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The Possibility of Reverter in Colorado - cont.

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The Possibility of Reverter in Colorado

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(Continued from June Issue)

In *Union Colony Co. of Colorado v. Gallie* (March 6, 1939), 104 Colo. 46, 88 Pac. (2d) 120, the plaintiff, Gallie, brought an action against the defendant, the Union Colony, seeking to have a condition subsequent in the deed through which she deraigned title to certain real estate in the City of Greeley declared void and of no effect.

In her complaint plaintiff alleged the Union Colony Company, herein designated as "old company," was a corporation whose corporate life expired January 1, 1929, and that the defendant company, the Union Colony Company of Colorado, herein designated as the "new company," was chartered on March 13, 1934. The plaintiff further alleged she deraigned her title to certain property described in the complaint by mesne conveyances from the old company, that in the conveyance by the old company, under which she claims title, consideration for the conveyance is recited as "two hundred seventy-seven and 50/100 Dollars," "and also, the further consideration, that it is expressly agreed between the parties hereto, that intoxicating liquors shall never be manufactured, sold or given away in any place of public resort as a beverage, on said premises; and that in case any one of these conditions shall be broken or violated, this conveyance and everything herein contained shall be null and void."

The new company was organized for the purpose of taking over all the property and assets of the old company. One of the objects of the new company was "to acquire, own, and succeed to any and every property right, estate or interest of any kind, nature or description retained by, or reserved to the former corporation, in any deed, contract or conveyance made by it in regard to the use of any lots or lands sold or conveyed by it or by which the right to the continued use thereof was given, or the title thereto was made, subject to forfeiture or annulment by the breach of any of the covenants, conditions or agreements therein contained."

Immediately following the organization of the new company the two surviving members of the last board of trustees of the old company, by deed dated March 20, 1934, conveyed to the new company all of the assets of the old company, specifically including all rights under deeds of forfeiture for breach of the condition. The plaintiff further alleged in her complaint that this condition respecting liquor was no longer valid and enforceable through forfeiture in event of violation, but was a cloud

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upon plaintiff's title and hindered the plaintiff in obtaining a loan and was detrimental to the full enjoyment of plaintiff's lawful rights in and use of said property. That the claim and condition was now void and unenforceable. On the other hand, the defendants claimed that the condition was valid, subsisting and enforceable by re-entry of defendant corporation upon breach and violation of the said condition. The trial court entered its decree as follows:

> "(1) That the right to re-enter and forfeit titles in the event of breach of condition subsequent contained in the deeds of the Union Colony of Colorado respecting the sale of intoxicating liquors was extinguished, invalid and void.
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> "(2) That the defendants have no right of re-entry and no right to forfeit plaintiff's title in event of breach of said condition.
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> "(3) That the title of plaintiff, and all others similarly situated, as to property deraigned from the Union Colony of Colorado, is quieted against any claim of defendants, and all persons claiming by, through or under them, to re-enter and forfeit title upon breach of said above quoted condition."

The court in its opinion, deciding against the condition subsequent, stated in part as follows:

> "The condition in the deed from the old company through which plaintiff deraigns her title is a condition subsequent and upon breach it is conceded would have entitled the old company during its corporate existence to declare a forfeiture and to re-enter upon the property conveyed. 1 Cooley's Blackstone, B, II, chapter 10, p. 153; Brown v. State, 5 Colo. 496 at page 503; Cowell v. Colorado Springs, 3 Colo. 82; Cowell v. Colorado Springs, 100 U. S. 55, 25 L. Ed. 547.
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> "We have held that 'conditions subsequent are not favored by the law, and are construed strictly, because they tend to destroy estates.' Godding v. Hall, 56 Colo. 579, 600, 140 P. 165. At common law, which was adopted by Colorado (section 1, chapter 159, '35 C. S. A.), and which in the absence of a statute otherwise providing, is in force, the right of re-entry for condition broken, sometimes described as a possibility of reverter, could not be assigned. 1 Tiffany, Real Property (2nd ed.), Sec. 86 (b); Restatement of Law of Property, Sec. 160.
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> "The condition subsequent reserved by the old company creating a possibility of re-entry upon breach, called in the Restatement of the Law of Property, supra, a power of termination, does not constitute an estate in the grantor. It is merely a possibility of the grantor coming into an estate in the future. 'In all these instances, of limitations or conditions subsequent, it is to be ob-

served that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature.' 1 Cooley's Blackstone, Bk. II, Ch. 10, page 153.

