

## Section 2. THE COMMON LAW SYSTEM OF ESTATES IN LAND AND FUTURE INTERESTS [“LITE” VERSION]<sup>1</sup>

### A. INTRODUCTION

[DKM3 covers more material than is necessary for this course. Some students get interested in the material, and I certainly don’t want to prevent you from working through the material in DKM3. For some time, however, I have thought that a “lite” version would be better for most people, and my first attempt at that follows. For the purpose of what we will be doing in class, the principal difference will be that in all cases you will be asked to solve the problems only according to the common law as it exists today with an assumed set of statutory or decisional changes that are given at the beginning of each problem set.]

Many students quite justifiably ask why they should go through the dismal process of learning the common-law system of estates and future interests. Some of the rules which are discussed in this section are not in effect in most American jurisdictions today, a fact which leads many students to think that estates and future interests are an exercise in legal history. In fact, much of the purported history in this section is not history at all. It is a construct put together after the fact when the system of estates and future interests was about to be reformed in the nineteenth century. But that construct proved to be powerfully attractive, perhaps because it was systematic. For whatever reason, much of the common law system is still with us today. The part of it which has been displaced has been displaced in such a way that one must understand what went before in order to understand what has been changed. A statute which says “the estates of dower and curtesy are abolished” (UNIFORM PROBATE CODE § 2–112, *infra*, p. S303) doesn’t make much sense unless one knows what dower and curtesy are.

Behind the logical construct of the nineteenth century, which one must understand in order to understand today’s law, there lies a real history—a curious blend of logic, policy and misunderstanding that typifies so much of legal development. We have tried to write this section in such a way that that real development is not totally lost, for we think that estates and future interests makes a fascinating study in itself. The first-year property course, however, is not a course in legal history, and if you have the opportunity to take a course in legal history later on, you may be surprised at how different the system of estates and future interests really was in the Middle Ages or even the seventeenth century from what we describe here as “the common law.” Our focus is on today, and today we see the common law through nineteenth-century glasses.

This section is designed to introduce the entire “common law” system of estates and future interests as it is viewed today. In most subsections we go beyond the common law system to show how the law has been changed and how it works today. In three areas, however, the changes have been so radical or the subjects are so important that they have separate sections or chapters devoted to them: restraints on alienation and perpetuities (Ch. 3, § 3), marital property and

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<sup>1</sup> Because of the introductory nature of this section we have not included anything like a full panoply of citation support. Property casebook buffs will recognize that the basic organizational structure of this section has been borrowed, with the kind permission of the authors, from O. BROWDER, R. CUNNINGHAM & J. JULIN, *BASIC PROPERTY LAW* (1st ed. 1966). Many students find it helpful to read a fuller but still introductory account of this material, and for this purpose we recommend either C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* (2d ed. 1988) or T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* (2d ed. 1984). For fuller but still basic introduction to the history, see A. SIMPSON, *A HISTORY OF THE LAND LAW* (2d ed. 1986). The standard treatise on future interests is L. SIMES & A. SMITH, *FUTURE INTERESTS* (2d ed. 1956).

concurrent interests (Ch. 3, § 4) and landlord and tenant (Ch. 4). In these areas all that is given in this section is the common-law background. To see the common-law system as a whole, you should read the text at the beginning of each subsection and work the initial problems.

[p\*385] Estates and future interests are not easy. As is often the case in property law, a principal problem is vocabulary. The following chart is designed to introduce you to the basic vocabulary of estates and future interests. The chart is not complete; we will add to it as the section goes on, but it contains the basic framework for the section, and you should return to it for reference.

How long?	How inherited?	Begins when?	Subject to contingencies?
freehold fee life non-freehold term of years periodic (e.g., month to month) at will at sufferance	simple tail	present future in the grantor reversion possibility of reverter right of entry in third party remainder executory interest	no absolute (usually applied only to fees) vested (applies only to future interests and denies condi- tions precedent other than the expiration of the pre- ceding estate(s)) yes subject to a condition or spe- cial limitation contingent (applied only to future interests and indi- cates the presence of condi- tion(s) precedent)

### Notes

1. Freehold interests tend to be called “estates” while non-freehold interests tend to be called “tenancies.” The distinction is not quite accurate (technically, any possessory interest is an “estate”), but today we associate non-freehold interests with the landlord-tenant relationship and thus tend to speak of a periodic *tenancy* or one for years, at will or sufferance but of a life *estate* or an *estate* in fee.

2. Generally the vocabulary given above carries with it at least an indication of the meaning of the terms. We will try to make these terms more precise throughout the rest of this chapter. Two of the terms, however, may be completely mystifying: “fee” and “tail.” “Fee” denotes today<sup>2</sup> an estate of potentially infinite duration. When a person dies holding a fee, it passes to his or her heirs (whether lineal or collateral) or devisees uninterrupted. “Tail” denotes a type of inheritance restricted to the lineal descendants of the first taker. When the first taker in fee tail dies, the property passes to his or her children (grandchildren, etc.), but cannot pass to his or her collateral heirs if he or she dies without issue. *See* pp. S202–204 *infra*.

