowley*,² the Supreme Court by a five to four decision, upheld a Congressional act which prohibits physicians for medicinal purposes from prescribing more than one pint of vinous or spirituous liquors per patient for every ten days. These cases vitiate the Tenth Amendment in that they usurp the police power of the States in regulating the medical profession.

The *Lambert* doctrine works as follows: A is ill; he is deprived of needed medicine in order to prevent B from quenching his thirst. Because some medicinal alcohol may get into beverage channels, the federal politician and reformer and judge elbow the physician from the bedside of his patient. The act sets up an absolute maximum of one pint in ten days. There are no exceptions or qualifications. If on the ninth day the patient should take a sudden turn for the worse, or an entirely new ailment intervene, making prescription of additional alcohol essential to prevent death, the doctor must violate either his conscience or the law.

¹ 265 U. S. 545 (1924).

² 272 U. S. 581 (1926).

Case 3. Following the same line of reasoning, the Supreme Court in *Selzman v. United States*,³ held that Congress has power to prevent or regulate the sale of denatured alcohol *not usable* as a beverage. Here Congress invades the field of *industrial* alcohol to protect "the ignorance of some" and "the craving and hardihood of others" and to frustrate the "fraud and cupidity of still others." The Federal Oil Conservation Board has estimated that the total amount of petroleum in known fields in the United States would last at the present rate of consumption for only six years. At present there are three possible substitutes for gasoline; shale oil, methanol and ordinary alcohol. Experts agree that the latter is the most efficient and practicable. Congress and the Supreme Court in their endeavor to distort the doctrine of implied powers, may cripple the industrial and defensive power of the nation.

If Congress can go outside the beverage class and invade the medicinal and industrial fields, it can also regulate or prohibit the manufacture and sale of sacramental liquor. It is a well known fact that in many communities the sacramental quotas of congregations for religious purposes are not exhausted and certain officials have a surplus supply of palatable vinous liquors that ultimately may get into beverage channels. The advocates of this drag-net theory would not be satisfied in merely attempting to regulate the abuse of sacramental privileges. They claim the right to prohibit as is evidenced by the *Everard* case prohibiting the use of malt liquor for medicinal purposes. If Congress by legislative fiat can declare that malt liquor prescribed by a physician to a patient is not for a medicinal purpose (and that is the theory of the *Everard* case) then Congress can establish by its *ipse dixit* that vinous liquor furnished by God's vicar to one of the faithful for home consumption is not for a sacramental purpose. The net effect of the application of

³ 268 U. S. 466 (1925).

"The House that Jack Built" doctrine is to emasculate the limitations of the Eighteenth amendment and give it a meaning that was never anticipated at the time of its adoption.

Further, if Congress can go outside the beverage class it can also go outside the *intoxicating class*. It can prohibit the manufacture of cider and fruit juices. If it can prohibit something which ultimately through natural processes of fermentation may become intoxicating, the next step will be the prohibition of non-intoxicating beverages that look like intoxicating liquor. It may be properly mentioned, as a reduction *ad absurdum*, that water looks like gin.

If in order to effectively enforce prohibition of intoxicating liquors Congress can prohibit the sale of non-intoxicating beverages, then why may not a second implied power engender a third, under which Congress may forbid the planting of barley, corn and hops and the manufacture of barrels and kegs? The mischievous consequences of such reasoning were long ago pointed out in *Kidd v. Pearson*,⁴ where replying to a suggestion that under the expressly granted power to regulate commerce, Congress might control related matters, the Supreme Court said:

"The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short every branch of human industry. For is there one of these that does not contemplate more or less clearly, an interstate or foreign market."

Case 4. The latest decision embracing this new-fangled doctrine was delivered by Justice Holmes for a unanimous court on May the fifth 1930, in the case of *Danovitz v. The United States*.⁵ The court held that persons who sell barrels, bottles, corks and labels are subject to prosecution under the Volstead Act when these articles are "offered for sale in such a mode as purposely to attract purchasers" who intend to

⁴ 128 U. S. 1 (1888).

⁵ 281 U. S. 389 (1930).

manufacture intoxicating liquor illegally. The Volstead Act provides that it shall be "unlawful to have or possess any liquor or property designed for the *manufacture* of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property." The petitioner contended that new empty containers, bottles and barrels, and other apparatus described cannot be used in or designed for the *manufacture* of liquor, because the manufacture is completed before that apparatus comes into play. But Justice Holmes, the Liberal, insisted on a liberal construction of the word "manufacture" so as to express "the whole process by which an article is made ready for sale on the open market."