"A conveyance upon condition subsequent vests in the grantee a qualified fee, and, until the happening of the event that is to determine the estate granted, the grantor is divested of all right and interest in, and all title to, the land. Denver & Santa Fe Ry. Co. v. School District, 14 Colo. 327, 23 P. 978. Until the happening of the condition subsequent, the grantee has the same right in, and privileges over, his estate as though the estate were an estate in fee simple. People ex rel. v. Koerner, 92 Colo. 83, 86, 18 P. 2d 327.

"The possibility of a reverter, after the termination of a fee conditional, being a mere possibility, is not an estate, and may be defeated by statutory enactment. It is not an estate in land, and until the contingency of the condition happens the whole title is in the grantee, and the grantor has nothing he can convey. It is neither a present nor a future right, but a mere possibility that a right may arise upon the happening of a contingency, which is not the subject of a grant, devise or inheritance. 3 Thompson Real Property, section 2112. Possibility of reverter denotes no estate, but, as the name implies, only the possibility to have an estate at a future time. Challis on Real Property, 63; North v. Graham, 235 Ill. 178, 85 N. E. 267, 18 L. R. A., N. S. 624, 627, 126 Am. St. Rep. 189. It is clear from the foregoing authorities that notwithstanding the condition in the deed from the old company, it conveyed the entire interest in the property; hence it had no present property right, and no certainty of ever having such right in the future. It had merely a power that it might exercise if certain conditions arose with no certainty of their ever eventuating.

"In Schulenberg v. Harriman, 21 Wall 44, 22 L. Ed. 551, the court said: 'It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, *or the successors of the grantor* if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down.' (Italics ours.) We need not, and do not, determine whether the surviving members of the board of trustees of the old company were, in the legal sense of the word, its successors. The question of whether they, as trustees for the stockholders and creditors of the old company, might have declared a forfeiture and

re-entered, is not here involved and cannot be involved in any future litigation, for if they had that right they have conveyed it and by such conveyance, there being no statutory provision authorizing an assignment or transfer of it, they have destroyed the power in themselves if it ever existed. If they were not successors of the old company in the legal sense, then they never had such power and the new company could not acquire it by the attempted conveyance of that which the grantors did not possess. Whichever horn of the dilemma is chosen necessitates the holding (of the trial court) that neither the new company defendant nor the sole surviving defendant trustee can now declare a forfeiture for breach and re-enter upon the plaintiff's property.

"Since the action was instituted by plaintiff for herself and all others similarly situated without objection on the part of the defendants, and since our holding that the condition in the deed is no longer enforceable against plaintiff, it is apparent that a similar holding would be required in any case where title is deraigned from the same source, and held under the same condition; consequently there was no error in the court determining, which it did in effect by quieting the title of all such persons, that the status of the surviving trustee and the new company with respect to the condition is such that it can no longer be enforced at all.

"Judgment affirmed."

"If a condition subsequent in a deed be possible at the time of making it, and afterwards becomes impossible to be complied with, either by the act of God, or of the law, or of the grantor, the estate of the grantee, being once vested, is not thereby devested, but becomes absolute." L. R. A. 1916 F. at 307. Brief of counsel, citing many cases. The unenforceability of condition subsequent caused by an economic change in the neighborhood has been recognized.