3. By and large the vocabulary in each column is mutually exclusive. To say that A has a life estate in fee is a contradiction in terms. A complete description of an interest, however, should contain the answers to each of the four questions at the heads of the columns. To say that someone has a fee really doesn’t tell you much, unless you know whether the fee interest is a present or future one, freely inheritable (simple) or entailed, absolute or conditioned in some way.

<sup>2</sup> Originally it meant simply a “fief” and is derived from Latin *feodum* from which we get our word “feudal.”

On the other hand, it is an awful mouthful to say that someone has a “present estate in fee simple absolute,” so we tend to use a shorthand based on how common the interest is (or is thought to be). Thus, when a court says that [p\*386] “Jones has a fee,” it probably means that Jones has a present estate in fee simple absolute unless it otherwise qualifies what Jones has got.

Certain kinds of grants are so uncommon that we practically never use certain terms to describe them. We tend to think of a life estate as not being inheritable,<sup>3</sup> and so the quality of inheritance is almost never given with a life estate. You should, however, make it a habit fully to describe the interests you encounter to make sure that you have exhausted all the possibilities.

4. The non-freehold interests have a number of peculiarities. We have included them above for the sake of completeness, but warn you against using the terminology in the other columns in connection with the non-freehold interests until you have read the material concerning them, *infra*, § 2D.

5. A future interest which begins its life as one held by the grantor or by a third party retains the characterization which it had at the time it was created, even when it passes into other hands. Thus, if *G* (the grantor) makes a conveyance and retains a reversion in himself, that future interest is still called a reversion, even if *G* conveys it to *A*. Similarly, if *G* grants a remainder to *A* and subsequently *A* conveys that future interest back to *G*, *G* has a remainder not a reversion. On the other hand, future interests initially created in third parties can change to other types of interests which can be held by third parties. Thus, a contingent remainder can become a vested remainder when the conditions for vesting are fulfilled, and an executory interest can become a remainder. See further *infra*, pp. S211–214, S222–225.

6. *On the Vocabulary of Alienation and Succession.* Some of the most important features of the common law system of estates and future interests have to do with the alienation of and succession to the various interests which the law recognizes. There are three basic ways in which a property interest may change hands: by conveyance between living persons (*inter vivos*), by will or testament, and, in the absence of a will, by devolution according to the rules of law.

While there are a number of words which describe alienation of land *inter vivos* (see pp. S167–170 *supra*), the word *convey* has become the common generic word to describe the *inter vivos* alienation of interests in land, and the word *grant* is often used to describe the conveyance of any freehold interest. These words are not generally used for personal property. For personal property *gift* and *sale* are the most common words of alienation, although these words may also be applied to land.

Until the nineteenth century in England the succession to realty was under the jurisdiction of the king’s courts while the succession to personalty was largely under the jurisdiction of the church courts. For this reason the vocabulary of succession to realty differs from the vocabulary of succession to personalty. In the absence of a will, real property *descends* to the heirs of the deceased owner, while personal property is *distributed* by his *administrator* to his *distributees*. By will realty is *devised* to the testator’s *devisees* while personal property is *bequeathed* to his *legatees* who receive their legacies normally from the testator’s *executor*. It would be simpler if these words were always used only in [p\*387] these senses, but they are not, although you can almost always tell from context whether the word is being used in a technical or a general sense.

In the Middle Ages alienation of land *inter vivos* was not so common as it is today, and the devise of much of English land was prohibited. Land normally descended by primogeniture: the

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<sup>3</sup> A life estate for the life of the grantee, of course, is not inheritable, and this is the most common kind of life estate. But a life estate for the life of another (an estate *pur autre vie*) may, under some circumstances, be devised or descend, as long as the measuring life continues. See 2 R. POWELL, REAL PROPERTY ¶. 203[4] (P. Rohan ed. 1991).

eldest son (or that son's eldest son if the former predeceased his parent) took all of his deceased parent's land. In the absence of a son the daughters took equally as coparceners (*infra*, § 2F4). Alienation of personal property, on the other hand, was quite common; disposition of it by will was possible and encouraged by the Church, and in the absence of will, the spouse and children of the deceased shared in the succession to his personal property by a system not too different from that which we have today (*see pp. S278, S302–303 infra*)

## B. THE FREEHOLD ESTATES

### 1. Present Estates in Fee Simple Absolute

*“To A and his heirs.”*

Reading across the top of the vocabulary chart we come to the present estate in fee simple absolute. This estate is often described as “the largest estate” known to the common law, the “crown jewel” in the system of estates. Such statements must be taken with caution. In the first place, “large” does not refer to physical extent. I may have a present estate in fee simple absolute in a parcel of land no bigger than a postage stamp. Secondly, the “largeness” of the estate should not be taken to refer to absolute rights of ownership. Absolute ownership has never existed at the common law; the fee estate carries less of an absolute connotation than does the civil law concept of *dominium*. The present fee simple absolute is subject to both the eminent domain and the regulatory power of the state. Further, any given parcel of land may be subject to numerous rights in others, easements, liens, etc., which severely hamper the fee owner's ownership rights.