On the very same day that the decision was announced Assistant Secretary Lowman of the Treasury Department declared that this was a test case and that the decision might be made the basis for a nation wide drive to seize all such paraphernalia. Mr. Lowman, in the press for May fifth, said:

"So far we have been unable to stop that sort of thing, but the decision today may be the vehicle that will enable us to do so. We also have been unable to stop the sale of a long list of extracts to which alcohol may be added to make intoxicating liquor. It may be that under today's decision we will be able to seize such extracts and stop that sort of violation."

To those who are satisfied with this type of reasoning, when applied to the exclusive dealer in such paraphernalia, it is only a short step to adopt the same theory where the hardware retailers or "general store" owners are involved. And then the next attack in the glorious drive toward the great objective will be aimed at the manufacture of bottles and barrels or the producer of the raw material that is indispensable to the manufacture of intoxicating liquor, to-wit—the farmer.

III.

The prohibition enthusiasts who have committed themselves to the policy of enforcement-at-any-price should not

take the credit of inventing a new technique of constitutional interpretation. The doctrine that they are defending today was clearly formulated and emphatically repudiated by the Supreme Court of the United States in 1888 in the case of *Kidd v. Pearson*⁶ referred to above. That was a case involving the commerce clause. The decision was a strategic one. Had the Supreme Court accepted the theory that "commerce" included manufacturing and mining and agriculture and fishing it would have sounded the death knell of the police power of the states.

The Irving Fishers and the Nicholas Murray Butlers may wrangle over the question as to whether prohibition has been given a fair trial. One thing is certain. The Supreme Court of the United States has gone out of its way in giving aid and comfort to the officers of the law in their attempt to carry out the noble experiment. In prohibition cases a novel body of constitutional doctrine is being created. Bills of rights, federal and state, are being denaturalized by the pious advocates of law enforcement. The constitutional immunities against unreasonable searches and seizures, entrapment and self-incrimination are being whittled away. Stealthy encroachments are being made upon the "right of castle." Our government in its eagerness to utilize effective "short cuts" has emasculated the John Marshall doctrine of implied powers, and has forgotten the advice of the Supreme Court of Missouri of the vintage of 1912 that "sound law must be written even in whisky cases." The game may be intriguing to the players, but sooner or later the spectators who are paying for this Pyrrhic victory will challenge their government by asking an embarrassing question—"Shall there be *two* constitutions, one for prohibition and one for all other matters whatsoever?" Does it require a seer to predict what the ultimate answer will be?

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⁶ *Supra*, note 4.

THE NATURE OF POSSIBILITIES OF REVERTER

The recent case of *Copenhaver v. Pendleton*¹ gives renewed interest to the much mooted question as to the nature of possibilities of reverter. It is the purpose of the present article to discuss this problem with special reference to their devisability. It should be observed, however, that courts and text writers are not uniform in what they include within the term "possibility of reverter". Some courts include within this term the grantor's interest after creating an estate on condition subsequent. Tiffany insists that a distinction should be observed. He says:

"The right of entry for breach of condition, annexed to an estate in fee simple, is sometimes referred to as a possibility of reverter. The expression 'revert,' however, signifies a return to the grantor of the ownership or possession by operation of law, and is not properly applicable to the reacquisition of the ownership or possession by entry or its equivalent. The right of entry in such a case might consequently, so long as the condition has not been broken, more appropriately be referred to as a contingent right of re-entry."²

This distinction certainly seems well taken, but since the courts have not generally observed it and since it does affect the question of devisability, the term possibility of reverter will be used in this article, for the sake of brevity, to include the right or interest of the owner of land after he has created an estate on condition subsequent, an estate on limitation, a determinable fee, or an estate in fee simple conditional.

It is quite generally agreed that this future interest can be transferred at common law by a deed of release.³ But it is almost universally held that the possibility of reverter

¹ 155 S. E. 802 (Va. 1930), noted in 17 VA. L. REV. 402.

² TIFFANY REAL PROPERTY, 2 Ed., Vol. I, p. 474.