Rule against perpetuities: The right or possibility of reverter (sometimes called right of entry), upon a breach of a condition subsequent is not within the rule against perpetuities. *French v. Old South Society* (1871), 106 Mass.; *Tobey v. Moore* (1881), 130 Mass. 448. Thus where a grant of land provided that the title should revert to the grantor if the land should be used for any purpose other than that stipulated, it was held not void as a restraint on alienation in violation of the statute against perpetuities, since the land was alienable so long as it was used for the purpose designated. *Fayette County Board of Education v. Bryan* (1936), 263 Ky. 61, 91 S. W. (2d) 990.

The opinion in Tobey v. Moore, supra, was delivered by Chief Justice Gray, author of the celebrated work on the doctrine of the rule against perpetuities. In that case he said: "The rule against perpetuities,

which governs limitations over to third persons to take effect in the future, has never been held applicable to conditions, a right of entry for the breach of which is reserved to the grantor or devisor and his heirs, and may be released by him or them at any time." Citing Sugd. Vend. (14th Ed.) 596, *Gray v. Blanchard,* 8 Pick. 284; *Austin v. Cambridgeport Parish,* 21 Pick. 215; *Brattle Square Church v. Grant,* 3 Gray, 142, 148, 161; *French v. Old South Society,* 106 Mass. 479; *Cowell v. Colorado Springs Co.* (1876), 3 Colo. 82, affirmed in 100 U. S. 55.

Tiffany on Real Property, 3rd Ed. Vol. 2, Sec. 402, declares: "There has been much discussion as to whether the rule against perpetuities is applicable to contingent remainders;" then, in Section 403, he says: "In this country it has been decided, and generally recognized, that the rule does not apply to the contingent right of entry for breach of a condition, even though annexed to an estate in fee simple." In support of this he cites Hopkins v. Grimshaw, 165 U. S. 342, and Cowell v. Colorado Springs Co. (1876), 3 Colo. 82, 100 U. S. 55.

On application of the rule against perpetuities see 28 Mich. Law Rev. 1015, where there is a fine note.

The grantee of a determinable fee is accorded all the attributes of an owner in fee simple as long as the condition is not broken.

"A determinable or qualified fee has all the attributes of a fee simple, except that it is subject to be defeated by the happening of the condition, the grantor retaining at the most a mere possibility of reverter." Thompson on Real Property, Permanent Edition, Vol. 4, page 709, Sec. 2171. "It has all the attributes of a fee simple, except that it is subject to be defeated by the happening of the condition. The estate may be possessed, incumbered, sold and conveyed in the same manner as a fee simple, but the executory interest created by the happening of the condition which terminates such estate cannot be defeated." Boye v. Boye (1921), 300 Ill. 508 at 511. That the grantee of a determinable or qualified fee is a landowner is illustrated by the following cases:

(a) *TAXATION: In Board of Commissioners of El Paso County, et al. v. The City of Colorado Springs* (1919), 66 Colo. 111, 180 Pac. 301, the court held that the grantee of a terminable fee is to be considered the actual and legal owner of the property, and must therefore pay the usual taxes. In contrast with this case and in harmony with it a Connecticut case held that where a state statute exempted real property of a corporation organized exclusively for scientific, educational, literary, historical or charitable purposes, such property was not taxable though it was conveyed upon the limitation that it should revert to the grantor if at any time the corporation failed to use the property for any of the purposes named in the deed and included in the statute. See *Connecticut Junior Republic Assn., Inc. v. Litchfield* (1934), 119 Conn. 106, 112, 174 Atl. 304, 95 A. L. R. 56.