What we mean when we say that A owns a present estate in fee simple absolute is that he has the right to possession (more accurately, seisin) of a parcel of land and that that right has the longest possible duration known to the common law. It may be inherited by descendants or collaterals; it may be devised (after the Statute of Wills in 1540), and it is freely alienable by the present holder. Only upon the death of the present holder intestate and when no heirs can be found (for the law presumes that all men have heirs, either descendants or collaterals), will the estate escheat (revert back) to the crown or the state whence it came. Thus, the duration of the fee simple estate is potentially infinite.

Two important points follow from the preceding discussion: (1) When we are talking about estates we are talking about the seisin (or, in the case of estates less than freehold, the possession) of a given tract of land. (2) When we are talking about the quantum of an estate, we are talking about its duration, beginning with the “largest” estate, the present fee simple absolute, which is now possessory and can have a potentially infinite duration. All other estates (except ownership by the crown or the state which is not regarded as an estate) have a lesser quantum than this.

[p\*388] The formula of words by which a fee simple absolute is created is “Grantor hereby gives (etc., *see pp. 167–170 supra*) to A and his heirs.” This formula was the one used historically and is in common use today. At common law, with a few exceptions, a grant simply “to A” without the addition of the phrase “and his heirs” would not create a fee but simply a life estate. (The same rule did not apply to devises.) Most states today have statutes dispensing with the necessity of the phrase or stating in effect that a grant “to A” will be presumed to be a grant in fee unless an intention to the contrary appears on the face of the document.

Despite the phrase “to A and his heirs,” however, the presumptive heirs of A have no interest in the land unless and until A dies intestate and without having alienated the estate. The words “and his heirs” are not *words of purchase*, i.e., words which indicate that the purchaser (whether or not for consideration) takes an interest, but *words of limitation*, i.e., they describe the quantum of the estate which A takes. (We find that some students tend to forget this distinction; so perhaps we should point out here that the phrase “and his (their) heirs” always is taken as words of

limitation. Thus in the grant “to A for life, remainder to B and his heirs,” B has a remainder (not a present estate) in fee simple and his heirs have nothing.)

The reason why the phrase “and his (their) heirs” came to be taken as words of limitation is obscured in history. In the feudal period (11th and 12th centuries) devise of most land was not possible and alienation *inter vivos* uncommon. In this period we get some indication that the heirs presumptive (“presumptive” because no one has heirs until he or she is dead) were regarded as having some interest in the fee. They seem to have lost this interest around the beginning of the 13th century. Later on in the century the Statute Quia Emptores, 18 Edw. 1, c. 1 (1290), is generally regarded as having reinforced a policy of freer alienability of land. By this statute a landowner could no longer grant out his land and retain the feudal suzerainty in himself (a practice known as *subinfeudation*). If he granted the land in fee the new owner took over completely for the old and assumed the feudal obligations which the old owner owed to the next higher feudal lord, be that lord the king or some lesser magnate in the feudal hierarchy. At the same time the old owner under the statute no longer had to obtain the permission of his feudal lord before he alienated the land. Thus, the phrase “to A and his heirs” came to describe simply what A got, a freely alienable, descendible, and (after 1540) devisable interest in a piece of land.

### **Problems**

Fully describe the interest of all parties named or described in the following instruments in a common-law jurisdiction as of the effective date of the instrument (recall that a devise is not effective until the devisor’s death). Assume that the Statute Quia Emptores is in effect, and that there is a statute of wills and a statute stating that all grants are assumed to be in fee simple unless the contrary is expressed:

1. G grants “to A.”
2. G grants “to A and his heirs.”
3. G grants “to A for life.”
4. D devises “to A.”
5. D devises “to A for life.”

[p\*389] Would you answer any differently if the jurisdiction in question had not passed the statute stating that all grants are assumed to be in fee simple?