³ Brill v. Lynn, 270 S. W. 20, note 38 A. L. R. 1111 (Ky. 1925); Atkin v. Gillespie, 299 S. W. 776 (Tenn. 1927); Trustees Presbyterian Church v. Putnam, 162 N. E. 601 (N. Y. 1928); 37 YALE L. REV. 530; 12 MINN. L. REV. 768; 8 OREG. L. REV. 886; 27 MICH. L. REV. 346.

is not otherwise transferable by deed at common law. Pennsylvania and Georgia seem to be the only states contra.⁴ As to whether the possibility of reverter will pass by devise or in course of intestate succession as provided by statute, there is much greater difficulty. It is properly a question of statutory construction; if the Statute of Wills provides in effect that whatever is descendible is devisable, then obviously the devisability of such a future interest depends on its inheritability, *i. e.*, whether it passes by descent at common law. Exactly the same question would arise if the statute prescribing the course of intestate succession applies only to estates of inheritance.

The first of the so-called "Canons of Descent" by which the course of intestate succession was determined at common law,⁵ is found in the rule that descent must be traced to the first purchaser and in the auxiliary maxim *seisina facit stipitem*. The first purchaser is the person who first brought the estate into the family and thus started the line of descent which is then confined exclusively to *his* heirs until some one of his heirs acquires the seisin, when a new line of descent is started. Thereafter each succeeding claimant must show kinship with the person who last died seized.⁶ Accordingly when an ancestor died seized, that is, having the right of possession, then his next of kin acquire this right to possession at the very same moment of time that they acquire the estate. Hence no question can arise as to the moment of time which is to be taken as a basis for determining who the heirs are. Since they acquire the estate and the right to possession at the very same moment of time, to-wit, the moment of the ancestor's death, the heirs are to be determined according to the situation as it exists at that time. Such a case presents no difficulty. But the determination of

⁴ TIFFANY REAL PROPERTY, 2 Ed., Vol. I., p. 313; 37 YALE L. REV. 530; 3 MINN. L. REV. 337; 9 COL. L. REV. 171; 17 VA. L. REV. 403.

⁵ 2 BL. COM. 208.

⁶ 27 AM. AND ENG. ENC. OF LAW, 2 Ed. 297; TIFFANY REAL PROPERTY, 2 Ed., Vol. 2, p. 1890.

the heirs in the case of future interests presents a different and more difficult problem. According to this first "Canon of Descent" if a person had acquired a reversion or remainder (vested or contingent) in some other manner than by descent, *i. e.*, by way of limitation in a deed or will, then when he died, he being thus the first purchaser, the future interest would pass to his heir; but when the heir died without having become entitled to possession, he being thus neither the first purchaser nor having died seized, the future interest would not pass to *his* heir, but to the next heir of the original reversioner or remainder man (the first purchaser). Under this rule where an estate in reversion or remainder is cast upon a person by descent, who dies without having become entitled to possession, the future interest does not pass to *his* heir, but to the persons who *at that time* answer the description of heirs of the first purchaser. This is the more technical form of stating the rule at common law that in the case of future interests the heirs are to be determined according to the situation as it exists when the right of possession accrues. A remarkably lucid explanation of this rule is given by Judge Epes in *Copenhaver v. Pendleton*, *supra*, who suggests the following illustration. By limitation in a deed or will, A acquired a reversion in one tract and a remainder (vested or contingent) in another tract, and dies without having become entitled to either tract. The reversion and the remainder both pass to his heir B. Subsequently B also dies without having become entitled to the possession of either tract. The future interests do not pass to B's heir, but to the next person who *then* is heir of A. Thus it may be said to be the well established rule of the common law that when a reversioner or remainder man dies, the future interests pass by descent to his heirs who are to be determined according to the situation as it exists when the right of possession accrues. The authorities cited by Judge Epes fully sustain this proposition without dissent.

This rule, then, is clear and well settled as applied to reversions and remainders; but it still leaves open the question whether the rule is applicable to possibilities of reverter. It has indeed been argued and held that these latter interests pass by representation and not by descent, a distinction which has an important bearing on the question of devisability and statutory descent.