In *Board of Commissioners of El Paso County, et al. v. City of Colorado Springs* (1919), 66 Colo. 111, 180 Pac. 301, the city of Colorado Springs executed a quit-claim deed to the County of El Paso, whereby in consideration of $1.00 and the agreement that no intoxicating liquors should be sold upon the property conveyed, it granted "Block 112 in the Town of Colorado Springs," conditioned to revert if "liquor was sold on the premises," and "Provided, further, that if said block of ground or any part of it shall be used otherwise than for the purposes of building and maintaining a courthouse thereon * * * then all rights conveyed by the deed should revert to the City of Colorado Springs." The deed also required that the part of the block not used for the courthouse building should be appropriately kept and maintained as a public park, at the county's expense forever. It also provided that "if said block of ground or any part of it shall at any time be used otherwise than for the purpose of building and maintaining a courthouse thereon, unless it be for the future enlargement of said courthouse," then all rights conveyed by the deed should revert to the city of Colorado Springs.

On the same day the Colorado Springs Company, a corporation, which had owned the site of Colorado Springs, executed a similar deed to the county.

It was admitted that the city and the Colorado Springs Company, before the conveyance, were the owners of the block.

The case came before the court on the main question whether the city has the power to levy special improvement taxes on the county property.

> "The county claims that it does not own the block in question. Not so. It is admitted in the pleadings that its grantors were the owners. The deeds in proper terms convey a fee simple, determinable, however, on condition of sale of intoxicating liquor or cessation of use for a courthouse, and burdened with the proviso or condition that the vacant part of the block shall be kept for a park unless the courthouse be enlarged to cover it. Burdens like rent and other duties are familiar attachments to ancient fees, and have never been abolished, and conditions subsequent are common matters. The right conveyed is certainly not a technical easement.
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> "True, we should give the deed the meaning intended by the parties, but that must be derived from its contents, and when words are used which have a well recognized legal effect (in this case by statute, R. S. 1908, Sec. 675), we must give them that effect unless there is something else in the instrument to show that another meaning was intended. The very purpose of technical words and phrases, which is to facilitate construction by the use of words of known and fixed meaning, would be frustrated were we to do otherwise. There is nothing in the present deeds to show that any-

thing but a determinable fee was intended, because there is no expression inconsistent therewith. If the grantors held the title in trust, their deeds, nevertheless, conveyed the legal estate in fee subject to the trust. *Stephens v. Clay*, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; *Lipschitz v. People*, 25 Colo. 268, 53 Pac. 1111; *Lewis v. Hamilton*, 26 Colo. 267, 58 Pac. 196. In the deeds they took pains to protect the trust, and the county accepted the deeds on those terms, and has no other right to the land.

(b) AS A LANDOWNER PETITIONING FOR THE INCORPORATION OF A TOWN. A grantee of land conveyed to him on a condition subsequent is considered, until the happening of the event that is to determine the estate granted, to be a landowner within the meaning of section 8979, Colorado Compiled Laws, and as such qualified to petition for the incorporation of a town. *People v. Koener* (1932), 92 Colo. 83, 18 Pac. (2d) 327, cited in 104 Colo. at 54.

(c) On the question of possibility of reverter as a taxable entity see the article by Hayes R. Hindry in the January, 1941, issue of DICTA.

The estate or right remaining in the grantor offers a grant upon a conditional limitation. This is the case of a true right of possibility of reverter.

(a) Release of the right. A grantor of realty reserving in himself a right of possibility of reverter, may, before breach of the condition, convey to the original grantee a release of his right. The original grantee thereupon becomes the owner of the fee simple absolute, and the right of the possibility of reverter is extinguished. Upon this point there does not seem to be any Colorado court decision.

On the question of the rights of the heirs of the grantor after breach see the able articles, signed by J. B. F., in Virginia Law Review (1930-31), pp. 402-405. See also Note to *Mary North v. Graham* (1908), 235 Ill. 178, 85 N. E. 267, in 18 L. R. A. (N. S.), 1909, page 624, and that by Professor Sternberg in 6 Notre Dame Lawyer, page 442. Also the article in Columbia Law Review (1909), page 170.