## **2. The Fee Tail (Introducing the Reversion and the Remainder)**

*“To A and the heirs of his body.”*

Like the fee simple, the fee tail is potentially infinite in duration. As in the fee simple, too, the words “heirs of his body” are words of limitation not words of purchase. Unlike the fee simple, however, the fee tail may descend only to the first grantee’s direct descendants (children, grandchildren, etc.) and not to collaterals. The fact that the fee tail may not descend to collaterals of the first grantee means that this estate is somewhat less “large” than a full fee simple (hence it was called *talliatum* or *taillé*, from the Latin and Norman French, respectively, meaning “cut down”). Let us suppose that G the owner of land in fee simple grants it “to A and the heirs of his body.” It should be clear that A has a fee tail, but what happened to the rest of G’s fee simple? G had the largest estate known to the law and gave away only part of it. By a curious logic, which might be called the principle of conservation of estates,<sup>1</sup> the law asserts that that portion of G’s estate which he has not granted to A cannot simply disappear. If G does not expressly grant it out,

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<sup>1</sup> The principle has also been called “the arithmetic of estates.” T. BERGIN & F. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 21–23 (1966).

he will be assumed to have retained it; he has the *reversion* after A's fee tail. Thus, if at any time the direct descendants of A should die out, the land will revert back to G, or, if he is dead, to his heirs.

G might not, however, want to have the reversion. He might want some other person, B, to have the land if A's line should die out. G may achieve his purpose by giving B the *remainder* after A's fee tail: "to A and the heirs of his body, remainder to B and his heirs." We will return to remainders and reversions, *infra*, § 2C1. Suffice it to say here that the important distinction between the two is that reversions are future interests retained by the grantor, to take effect after the expiration of some prior interest, while remainders are future interests granted to someone other than the grantor, to take effect after the expiration of some prior interest.

In addition to the *general* fee tail, an estate which could be inherited by any of the heirs of the body of the first taker, the law permitted two further restrictions on the type of inheritance: (1) an estate could be made inheritable by the heirs of the first taker by a particular spouse, the *special fee tail*, and (2) it could be made inheritable by only the male heirs of the body of the first taker, the *fee tail male*, or by only the female heirs of the first taker's body, the *fee tail female*. Beyond this the law did not go; other restrictions on the type of inheritance are generally thought to have been forbidden. One could not (and cannot), for example, create an estate that will descend only to person's heirs on one parent's side of the family.

### *Note on the Fee Tail in America Today*

There is nothing deader in the common-law system of estates than the fee tail (unless it be the unexecuted passive use). By the time the colonies were founded disentailing an estate by a form of conveyance known as a common recovery was easy to do, and the estate was never popular in America anyway. Yet, there's always someone who doesn't get the word, and [p\*391] the reactions of American jurisdictions to attempts to create the estate have been most diverse:

(a) In two states, of which South Carolina has by far the most decisions, the Statute De Donis Conditionalibus, 13 Edw. 1, c. 1 (1285), (which created the fee tail as described above) is said not to be part of the received law and thus a grant "to A and the heirs of his body" creates a *fee simple conditional*, a fee conditioned on the grantee having heirs of his/her body. 2 R. POWELL, REAL PROPERTY ¶ 195 (P. Rohan ed. 1991).

(b) In four states, Delaware, Maine, Massachusetts, and Rhode Island (only for estates created by deed), the fee tail is recognized, but disentailing is readily achieved by deed, and creditors take preference over issue in satisfying their claims. *Id.* ¶ 196.

(c) Connecticut, Ohio, and Rhode Island (only for devises) have statutes preserving the fee tail for one generation and giving a fee simple to the issue of the first donee in tail. *Id.* ¶ 198[1].

(d) Six states have statutes which convert a purported grant in fee tail to an estate for life in the first taker with a remainder in fee simple in the issue. E.g., ILL. REV. STAT. ch. 30, § 5 (1989); see R. POWELL, *supra*, ¶ 198[2].

(e) Approximately twenty-five states have statutes which convert a purported grant in fee tail to an estate in fee simple in the first donee. E.g., N.Y. EST., POWERS & TRUSTS LAW §. 6-1.2 (McKinney 1967); see R. POWELL, *supra*, ¶ 198[3]. In this group probably should also be placed those few states in which the fee tail is prohibited. E.g., TEX. CONST. art. I, § 26; see R. POWELL, *supra*, ¶ 197. About half of these states allow a remainder limited over after the fee tail to take effect as an executory interest if the first donee in tail dies without issue. E.g., MICH. COMP. LAWS ANN. §. 554.4 (1988); see R. POWELL, *supra*, ¶ 198[3], at 14.33.

### Problems

[We will not do these problems in class. They are, however, a good exercise, and I will pass out answers to them when I pass out answers to the rest of the problems at the end of the unit. If you do decide to do them, you might want to read the slightly longer description of the fee tail that appears in DKM3, Ch. 4, § 3B2.]