If a person dies without any estate at all, then obviously his next of kin can *inherit* nothing from him. And yet the law is that where such person would have acquired an estate by descent if he had lived, then his next of kin, although they cannot inherit anything from him, nevertheless take the estate that he would have acquired by descent if he had lived. This is called taking by representation and is properly invoked only in cases where it is impossible to take by descent. But only living persons can represent the deceased and hence the persons who are to take by representation must be determined according to the situation as it existed when the right of possession accrued. Thus, if there be two sisters and one of them dies leaving six daughters and the father of the two sisters then dies intestate without other issue, the six daughters take the share the mother would have taken.⁷

It seems agreed that reversions and remainders take the course above described by the common law descent: *i. e.*, these interests are inheritable (descendible) at common law. It is also agreed that possibilities of reverter take the same course at common law, but whether they take it by descent or by representation is a disputed question. The view that the heirs take by representation rests on the theory that possibilities of reverter are not estates or interests in land at all, but mere expectancies like the *spes successionis* of the prospective heir and consequently, as in the case of such

⁷ 27 AM. AND ENG. ENC. OF LAW, 2 Ed. 320; TIFFANY REAL PROPERTY, 2 Ed., Vol. II, p. 1899.

spes, it must be by representation.⁸ This latter theory seems to have been first adopted in South Carolina.⁹ The contrary view rests on the theory that a possibility of reverter is analogous to a contingent remainder or an executory devise.¹⁰ As long as it remains purely a question of common law, there is usually no practical difference at all, because the persons who ultimately get the right to possession are exactly the same whether they take by representation or by descent. But, as already stated, the question has a great practical importance in connection with the construction of present day statutes of wills and statutes prescribing the course of intestate succession, for quite obviously if these statutes are by their own express provision limited to estates of inheritance, and the possibility of reverter is a mere expectancy and not any estate at all, then it is neither devisable nor descendible in statutory course.

A brief survey of the leading cases may be interesting and useful in determining the present status of the law on this subject. The question as to the nature of possibilities of reverter seems to have been first raised, however, in connection with the doctrine of merger, according to which, where a smaller and larger estate become vested in the same person, the less estate is then extinguished by being merged in the larger. Now, if the possibility of reverter is an estate, then the doctrine of merger is applicable and the tenant would have a fee simple absolute. This was the holding in an early English case wherein a fee simple conditional was devised to one J. S. who later, as heir of the testator, acquired the possibility of reverter and it was held that the fee conditional was merged in the possibility of reverter and as a consequence J. S. had a fee simple absolute.¹¹ But five years be-

⁸ TIFFANY REAL PROPERTY, 2 Ed., Vol. I, pp. 315, 316; note 18 L. R. A. (N. S.) 624; 9 COL. L. REV. 274; 37 YALE L. REV. 530; 17 VA. L. REV. 402.

⁹ Adams v. Chapline, 23 S. C. 115 (1833).

¹⁰ Copenhagen v. Pendleton, *supra*, note 1.

¹¹ Doe v. Simpson, 132 Eng. Rep. 816 (1938).

fore this decision South Carolina had already committed itself to the opposite theory in the leading case of *Adams v. Chapline*.¹² The peculiarity of this case is that both the trial court and the higher court decided for the defendant, but there is a sharp division on the question of merger. The trial court held that since the possibility of reverter and the conditional fee became vested in the defendant's predecessor, the doctrine of merger was applicable and he had a fee simple absolute. The higher court very vigorously rejects this holding and decides for the defendant on another ground.

The case of *Dees v. Harry*,¹³ adopting the South Carolina view, held that a possibility of reverter is not devisable within the meaning of the South Carolina statute authorizing the testamentary disposition of "lands, tenements and hereditaments". This holding has been quite recently approved and confirmed.¹⁴

One of the most frequently cited cases for the South Carolina view is *Upington v. Corrigan*.¹⁵ The facts of this case are simple. Mary Davey in 1862 conveyed the premises, subject to the condition that the grantee erect a building thereon within a reasonable time, a condition which was broken. Mary devised the land to defendant as her "residuary legatee" (sic). In 1891 Mary's heir sued in ejectment. The court, in deciding for the plaintiff, held that Mary's interest was a "mere possibility of reverter" and hence was not within the meaning of the New York statute which provided that "every state and interest in real property descendible to heirs may be devised".

*Methodist Church v. Young*¹⁶ was a controversy between the heir and the devisee who relied on the North Carolina

¹² *Supra*, note 9.

¹³ *Dees v. Harry*, 23 S. C. 120 (1835).

¹⁴ *Vaughn v. Lanford*, 62 S. E. 316, noted in 9 COL. L. REV. 172. (1908).

¹⁵ *Upington v. Corrigan*, 45 N. E. 359 (N. Y. 1896).