(b) He has nothing he may convey to a third party. On this point there is Colorado authority. The author of the note in 109 A. L. R., at page 1156, correctly says: "In *Denver & S. F. R. Co. v. School District* (1890), 14 Colo. 327, 23 Pac. 978, where, after deeding land to be used for school purposes, the grantor, the removal of the school being considered, granted other land in lieu thereof and subsequently deeded the first land to a third person, and the school was never moved, in holding that such third person received no title, the court said that the condition in the first deed created a limitation; that as the grantor had conveyed his entire estate, nothing remained in him to convey to the third person; that there was nothing left in the grantor save the mere possi-

bility of a reverter; and that no interest in the estate, therefore, could pass to the grantee." (The stranger.)

Another Colorado case seemingly in harmony with the above decision is *Union Colony v. Gallie* (1939), 104 Colo. 46, 88 Pac. (2d) 120. "It is clear that at the time the deeds were executed," (to the stranger) the plaintiff had an estate on condition and the defendant a contingent right of re-entry. Therefore, what the *court* says about the possibility of reverter is dictum, and yet the fact that the court mentions it four times and discusses it at some length shows that in the mind of the court, as far as the question of assignability is concerned, there is no difference between the two," wrote Professor William Sternberg in a letter to me.

A contrary holding is found in *Kennedy v. Kennedy* (Nov., 1936), 183 Ga. 432, 188 S. E. 722, 109 A. L. R. 1143, in which it is said: "where the owner of a tract of land conveys a part of it to school trustees to be held by said trustees so long as said land is used for school purposes," and said donor makes a warranty deed, for a consideration, to a third party to the entire tract of land, including that given to said trustees, and subsequently the school is abandoned, the title to the land so given to the trustees vests in the grantee and his successors under the warranty deed."

The trial court held that after the owner had conveyed the tract to the school trustees he thereafter owned no estate in the schoolhouse tract, his only interest being right of possibility of reversion upon the happening of an event that might never happen. This interest or possibility of an interest could not be considered to be an estate or anything subject to sale. On appeal this decision was reversed, the court deciding that the right of a possibility of reverter was a saleable interest remaining in the grantor, which is alienable.

However, by statute such an interest may be made transferable. "It appears from *Battistone v. Banulski* (1929), 110 Conn. 267, 147 A. 820, that where the interest remaining in the grantor is transferable (it being so in this case by statute), the grantee of such interest is vested with all the rights of the grantor in the property, and that if the original grant of the fee is subject to a limitation, the subsequent grantee is vested with the fee upon the happening of the event which *ipso facto* terminates the estate of the original grantee, but that if the original grant of the fee is subject to a condition subsequent, the subsequent grantee obtains the right of re-entry on condition broken, and, upon breach of the condition subsequent, the title remains in the original grantee until re-entry by the subsequent grantee." Annotation, 109 A. L. R. 1159.

This inconsistent position of the courts illustrated in the two above mentioned situations, and which will be again referred to, is based upon the historical development of the law and not upon logic and reason. It

can now only be corrected by statute, as appears in *Battistone v. Banulski, supra.*

In D. & S. F. Ry. Co. v. School District (1890), 14 Colo. 327, 23 Pac. 978, the facts were that on September 15, 1880, Peter Magnus, then the owner in fee of lots 1, 2, 3 and 4, in Block 3, Petersburg, Colorado, conveyed them to the school district by quit-claim deed in the usual form. The deed contained the following covenant:

> "It is hereby agreed that the said above-described property is to be used for school purposes, and that, whenever it shall cease to be so used, the said property shall revert to the grantor herein, his heirs and assigns, and this said agreement is hereby declared to be a covenant running with the said lots."

Subsequently, and on March 2, 1887, Magnus conveyed the lots to one Peabody. Thereafter Peabody conveyed the undivided one-half of said lots to a Mr. McGavock. Then, still later, and on July 1, 1887, Peabody and McGavock gave permission to the D. & S. F. Ry. Co. to enter upon and construct its railway over the lots. This was done at an expense of $1,000 to the railway.