What would be the effect of each of the above statutory provisions on each of these two devises:

6. *D* devises “to *A* and the heirs of his body”;
7. *D* devises “to *A* and the heirs of his body, remainder to *B*”;

in the following situations:

- (a) *A* dies without surviving issue;
- (b) *A* dies with surviving issue;
- (c) *A* has issue and attempts to convey his estate to *C*;
- (d) *A* has no issue and attempts to convey his estate to *C*.

### 3. Defeasible Fees

*“To A and his heirs, so long as the land is used for school purposes.”*

*“To A and his heirs, but if the land is used for other than school purposes, G or his heirs shall have the right to enter and declare the estate forfeit.”*

Like the fee tail these grants clearly do not pass a full fee simple absolute to the grantee. By the principle of conservation of estates something is left, which, absent a specific grant over, is retained by the grantor. In the case of the first form of grant what is left over is called a *possibility of reverter*, in the case of the second form a *right of entry* or *power of termination*. For reasons which we shall examine *infra*, § 2C4, it is difficult to create interests corresponding to possibilities of reverter or rights [p\*392] of entry in third parties. If such interests are permissible, they are called *executory interests*, and *A*’s interest is called a *fee simple subject to an executory limitation*.

Examine again the language of the two grants above. The effect of each looks pretty much the same. In both grants it is clear that *G* wants *A* to have the land contingent upon his using it for school purposes. If he does not so use the land, *G* or his heirs are to get it back. There is a substantial difference between the two grants, however, one which almost all courts recognize, although they frequently get the matter confused in technical vocabulary. Under the first form of grant *A*’s fee estate terminates automatically when the land ceases to be used for school purposes. Under the second form *G* or his heirs have to do something if the condition is breached. *G* has a right of entry, but if he does not exercise that right, *A*’s estate continues. Some of the practical consequences of this distinction can be seen in *Storke v. Penn Mutual Life Ins. Co.*, *infra*. Now for the vocabulary: The first form of grant is known as the *fee simple determinable*, also the *base* or *qualified* fee (although the latter term, like *defeasible* fee, is sometimes used to describe both forms), or *fee upon a special limitation*. The second form of grant is known as the *fee simple on a condition subsequent* (to distinguish it from the conditional fee prior to the Statute De Donis where the condition of the birth of an heir was a precedent condition). The term *fee on a conditional limitation* is sometimes applied to either form of grant, perhaps more frequently to the fee simple determinable, and it is also applied to the fee subject to an executory limitation. We do not recommend the use of the term, because it is confusing.

The courts frequently say that no form of words is necessary to create either of these interests; the question is one of intent. Because of the confusion between the two types of interests, however, the draftsman is advised to proceed cautiously. Language such as “so long as,” “while” or “until” is usually held to create a determinable fee, frequently aided by an additional clause such as: “but if the land is not used for school purposes, it shall revert to *G* and his heirs.” Language such as “but if” or “upon the condition that” usually creates a fee upon a condition subsequent. Here draftsmen far less persnickety than Abundance of Caution would advise that the right of entry or power of termination be specifically retained, because many courts will not assume that it is retained without the language. It is important that the conditional language be expressly stated as such, since in its absence the courts will tend to interpret the statements of intended use as being covenants, the breach of which will give rise only to an action for damages (or perhaps specific performance) but will not result in forfeiture of the estate.

The owner of a defeasible fee has a freely alienable, devisable estate, subject always to the limitation or condition. The situation of the holder of the right of entry or possibility of reverter is considerably less favored. At common law his interest was generally not devisable or alienable, although it could, under most circumstances, be inherited by his heirs. (There was, perhaps, more openness to the devisability of the possibility of reverter.) Some American courts still follow this rule, and a few have held that the attempted alienation of a right of entry destroys it. The trend, however, aided by statute, is in favor of free alienability of these interests.

The fee simple is not the only estate which can be made defeasible. Defeasible life estates are not uncommon (“to my widow for life so long as she does not remarry”), and at common law the fee tail could be made defeasible. Leasehold interests can be made defeasible, although there is [p\*393] some doubt whether the distinction between an interest on a special limitation and one subject to a condition subsequent applies to leasehold estates.

### ***Problem***

Fully describe the interests of all parties named or described in the following instrument. Assume the same statutes as in Problems 1–5, *supra*, p. S202.

8. *G* grants “to *A* so long as liquor is not sold, stored or used on the premises, and upon its determination the estate shall revert to *G*.” *G* then devises all his right, title and interest in the land to *B* and then dies.

9. *G* grants “to *A*, but if liquor is sold, stored or used on the premises, *G* shall have a right to reenter and determine the estate.” *G* then devises all his right, title and interest in the land to *B* and then dies.

10. *G* grants “to *A*, provided that the estate granted shall cease and determine if liquor is sold, stored or used on the premises.” *G* then devises all his right, title and interest in the land to *B* and then dies.

### **STORKE V. PENN MUTUAL LIFE INSURANCE CO.**

Supreme Court of Illinois.  
390 Ill. 619, 61 N.E.2d 552 (1945).

