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RESTRICTIONS UPON THE HOLDING OF REAL PROPERTY IN KENTUCKY BY RELIGIOUS SOCIETIES AND CORPORATIONS

Statutory restrictions are placed upon the holding of real property in Kentucky by religious societies and corporations. It is the purpose of this note to survey the Kentucky cases which have applied statutes restricting real property holdings. Those cases dealing with religious societies will be considered first, followed by those dealing with corporations. The changes which have occurred in the legislative and judicial attitudes toward restrictions upon the holding of real property in Kentucky will be evaluated, with emphasis being placed on the present state of the law.

The present Kentucky mortmain acts are framed in terms of escheat. Section 273.090(1) of the Kentucky Revised Statutes* provides that:

No religious society may take or hold legal or equitable title to more than fifty acres of ground for a longer period than one year under penalty of escheat.

The Kentucky Constitution, section 192, and KRS 271.145(1) provide that:

No corporation shall . . . hold any real estate, except such as may be proper and necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat.

The statutes provide for enforcement of the escheat provisions by an action in the name of the Commonwealth in the circuit court where such land is located, after giving notice sufficient to allow the violator to dispose of the land (one year in the case of religious societies and two years in the case of corporations¹).

History and Evolution of Mortmain Acts

The concept of placing restrictions upon the taking and holding of real property by religious societies and by corporations was inherited, along with the common law, from England. The English have long discouraged conveyances to religious societies and corporations. Such conveyances were known as conveyances into "mortmain" (deadhand) because they resulted in a "dead" loss to the feudal overlord.² Parliament enacted the first mortmain statute, "De Viris Religiosis," in 1279. It provided that no sale or gift of land could

* (Hereinafter cited as KRS).

¹ KRS 273.090 (2); KRS 271.145 (2).

² James, Introduction to English Law 376 (3d ed. 1955).

be made to a religious house without the king's license. The prohibition was subsequently extended to all corporate bodies.³

A recent study⁴ notes certain extensions and modifications of the traditional mortmain statutes. The trend has been toward extending the scope of mortmain statutes beyond a mere safeguard against the inalienability of real property. Not only is the power of religious societies to hold real property limited in some states, but the right to hold personal property is limited as well.⁵ "Time before death" and "percentage of estate" limitations are imposed in several states.⁶ In the former, testamentary dispositions to religious societies must be executed within a stated period prior to death, while in the latter, bequests or devises to religious societies may not exceed a certain percentage of the net estate. The author of the study points out that these extensions by state legislatures emphasize a policy of protection of heirs who might suffer as a result of a last minute bequest or devise to a religious society.⁷

While the original purpose of legislation restricting corporations' real property holdings was identical to that of the statutes aimed at religious societies, changes of purpose have occurred in the area of restrictions upon corporate property as well. For example, the state may require that corporate assets be kept liquid (especially in the case of financing institutions and banks), or that land be held locally rather than by foreign corporations over which the state has little supervision.⁸

Restrictions upon the Holding of Real Property by Religious Societies

Litigation in Kentucky involving restrictions upon the right of churches and religious societies to hold real property has been rather limited. There have been only a dozen cases in the past century. Practically all of these cases involved a statute passed in 1893 which provided:

No church or society of Christians shall be capable of taking or holding the title, legal or equitable, to exceeding fifty acres of ground; but may acquire and hold that quantity for the purpose of erecting thereon houses of public worship, public instruction, parsonage or graveyard.⁹

³ 3 Holdsworth, *History of English Law* 87 (1923).

⁴ Joslin, "Mortmain' in Canada and the United States: A Comparative Study" 29 *Can. B. Rev.* 621 (1951).

⁵ *Id.* at 624, 625. The author lists the states which have personal property restrictions and gives code citations.

⁶ *Id.* at 626, 629. The author points out, however, that the "time before death" statutes have been subject to easy circumvention by last minute inter vivos transfers.

⁷ *Id.* at 629.

⁸ 3 *American Law of Property* § 12.76 (Casner ed. 1952).