¹⁶ *Methodist Church v. Young*, 40 S. E. 691 (N. C. 1902).

statute authorizing the devise of "any real or personal estate" and "any rights of entry for condition broken." It was held that the contingent right of re-entry is not real or personal estate and that the other clause of the statute applies only to rights of entry for condition broken in the life time of the testator and that, accordingly, the contingent right of re-entry is not devisable.

In *Puffer v. Clark*¹⁷ certain premises were conveyed on condition that they be used as a home for superannuated ministers. The Court, citing the foregoing Illinois and South Carolina cases with approval, held that "a possibility of reverter is not devisable, but passes to those who are the heirs of the grantor at the time of the breach. It passes by right of representation and not by descent."

While these cases apparently represent the weight of authority,¹⁸ and what the Michigan court calls "the better reasoning,"¹⁹ there are several cases which have definitely adopted the contrary view. Massachusetts took the lead in an early case²⁰ in which one Drake devised a lot to a certain town on condition that the town build a school house thereon. The condition was broken and the court held that the residuary devisee could maintain the writ of entry, because at the death of the testator, the contingent right of re-entry passed to him by the devise and not to the heir. This holding was approved and confirmed a few years later.²¹

The most frequently cited case for the minority view is *North v. Graham*.²² The discussion of the Court in this case is not very clear, but the decision involves the holding that a contingent right of re-entry passes to the heirs by descent and not by representation. In 1877 one Adam Steward con-

¹⁷ *Puffer v. Clark*, 168 N. W. 471 (Mich. 1918).

¹⁸ *TIFFANY REAL PROPERTY*, 2 Ed., Vol. I, pp. 316, 473; note 18 L. R. A. (N. S.) 624; *Ashuelot Bank v. Keene*, 74 N. H. 148, 9 L. R. A. (N. S.) 758, 65 Atl. 826 (1907); cases cited *supra*.

¹⁹ *Puffer v. Clark*, *supra*, note 17.

²⁰ *Hayden v. Stoughton*, 5 Pick 528 (1827).

²¹ *Austin v. Cambridge*, 21 Pick 215 (1838).

²² *North v. Graham*, 85 N. E. 267; 18 L. R. A. (N. S.) 624 (Ill. 1908).

veyed the premises to the Methodist Church so long as they should be used for a meeting house. In 1866 he quit-claimed to his brother, the defendant (this transfer was of course inoperative). In 1888 Adam died leaving three daughters, one of whom soon after died without issue. The other two daughters were Mary, the plaintiff, and Demeris. Demeris married one Snyder, had a daughter, Myrtle, and died without other issue. Myrtle also died unmarried and without issue, thus leaving Snyder, the father of Myrtle, the only person who could succeed to her rights. Now a father can take by descent from his daughter, but not by representation.²³ Hence, the question whether Mary was the sole owner of the premises or whether she must share with Snyder would depend on whether Myrtle's right passed by descent to her father. In as much as the court decided that the judgment should be in favor of Mary "not for the entire premises but for one-half of the premises," the decision involves the holding that Snyder derived his right from his daughter by the law of descent. The court nowhere expressly mentions the distinction between descent and representation, but it evidently has this distinction in mind when it puts the question in the following form: "Did the land revert or descend to the grantor's heirs who were in existence at the time of his death, or to his heirs who were in existence at the time the fee was terminated?" Prof. Kales regards this case as having "settled the rule in Illinois."²⁴

The most recent approval of the minority view and the strongest argument in its defense is found in the 1930 case of *Copenhaver v. Pendleton*, *supra*. The Court extensively reviews the authorities especially disapproving *Adams v. Chapline*, *Dees v. Harry*, and *Upington v. Corrigan*, and holds that the possibility of reverter passes at common law

²³ *Supra*, note 7.

²⁴ KALES ESTATES FUTURE INTERESTS, 2 Ed., Sec. 381, 382 pp. 413-417.

by descent and not by representation and hence is within the meaning of the Virginia statute authorizing the testamentary disposition of "any real estate of inheritance."

This brief survey of leading cases discloses the following result: that by the weight of authority, the possibility of reverter, using that term as defined in the beginning of this article, is not devisable pursuant to the Statute of Wills and does not follow the course of intestate succession prescribed in the Statute of Descent, unless these statutes provide for it in the most explicit and unmistakable terms.

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