GUNN, J. Appellants, as plaintiffs, prosecuted this action in the circuit court of Cook county as heirs-at-law of Jay E. Storke. Jay E. Storke and Bernard Timmerman, now both deceased, in 1889 subdivided approximately forty acres of land into lots. At that time the property was outside the limits of the city of Chicago. It is now located in the neighborhood of Halsted street between Seventy-fifth and Seventy-ninth streets. Part of the property involved was conveyed by deed containing the following covenant:



“And the party of the second part [the grantee in said deed], his heirs and assigns hereby covenant and agree that no saloon shall be kept and no intoxicating liquors be sold or permitted to be sold on said premises herein conveyed or in any building erected upon said premises; and that in case of breach in these covenants or any of them said premises shall immediately revert to the grantors, and the said party of the second part shall forfeit all right, title and interest in and to said premises.”

It was agreed to be binding upon the heirs, executors, administrators and assigns of the respective parties. The balance of the premises involved had a covenant of substantially the same wording and with like effect. There was also one providing that the building erected upon the premises should cost at least \$2500, but no question is raised as to the value of the building upon the premises.

By mesne conveyances, appellee Penn Mutual Life Insurance Company, on November 19, 1934, acquired title to the premises involved herein by quitclaim deed, which did not contain the covenant prohibiting the use of saloons upon the premises. The premises have been occupied by Edward Walsh as tenant of Penn Mutual Life Insurance Company since 1934, and have been operated during all of that period as a saloon or tavern. The plaintiffs are the heirs-at-law of Jay E. Storke. The heirs of Bernard Timmerman are unknown. There are 491 lots in the sixteen blocks embraced in the subdivision, which are covered by the same restrictions as to the use of the premises.

The facts disclose this subdivision has become a built-up business section of the city of Chicago, and located in various parts of it are saloons or taverns, with at least sixteen saloons in the neighborhood of the property involved or in the adjoining blocks, and liquor has been almost continuously sold in this subdivision since 1933, the date of the repeal of the prohibition amendment. There have been numerous instances where the heirs-at-law of [p\*394] Timmerman or Storke have released and waived the restriction contained in the deed, from as far back as 1904 to as late as 1924.

In 1926, appellee Penn Mutual Life Insurance Company purchased a first mortgage on the premises herein involved for the sum of \$42,500, and in November, 1934, it purchased the title to said property and released said mortgage lien and the personal liability of the mortgagor in reliance upon the abandonment of the possible right of reverter by the heirs of Jay E. Storke, and by their waiver of the restriction by acquiescing in the use of the said premises in said subdivision for saloon purposes and by releasing and relinquishing any possible right of reverter therein.

December 29, 1942, plaintiffs filed their complaint asking that the court establish title in the plaintiffs and the unknown heirs of Timmerman, and that defendant and appellee insurance company be decreed to have no right or title in the premises; that the interest of the plaintiffs and the heirs of Timmerman be ascertained; that partition be had of the premises; that the defendant Walsh be perpetually enjoined from maintaining a tavern, and that plaintiffs have further relief, etc. The case was tried upon a stipulation of facts, and anything not pointed out above, necessary to a decision of this case, will be referred to hereafter.

To reach a proper conclusion under the disclosed facts, it is necessary to determine the character of the condition, covenant, or reservation contained in the deed from the original grantors. Appellants say they do not deem it necessary to classify their supposed reversionary interests as either based upon a conditional limitation or as a condition subsequent, but assert that they rely upon the decision of *Pure Oil Co. v. Miller-McFarland Drilling Co., Inc.*, 376 Ill. 486. Since the reversionary right in that case was held to arise from a deed containing a conditional limitation, we must infer that such is the basis of appellants' case. Appellee insurance company, however, contends the provisions in the deed upon which appellants seek to recover constitute conditions subsequent. Such different results follow from these different contentions that

resolving the character of the restrictions contained in the deed will be determinative of the case.

The distinction between a conditional limitation and a condition subsequent is sometimes very refined, because of the language used under the different situations under which the question arises. Many distinctions are to be found in the books whether from the words used there is created a condition subsequent making the estate voidable, or words of limitation causing the estate to cease. The term "conditional limitation" in this State has been applied both where, upon the happening of certain events, the estate goes to third persons, and where a determinable or base fee is granted to the first taker followed by a possibility of reverter upon the happening of a contingency. (Tiffany, 2d, § 90.) The term will be used herein in the latter sense.

The basic difference between estates upon conditional limitation and those upon condition subsequent is ascertained by the fact that, in the latter case, the entire estate has passed to another, but can be returned to the grantor upon the subsequent happening of a described event; while in the case of a conditional limitation, the estate passed to another contains within itself a ground for its return to the grantor. . . .