⁹ *Ky. Acts 1893, ch. 200* § 3.

This statute differs materially from the one on the books today,¹⁰ in that it was worded as a bar to the *capacity* of a church or "society of Christians" to take title to real property in excess of fifty acres. The 1893 statute contained no escheat provision as does the present statute.

The 1893 statute referred only to "societies of Christians." The court construed this to include religious societies in general and not, therefore, discriminatory against Christians.¹¹ The present statute adopted this construction literally.

Since the 1893 statute was not framed in terms of escheat, but as a bar to the *capacity* of churches or religious societies to acquire title to real property, the Kentucky court held that the real parties in interest who could attack a devise to a religious society through the statute were the heirs at law who would take the property by inheritance if the devise were void.¹² A literal interpretation of KRS 273.090 would seem to dictate that the state is the only interested party and that an original proceeding in the name of the Commonwealth is the *only* type of suit in which the statute may be invoked today. Such an interpretation would uphold the policy of preserving the alienability of real property while eliminating the policy noted earlier, *i.e.*, the protection of close relatives from disinheritance by devises to religious societies.¹³

All the reported Kentucky cases in which mortmain statutes have been invoked have involved testamentary dispositions to churches or religious societies. Where the testator has attempted to vest title to more than fifty acres of real estate in a church or religious society, the Kentucky court has held that the devise failed¹⁴ and the interest passed to the heirs at law as in intestacy.¹⁵ Furthermore, where real property has been conveyed to a church under a will in violation of the statute, and the church has subsequently sold the property, the unremembered heirs have been able to proceed against the church's vendee and recover the property.¹⁶ In such a case, the vendee has been freed from his obligation to pay the purchase price and has been

¹⁰ The term "mortmain act" is used in a broad sense in this paper, and includes any restriction upon the holding of real property by religious societies or corporations, regardless of how enforced.

¹¹ *Compton v. Moore*, 156 Ky. 544, 550, 161 S.W. 540, 543 (1913).

¹² *Id.* at 549, 161 S.W. at 542.

¹³ *Joslin*, *supra* note 7. The author points out that mortmain acts have, for policy reasons, been used for the protection of heirs from disinheritance by devises to religious societies.

¹⁴ *Letcher's Trustee v. Letcher*, 302 Ky. 448, 194 S.W. 2d 984 (1946). The court supported a holding that an ultimate devise in fee to religious society was void as a perpetuity by stating that it was also violative of the mortmain statute.

¹⁵ *Compton v. Moore*, 156 Ky. 544, 161 S.W. 540 (1913).

¹⁶ *Spradlin v. Wiman*, 272 Ky. 724, 114 S.W. 2d 1111 (1938).

granted rescission of the purchase agreement.¹⁷ Where a church sold property which had been devised to it, without dedicating any part of it to church purposes, the court could find no basis, under the 1893 statute,¹⁸ for allowing it to retain even the fifty acre minimum.¹⁹

On the other hand, it has been held that if the devise of real estate fails by reason of the statute, the church may take *up to* fifty acres subject to the restrictions upon its use imposed by the statute, even though the testatrix attempted to bestow a greater number of acres on the church.²⁰ The only logical distinction between the two cases seems to be that in the former the church, by its sale of the property, demonstrated unequivocally that none of the property devised would be used for church purposes.

Since there is no statutory restriction in Kentucky upon a bequest of personal property to churches or religious societies, such a bequest has been upheld even though the personalty consisted of the proceeds of a sale of real property directed by the testator.²¹

Even though the testator did not specifically direct a sale, one case held that his direction that the property was to be used to establish a "fund" indicated his intention that it be sold. Relying upon equitable conversion the court treated that as done which should have been done and directed a sale of the property for the benefit of the church.²² In one case the testator directed that real property be placed in trust for designated churches. At the termination of the trust, the property was to be sold and the proceeds divided among the churches. The sale of the property for the benefit of the churches was upheld, but the court held that since the trust was invalid under the mortmain statute, the testator died intestate as to the duration of the trust.²³