After the railway company had built its railway over the lots, the school district, at no time having given up use of the premises for school purposes, brought this action in ejectment against the railway company to oust it from the premises. The lower court found in favor of the school district and this judgment was affirmed by the Supreme Court of Colorado.

In its opinion the court said:

> "As Magnus had conveyed his entire estate, it is clear that nothing remained to him which he could convey to Peabody, unless the limitation was such as to leave him vested with an estate in reversion which could be the subject of grant. Such reversion could not exist, however, unless, from the nature of the limitation, it appears that the event upon which it was based, in the nature of things, must happen. That event was the abandonment of the use of the premises for school purposes. It is manifest that such an event might never occur. The premises might always be used for the purpose for which they were conveyed. This being true, Magnus was not vested with a reversion, or an estate in reversion, and there was nothing left to him save the mere 'possibility of a reverter.' No interest in the estate, therefore, could pass by his deed to Peabody, and, as a matter of course, as Peabody took nothing he could convey nothing, either to McGavock or to the appellant. Whether these deeds might not operate as an assignment of the reversion or the possibility of reverter it is unnecessary to determine. It is sufficient to say that they did not convey the title or vest the

grantees named in them with any right or interest, either present or contingent, in the body of the land itself. Tied. Real Prop. §385; 2 Washb. Real Prop. 739.

"It follows, therefore, that Peabody was without authority to grant the license under which entry was made; that his conveyance was without legal force or effect; and that appellant took possession of the premises without right.

"When appellant entered upon the land, the title in fee, and the exclusive right of possession, was vested in appellee. The right of appellee to maintain ejectment, therefore, was perfect. That right was not lost, unless the conduct of its officers in the premises was such that equity and good conscience would require that the value of the land be sued for instead of the land itself. In other words, the right could not be lost except by estoppel or acquiescence in the taking."

9. *Alienability inter vivos:* "Fifty years ago there were no American decisions on the inter vivos alienation of a possibility of reverter. Gray's position seems to have been that if such interests existed, they would be inalienable. Gray, Rule against Perpetuities (3d Ed., 1915), Sec. 13. Beginning with the year 1890, there had been a small number of decisions which are almost equally divided on this point. The Restatement has, however, determined the law in favor of the alienability of these interests. 2 Restatement, Property, Sec. 159." 50 Harv. Law Rev. 765. Prof. Lewis M. Simes.

It has been held in Colorado, however, that after "The grant of a qualified or determinable fee, the grantor is not vested with any title or interest in the land or in the reversion until the happening of the contingency upon which the land is to revert, for such contingency may never happen. He has nothing to convey, and his deed in expectancy of a reverter vests no interest in the grantee, but is wholly without legal force or effect." Thompson, Real Property, Section 2187, citing *Denver & S. F. R. Co. v. School Dist. No. 22* (1890), 14 Colo. 327, 23 Pac. 978, which admirably illustrates the doctrine.

"The rule as to the inalienability of the power of termination in land (otherwise known as the right of entry for condition broken), when unaccompanied by a reversion, is the same as it was fifty years ago. Unless the conveyance is a release, no alienation is accomplished. Moreover, the rule laid down in Rice v. Boston & Worcester R. R. (1866), 94 Mass. (12 Allen) 141, to the effect that an attempted alienation of a right of entry for breach of condition extinguishes it, is recognized by the Restatement. 2 Restatement, Property Sec. 160, Comment C." 50 H. L. Rev. 765, Prof. Lewis M. Simes, writing in 1937. He may now add Union Colony v. Gallie (1939), 104 Colo. 46, 88 Pac. (2d) 120.

It cannot be conveyed to a third party. In Rice v. Boston & Worcester R. R. Corp. (1866), 94 Mass. (12 Allen) 141. The headnote declares, "The right or possibility of reverter which belongs to a grantor of land on condition subsequent is extinguished by a conveyance thereof by deed to a third person before entry for breach of condition; even though such conveyance be to a son of the grantor, who upon the grantor's death becomes his heir." (There is no showing in the case that a right of entry was in the deed reserved to the grantor or his heirs.)