The accepted authorities of the common law are collected and aptly condensed with the following statement: "A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate, [p\*395] without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. . . . A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim." (*Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. 142, 3 Gray 142, 63 Am. Dec. 725.) . . .

Illustrations from our own decisions show these distinctions have been observed and followed. . . .

Courts prefer to construe provisions that terminate an estate as conditions subsequent rather than conditional limitations, and in doubtful cases will so construe them. [Citations omitted.] Conditions subsequent which destroy an estate are not favored and will not be enlarged. (*McElvain v. Dorris*, 298 Ill. 377.) Such covenants are to be strictly construed. (*Dodd v. Rotterman*, 330 Ill. 362.) If the parties intended the estate to vest and the grantee to perform acts, or refrain from certain acts after taking possession, it is a condition subsequent. *Hooper v. Haas*, 332 Ill. 561.

The foregoing cases clearly show the line of cleavage between an estate upon conditional limitation and a conveyance subject to a condition subsequent. If the deed contains language which purports to pass immediate title, but limits its duration by some event which may or may not happen, a conditional limitation is created, because there is always a possibility of reverter to the grantor. The estate fails upon the happening of the event by its own terms, because it comes within the condition which limits it, and it is self-operative.

On the other hand, a breach of a condition subsequent does not revest title in the original grantor or his heirs. [Citations omitted.] Re-entry is necessary to revest title, (*Powell v. Powell*, 335 Ill. 533;) and a court of equity will not aid a forfeiture where no right of re-entry is provided in the covenant. (*Newton v. Village of Glenn [sic] Ellyn*, 374 Ill. 50.) The deeds in question did not contain a right of re-entry. Under the authorities, the restrictions in the deed did not constitute a conditional limitation.

The action brought by the plaintiffs was partition. In order to maintain partition, it is requisite that the plaintiffs have title. [Citations omitted.] Appellants rely upon the *Ingleside* case, which, among other things, held that an equitable title could, in the same proceeding, be converted into a

legal title sufficient to support partition. Here, however, re-entry being necessary to effect the forfeiture, and there being no reservation of a right of re-entry, it was not within the power of equity to make the legal estate necessary to maintain a suit in partition. (*Newton v. Village of Glen Ellyn*, 374 Ill. 50.) There being no title in the plaintiffs, and there having been no re-entry, or provision for re-entry, the case was properly dismissed, as lacking in the elements necessary to maintain a partition suit.

We have indicated above that there was not a conditional limitation which would terminate the estate of its own force, and that the plaintiffs have not established that they are entitled to a forfeiture under a condition subsequent. There is a finding by the court that the plaintiffs had actually a constructive knowledge of the sale of liquor, for a period of time, which would render it highly unjust and contrary to the doctrines of equity for them to divest the defendant of title purchased for valuable consideration and in good faith. [p\*396]

The court also found that releases had been given to other owners in the subdivision by the plaintiffs, and by John W. Ellis, one of the plaintiffs' attorneys, which had created a change in the neighborhood from that contemplated in the original grant. If the provisions in the deed were construed as a restrictive covenant, they could not be enforced by the plaintiffs because the stipulation of facts and findings of the court show that the change in the circumstances and use of the property in the subdivision has been brought about by the acts of the grantors or their assigns. Under such circumstances, they cannot be enforced. [Citations omitted.]

If the contention of appellants were correct, that the deed in question contained a conditional limitation, it would not aid them. In such case, as pointed out, no re-entry would be necessary and the estate would terminate immediately upon breach without action or re-entry. That being the case, the fourth paragraph of section 3 of the Limitations Act (Ill. Rev. Stat. 1943, chap. 83, par. 3,) would apply. The statute provides that if a person claims an estate by reason of a forfeiture or breach of condition, his right shall be deemed to have accrued when the forfeiture occurred or the condition was broken. This section must be construed in connection with section 6 of the same act. The use of said premises as a saloon commenced before appellee obtained a deed therefor. The deed to appellee purporting to convey the entire estate constitutes a color of title in good faith, and taxes were paid for more than seven years. This would give appellee a good title, even if the position assumed by appellants was correct. Under either construction, the facts and the law bar the plaintiffs from recovery.

The deed to the original grantors cannot be construed as creating a conditional limitation. As a condition subsequent, appellants are not entitled to recover. Considered as a restrictive covenant, all rights of enforcement have been waived. And assuming appellants' contention that the estate was terminated by breach of condition, they are barred from recovery by the Statute of Limitations.

The decree denying the plaintiffs' right to recover, and confirming the title of the appellee, was correct, and is hereby affirmed.

Decree affirmed.