A strict application of the 1893 Kentucky mortmain statute would seem to prohibit a church or religious society from holding real property as trustee of a charitable trust. As Professor Scott²⁴ points out, however, the effect of mortmain statutes on charitable trusts depends upon judicial construction of these statutes. The Kentucky court seems to have adopted a liberal construction of the mortmain statutes where charitable trusts are involved. Where real property has been devised to churches or religious societies to be used for a charitable purpose

¹⁷ *Wiman v. First Christian Church*, 273 Ky. 821, 117 S.W. 2d 989 (1938). The court pointed out that the church should have been joined in the original proceeding against its vendee.

¹⁸ Ky. Acts 1893, ch. 200 § 3.

¹⁹ *Spradlin v. Wiman*, 272 Ky. 724, 114 S.W. 2d 1111 (1938).

²⁰ *Compton v. Moore*, 167 Ky. 657, 181 S.W. 360 (1916).

²¹ *Chambers v. Higgins' Ex'r*, 20 Ky. L. Rep. 1425, 49 S.W. 436 (1899).

²² *Willett v. Willett*, 197 Ky. 663, 247 S.W. 739 (1923).

²³ *Street v. Cave Hill Inv. Co.*, 191 Ky. 422, 230 S.W. 536 (1921).

²⁴ 4 Scott, Trusts § 362.4 at 2605 (2d. ed. 1956).

which is sufficiently indefinite to take it out of the private trust category, the court has upheld the devise. The court has consistently interpreted the statute toward this end, stating that the statute was aimed at the churches' taking title to real property for their "own use"²⁵ or that "no title vests in any one church, nor is the trust for the benefit of any one church."²⁶ The fact that a religious society held the legal title to real property under such trusts has never been held violative of the statute.

The Kentucky court's liberal treatment of devises to churches or religious societies for charitable purposes indicates a departure from the policy of the original mortmain acts. Where the devise purported to vest title absolute in a church or religious society, the court construed the statute as prohibiting the taking or holding of real property in excess of the prescribed acreage. On the other hand when the devise purported to vest title in a church or religious society as trustee for a charitable purpose (as distinguished from ordinary church activities), the statute was interpreted so as to permit the taking of title when the holding of it would not violate the purpose of the statute. In other words, the taking of title which would otherwise be voidable by reason of the lack of capacity of the devisee is tolerated because of the policy favoring charitable dispositions of property.

It should be kept in mind that all of the available Kentucky case law on this subject deals with a statute which is substantially different from the one on the books today. KRS 273.090 is an escheat statute. It is not worded as an absolute bar to the capacity of a church or religious society to take title to real property. It does, however, place a time limitation of one year upon the holding of title to more than fifty acres. Prior to its repeal in 1946²⁷ the 1893 statute did not sanction the taking or holding of title to more than fifty acres for any purpose, for any period of time. The fundamental differences between the two types of statutes are aptly explained in an early Kentucky opinion applying the old statute:

Escheat statutes are designed to take from corporations the title to lands theretofore lawfully held but which have been held for a longer period than allowed by law and in violation of law; the Mortmain Statutes are designed to *prevent acquisition* of land by corporations in violation of law. Escheat Statutes from their very

²⁵ Kinney v. Kinney's Ex'r, 86 Ky. 610, 6 S.W. 593 (1888). The object of the trust was foreign missions.

²⁶ Shrader v. Erickson's Ex'r, 284 Ky. 449, 145 S.W.2d 63 (1940). The object was education of young priests. Kentucky Christian Missionary Soc'y v. Moren, 267 Ky. 358, 102 S.W.2d 335 (1937). The objects were Christian Churches of Laurel and adjoining counties.