The facts were that the grantor conveyed the demanded premises to a railroad corporation by a deed of warranty upon the express condition that the corporation should forever maintain and keep in good repair a passway over the same. Before any breach of the condition had taken place the grantor by a warranty deed conveyed the premises to his son and heir. Thereafter the grantor died intestate. After his death, the son, without making any entry on the land for breach of condition, brought suit to recover the land and offered evidence of a breach of the condition. The court held this transfer by the father to his son destroyed whatever rights the father had. Not enough of the facts are given to show whether the case is one in which the estate granted by the father to the railroad was one on a conditional limitation or on a condition subsequent. Authorities seem to consider it to be one of a condition subsequent. See 9 Columbia Law Review (1909), page 171. But the court does not seem to make any distinction between the interest remaining in the grantor of a determinable fee, and the right of re-entry for breach of a condition subsequent. It must, however, be noted that the court held that an attempt to assign such a right before condition broken, is not only not effective but actually extinguishes such right.

The court said, page 143: "We are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can only take by virtue of the privity which exists between the ancestor and heir. This privity is essential to the right of the heir to enter. But if the original grantor aliens the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est haeres viventis;* and upon his death his heir has no right of entry, because he cannot inherit that which his ancestors had aliened in his lifetime. The right of entry is gone forever."

If we regard this Rice case as one of the right of entry for condition broken, it may be stated that its rule is recognized in the Restatement of Property, Section 160, Comment, etc.

Apparently the only way by which the grantor may dispose of his right of possibility of reverter is by a release to the holder of the fee. *Deas v. Horry* (S. C. 1834), 2 Hill Eq. 244, wherein the court said: "A condition 'may be discharged by matter *ex post facto;* as in the examples following. If one makes a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever.' So in 5 Vin. Ab. Condition (I. d 11), the rule is said to be, 'when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone.' See also 1 Washburn on Real Prop. 453. *Hooper v. Cummings,* 45 Maine 359." See *Lytle v. Hulen* (1929), 128 Ore. 483, 275 P. 45, 114 A. L. R., Anno. 587 and 597. There held that "A conditional fee is one which restrains the fee to some particular heirs, exclusive of others, as to the heirs of a man's body, or to the heirs male of his body. Such estate is held to be a fee simple on condition that in default of such issue it should revert to the donor. In a fee conditional the entire estate is in the donee, the donor having a mere possibility of reverter, which he may release to the donee and thereby convert the estate into a fee simple, absolute. The issue is not regarded as having any interest whatever."

If the condition is not possible of performance, or where the breach is occasioned by an act of law or its performance is illegal, the grantor of course cannot enforce it, otherwise the grantor may release the grantee from the obligation or enforce performance of the condition or recover back the fee.

If a conveyance is made by a deed which fixes no time within which the condition is to be fulfilled it is the general rule that the grantee has his lifetime for performance. Thus where one Brown conveyed land to the State of Colorado to be used as a site for its capitol, and no words were to be found in the deed of Brown which indicated any intentions to limit or fix the time within which the state was to commence the erection of the capitol buildings, the time for the performance of the erection was held to be a matter for the grantee—the state—to determine. *Brown v. State* (1881), 5 Colo. 496. Of course it is otherwise where the time is fixed. See Thompson, Real Property, Vol. 4, Section 2102, Permanent Edition for cases cited.

11. The estate remaining in the grantor after a grant of realty upon a condition subsequent providing for a re-entry upon its breach. Though many courts say there is here a "possibility of reverter," other courts declare there is no possibility of reverter, that "there is left in the grantor only a chose in action."

(a) Release of this right by the grantor. On this point there seems to be no Colorado decisions. However, in *Brill v. Lynn* (1925),

207 Ky. 757, 270 S. W. 20, 38 A. L. R. 1109, it was held that this so-called right of possibility of reverter remaining in the grantor of realty upon a condition subsequent may be released by him to the holder of the fee conditional and that this release thereby makes the estate of the latter a fee simple absolute.