### *Notes and Questions*

1. The terminology used in the preceding case is, to a certain extent, the source of the analytical difficulties in the case. A "conditional limitation" as defined by the Illinois court is not quite the same thing as a fee simple determinable. For example, in a passage not given above (390 Ill. at 625, 61 N.E.2d at 555), the court gives the following (in a slightly different format) as examples of "conditional limitations": (a) "to A and his heirs, but if A shall die before reaching the age of 21, then to B and his heirs"; (b) "to A and his heirs, but if A shall die leaving no widow or children him surviving, then to B and his heirs." The court is thus equating a fee simple

determinable with a fee simple subject to an executory limitation. The problem is that there is no interest which can be created in third parties which corresponds to the right of entry. Interests in third parties, if they are valid, fall in automatically upon the occurrence of the condition, like possibilities of reverter. For what happens if the third-party interest turns out to be invalid, see *infra*, p. S229.

2. Why did the court decide that the interest in the principal case was not a conditional limitation? Why in the court's view did that determination not make any difference in the outcome? Assume that a right of entry had been [p\*397] specified in the deed. Would the court have come out the same way? Why or why not? Why do you think that the court expressed a constructional preference for rights of entry?

3. The principal case illustrates the use of the common law system of estates and future interests not as a device for getting land into the hands of those whom the grantor wishes to have it, but as a device to control land use, conditioning or limiting the grantee's interest upon the desired use and threatening him with forfeiture if he does not use the land in the desired fashion. By far the most common device for controlling land use in this way is not the determinable fee, fee on a condition subsequent or fee subject to an executory limitation, but the real covenant or equitable servitude ("Grantee covenants on behalf of himself, his heirs and assigns that liquor shall not be sold on the premises"), discussed *infra*, Ch. 5, § 3B. Most of these covenants are enforced in equity, and the equity courts have refused enforcement if neighborhood conditions have substantially changed. See pp. S451–460 *infra*. Grants in the form used in the principal case are not uncommon, however. We will see two examples later in the course: *Capitol Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957) and *Charlotte Park & Recreation Com'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), *infra*, pp. S593–594. In those cases, the distinction between a fee subject to an executory limitation (*Smith*) and a determinable fee (*Barringer*) arguably made the difference between an invalid and a valid racial restriction under *Shelley v. Kraemer*.

We will have occasion to treat further of these devices later on, particularly in § 3C, where we will explore the hostility of courts and legislatures to the right of entry and possibility of reverter as a form of restraint on alienation. Part of this hostility, we will see, is caused by the fact that in the United States rights of entry and possibilities of reverter, unlike executory interests, are generally not subject to the Rule Against Perpetuities. At this time you should begin asking yourself whether there are any policy reasons why we should not allow land owners to make grants subject to such restrictions. Consider the policy of free alienability, the problem of "clouds on title," and equity's oft-stated abhorrence of forfeitures. Do these principles make good sense? Are they consistent?

See generally Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940).

#### 4. The Life Estate

*"To A for life."*

The life estate is the simplest and perhaps the most common of the freehold estates less than fee simple. By the principle of conservation of estates, there must always be a remainder or reversion following a life estate.

There are two important qualifications on the rights of the life tenant. First, s/he cannot lawfully alienate more than s/he has; therefore, if tenant *A* in the grant above conveys to *B*, *B* will only take an estate for *A*'s life. *B* is said to become a tenant *pur autre vie*, from the Norman French meaning "for another's life." An obvious corollary of this is that the life estate for [p\*398]

the life of the tenant cannot be devised or inherited.<sup>2</sup> The second important limitation on the life tenant's powers is that s/he, unlike the present holder of a fee however qualified, must preserve the capital value of the land intact for the remainderman or reversioner; more precisely, s/he may not commit waste.

### Summary

The following chart summarizes the freehold estates which we have considered so far. Braces ({} ) indicate synonymous terms, a question mark (?) preceding the phrase indicates doubt about the propriety of usage or the existence of the estate.

#### Present Interest:

#### Future Interest:

	<u>in grantor:</u>	<u>in third parties:</u>
fee simple absolute	none	none
fee tail	reversion	remainder
general		
special		
female		
{defeasible fee		
?qualified fee		
?fee on a conditional limitation}		
[p*407]		
(a){fee simple determinable	possibility	executory
base fee	of reverter	interest <sup>3</sup>
fee on a special		
limitation		
?qualified fee		
?fee on a conditional		
limitation}		
(b) fee simple on a	{right of entry	?executory
condition subsequent	power of	interest <sup>3</sup>
	termination	
	contingent right	
	of reentry }	
life estate	reversion	remainder

<sup>2</sup> The situation with the *estate pur autre vie* is considerably more complex. See p. S192 n. 3 *supra*.

<sup>3</sup> When the defeasing interest is created in a third party (as opposed to coming into his hands after creation), the interest of the first taker is more properly described as a *fee subject to an executory limitation*. See p. S196 *supra*.