²⁷ Ky. Acts 1946, ch. 150.

nature must provide for forfeitures; in Mortmain Statutes which are intended to *prevent acquisition* of lands there is no necessity for a forfeiture provision. The State under an Escheat Statute is the party in interest, and, of course, it alone can go into court and demand a forfeiture; but in this case where we are dealing with Mortmain Statutes which positively prohibit the church from taking the title to this property, but which provides for no forfeiture to the State, the real parties in interest are the heirs at law of the testatrix, who will take it by inheritance if the devise is void.²⁸

It would take a strained judicial interpretation to apply the present statute for the benefit of unremembered heirs.

Since Kentucky has no statutory limitation upon testamentary dispositions of either real or personal property to religious societies, the law as it stands today seems to offer no relief to heirs who have been disinherited by devises to such societies. The purpose of preventing the holding of large parcels of land by churches or religious societies for their ordinary church purposes (as distinguished from the holding for a charitable purpose) is maintained by the present escheat statute. While the trend in most states has been to increase the protection of near relatives from disinheritance,²⁹ Kentucky has removed her mortmain statute from this area. The present escheat statute operates to prevent the holding of real property in "dead hands" in accordance with the purpose of the original mortmain acts. This strict legislative attitude is likewise contrary to a decided trend in the United States to remove the restriction.³⁰

Restrictions upon the Holding of Real Property by Corporations

The Kentucky constitutional provision and statute restricting the ownership of real property by corporations are framed in terms of escheat. Statutes proscribing holding more real estate than is necessary for the purpose of the corporation are rather innocuous on their faces and lend themselves to the exercise of broad judicial discretion in their application.

The Kentucky court has interpreted the restriction as not being absolute. That is, land not necessary and proper for the legitimate business of a corporation may be held for a period longer than five years if such land was purchased and subsequently held with the good faith intention to use it in the future as a "needful" part of the business.³¹

²⁸ *Compton v. Moore*, 156 Ky. 544, 549, 161 S.W. 540, 542 (1913).

²⁹ *Joslin*, *supra* note 4, at 630.

³⁰ *Ibid.*

³¹ *Commonwealth v. Mengel Box Co.*, 152 Ky. 287, 153 S.W. 771 (1913). A city lot was held for the purpose of assuring the corporation access between its principal places of business. *German Ins. Co. v. Commonwealth*, 141 Ky. 606, 133 S.W. 793 (1911). An insurance company had purchased a lot adjoining its office building with a view to expanding its offices.

The judicial attitude is illustrated by the following passage from a Kentucky case:

It was certainly not the intention of the delegates, in framing the constitutional provision relied upon, nor of the members of the legislature, in enacting the statute cited to carry out this provision, that corporations should be dealt with in a narrow or niggardly manner; or that they should be deprived of the right to look into the future and provide for a safe, expeditious and economic conduct of their business; but, on the other hand, their purpose was to prevent railroads or other corporations from buying up large and valuable tracts of land, not for any use connected with their business, but for speculative purposes, or for the purpose of removing the minerals or timber on such lands from the market, for the time being at least. It was abuses of this character that the makers of the constitution and the legislature were aiming to prevent. Although a corporation takes title to property and holds it for a longer period than five years, such property is not subject to escheat, unless the corporation is unable to show that it is needed for future use in the proper, fair, and legitimate conduct of its business. Cases will necessarily arise, where it cannot be definitely determined whether the property will or will not be necessary for the corporate use; but, if it appears, with reasonable certainty, that it will be, and in the happening of a contingency like that here sought to be provided against would be, needed by such corporation in its business, the court would not hesitate to declare the holding to be for a future use, and hence, justified, and, in no wise, violative of the constitutional provision relied upon.³²

In keeping with this liberal attitude, the court has held that the five year limitation does not run during a period when the corporation holds the property for a proper intended future use, and its application to such use has been prevented by litigation involving the property.³³

The consideration of future uses would seem to be a reasonable concession by the courts and not contrary to the historic purpose of the statute, *i.e.*, the prevention of real property being held in "dead hands."³⁴

Where the Commonwealth has succeeded in sustaining its burden of proof,³⁵ and no bona fide intention to devote real property held by a corporation to a legitimate future use can be established, the court has upheld rulings that the property escheat to the Commonwealth. The purpose of the statute has been carried out where the corporate violator had acquired the property to protect itself from loss on liens which it held on the property,³⁶ and where the illegally

³² Commonwealth v. Mengel Box Co., *supra* note 31 at 291, 153 S.W. at 772.

³³ Commonwealth v. Kentucky Traction Co., 140 Ky. 387, 131 S.W. 16 (1910).

³⁴ Great-West Life Assur. Co. v. Courier-Journal Job Printing Co., 238 S.W. 2d 639, 641 (Ky. 1956).

³⁵ Louisville School Bd. v. King, 127 Ky. 824, 107 S.W. 247 (1908).

³⁶ German Ins. Co. v. Commonwealth, 141 Ky. 606, 133 S.W. 793 (1911).

held property consisted of a storehouse connected to a building used as the corporate home.³⁷

The restriction has not been held applicable to all corporations; it applies to private corporations and not to public institutions such as schools.³⁸ It does not apply to a corporation organized for the purpose of, and engaged in the business of, buying, selling, owning, holding and dealing in real estate.³⁹ It does not apply to a corporation which has ceased doing business except to wind up its affairs, when part of the necessary five year allowance period is included in a period in which the corporation was defunct.⁴⁰ The constitutional provision has been held not to be a bar to action by the legislature in authorizing insurance companies to invest part of their reserve funds in real estate in Kentucky for a longer period than five years.⁴¹

The Kentucky court has made it clear that any real property held by a corporation, whether subject to escheat or not, is transferable by the corporation until escheat proceedings have actually been instituted. A transfer of title to property, even though illegally held by a corporation for longer than five years, vests an indefeasible title in its vendee, and the illegal holding is not grounds for rescission of a subsequent contract for purchase of the property.⁴²

While the basic statutory restriction based on section 192 of the Kentucky Constitution has remained unchanged throughout the history of the restriction, the present provision for giving notice prior to the institution of escheat proceedings would seemingly alleviate the harshness of some of the earlier decisions noted.

KRS 271.145(2) provides in part:

. . . Before any such action may be instituted, the Attorney General or the Department of Revenue shall give written notice to the corporation that, unless the property is disposed of within two years after receipt of the notice, an action will be commenced to forfeit the real estate. . . . The serving of the notice shall not invalidate or impair the corporation's title to the real estate, nor abridge its right to convey it before the action, nor affect the title of the person to whom conveyed.

This provision, added to the statute in 1946,⁴³ would remove the risk of complete loss by a corporation of real property which it holds

³⁷ Commonwealth v. Clark County Nat'l Bank, 187 Ky. 151, 219 S.W. 175 (1919).

³⁸ Kerr v. City of Louisville, 271 Ky. 335, 111 S.W. 2d 1046 (1937).

³⁹ Cree v. Associates Co., 192 Ky. 669, 234 S.W. 288 (1921).

⁴⁰ Louisville Banking Co. v. Commonwealth, 142 Ky. 690, 134 S.W. 1142 (1911).

⁴¹ Great-West Life Assur. Co. v. Courier-Journal Job Printing Co., 288 S.W. 2d 639 (Ky. 1956).

⁴² Louisville School Bd. v. King, 127 Ky. 824, 107 S.W. 247 (1908).

⁴³ Ky. Acts 1946, ch. 141.

in violation of the statute if the illegally held property were marketable at any time during the two years following the giving of notice.

Conceivably, however, private corporations which are holding real property not necessary and proper for carrying on their legitimate business and not for a legitimate future use could be running a grave risk. The notice provision has not as yet been tested in the Kentucky Court of Appeals. An early case held that, for purposes of determining when a cause of action accrues, the constitutional provision was self-executing.⁴⁴ Should the court hold that an enforceable cause of action accrues under section 192 of the constitution, notwithstanding the provision for giving notice to violators which is contained in the statute, any feeling of security engendered by the language of KRS 271.145(2) could be swept away.

Conclusion

The policy of restricting the holding of real property by religious societies and corporations is a very old one, based on the English statutes of mortmain. It has undergone various extensions and modifications in American legislation in keeping with shifts in policy considerations.

While the trend in the United States has been to abolish such restrictions, Kentucky retains them, limiting churches and religious societies to holdings of fifty acres of land. The present statute is enforceable by escheat proceedings and is not framed in terms of a bar to the capacity of churches and religious societies taking title to real property. It appears, therefore, that the statute would not bar a gift or devise of real property to a religious society, provided that the property is disposed of within the time allowed by the statute. Heirs who have been disinherited by a devise to a religious society do not appear to have a remedy under the present statute, as they did under earlier Kentucky legislation. Prior to its amendment in 1946, the Kentucky statute went to the capacity of churches and religious societies to take and hold real property in excess of fifty acres. This statute had a double policy function: it preserved the alienability of real property, and it protected the immediate heirs of landowners from disinheritance by devises of more than fifty acres to religious societies. Under the present escheat statute, going only to the holding of real property by religious societies, the Commonwealth is the real party in interest in any proceeding to escheat, and presumably would be the only party capable of invoking the statute.

⁴⁴ Louisville Banking Co. v. Commonwealth, 142 Ky. 690, 693, 134 S.W. 1142, 1144 (1911).

The present statute adequately carries out the historical purpose of mortmain acts. It operates to preserve the alienability of real property, while presumably allowing religious societies to benefit from an intended devise of real property if disposed of within a reasonable time. Mortmain statutes are not designed for the protection of heirs. If such protection is desired, it should be provided by independent legislation drafted specifically to deal with the problem.

Apparently the Kentucky constitutional provision and corresponding statute⁴⁵ dealing with restrictions upon the ownership of real property by corporations have come under recent reevaluation. One of the twelve subjects to be considered by a proposed constitutional revision convention (which failed to carry in a referendum) was: "Removal of limitations on the holding of real estate."⁴⁶ This recent interest would seem to indicate a need for an evaluation of the restriction in Kentucky.

Kentucky restricts the holding of real property not proper and necessary to the carrying on of the legitimate business of private corporations to a five year period. The restriction is enforceable by escheat proceedings in the name of the Commonwealth. The Kentucky court has consistently refused to apply the restriction where property which would otherwise be subject to escheat is held for a legitimate future use by the corporation. It is only where the Commonwealth can sustain its burden of proving that the property is held by the corporation for no legitimate future corporate use that the court will order an escheat. The court has tended to be rather liberal in determining what is a "proper and necessary" use; if the use will be a "needful" one the property will not be subject to escheat.

The restriction has been held not applicable to corporations whose business consists of dealing in real estate. Also, the constitutional provision does not operate as a bar to legislation allowing the holding of real estate by a particular type of corporation.

The constitutional provision upon which the statutory restriction is based contains no provision for the giving of notice prior to the institution of escheat proceedings, as does the statutory provision passed in 1946. If the Kentucky court were to hold that the constitutional provision is self-executing, corporations holding real property in violation of the constitution would be in grave danger of losing the property through escheat.

Assuming the validity of the statute, the purpose of preserving the alienability of property, though slightly diluted by the five year

⁴⁵ Ky. Const. § 192; KRS 271.145.

⁴⁶ Ky. Acts 1960, ch. 4 at 6.

period of allowance, is preserved. Since the legislature has manifested a disposition to do away with the constitutional provision it would seem reasonable to expect some legislative action in the near future.

The restriction serves a purpose which is as vital today as it was when the original mortmain acts were promulgated. Perhaps, however, it would be a reasonable concession to exempt urban real estate from the restriction. Corporate bodies could be permitted to hold urban real estate not necessary for their primary business activities, while the privilege of holding agricultural land could be reasonably restricted by the present five year tenure provision. Such a statutory approach would recognize the need for corporate capital in urban development, while retaining the primary objective of keeping agricultural land alienable.

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