It has also been held that the heirs of the grantor may release the right of entry for breach of condition subsequent. See the interesting and instructive case of *The Trustees of Calvary Presbyterian Church of Buffalo*, 224 N. Y. Supp. 651, affirmed, in 1928, in 249 N. Y. Ct. of Ap., Mr. Benjamin Cardozo being Chief Justice, wherein it was held that the living heirs of a deceased grantor may release not only their own rights but those of unborn heirs. The court regarded the case as one of a grant upon a condition subsequent. There is a good note on this case in 27 Mich. L. Rev. 346.

(b) The grantor after a conveyance of realty granted upon a condition subsequent providing for a re-entry upon condition broken, has left in himself nothing he may convey to a third party. There is Colorado authority here.

In *Union Colony v. Gallie* (1939), 104 Colo. 46, 88 Pac. (2d) 120, a case of condition subsequent, the court said in its opinion that "a possibility of re-entry upon breach, called in the Restatement of the Law of Real Property 'a power of termination,' does not constitute an estate in the grantor. It is merely a possibility of the grantor coming into an estate in the future. * * * The possibility of reverter after the termination of a fee conditional being a mere possibility is not an estate, and may be defeated by statutory enactment. It is not an estate in land, and until the contingency of the condition happens the whole thing is in the grantee, and the grantor has nothing he can convey. It is neither a present nor a future right, but a mere possibility that a right may arise upon the happening of a contingency which is not the subject of a grant, devise or inheritance." Citing 3 Thompson, Real Property, Section 2112. But see 4 Thompson, Real Property, Permanent Edition, Section 2182.

This interest cannot be assigned. The same court also stated in the same case: "At common law, which was adopted by Colorado (Section 1, Chapter 159, 35 C. S. A.), and which, in the absence of a statute otherwise providing, is in force, the right of re-entry for condition broken, sometimes described as a possibility of reverter, could not be assigned." See page 53 of 104 Colo., where the court also cites Tiffany, Real Property (2d ed.) Sec. 86 (b): Restatement of Law of Property, Sec. 160. See also *Owen v. Field* (1869), 102 Mass. 90.

In this connection we should consider *Wagner v. Wallowa* (1915), 76 Ore. 453, 148 Pac. 1140, L. R. A. 1916 F. at 303, wherein it was held that "a deed of real estate in possession of a prior grantee

under a conveyance containing a condition subsequent, which has not been broken, destroys the right of the grantor to enter for a subsequent breach of the condition." Here the subsequent conveyance was made to a stranger, and not to the first grantee.

There is then this interesting situation, that, "while the courts of this country uniformly have held that the mere possibility of reverter is not an estate and is inalienable, they have with equal uniformity held that in cases where the grantor of a defeasible fee, who, under the grant possesses a possibility of reverter, subsequently conveys the possibility of reverter to a stranger, although the attempted conveyance is held to be ineffectual in so far as it undertakes to convey any right or interest to this grantee, it has the effect of extinguishing the grantor's possibility of reverter. One of the outstanding cases on the question is that of the above, *Wagner v. Wallowa* (1915), 76 Ore. 453, 148 Pac. 1140, 1916 F., L. R. A. p. 303. In the latter publication an interesting annotation and discussion of the various cases may be found." *Brill v. Lynn* (1925), 207 Ky. 757 at 760, 270 S. W. 20, 38 A. L. R. 1109. There is a good note on the transferability of the right of entry for breach of condition subsequent in 32 Mich. L. Rev. 415, annotating *O'Connor v. City of Saratoga Springs* (1933), 262 N. Y. Supp. 809. With the *Wallowa* case compare *Magness v. Kerr* (1927), 121 Ore. 273, 254 Pac. 1012, which refuses to extend the harsh rule of the earlier case. The court, however, distinguishes the case by saying that in the *Magness* case the reserved interest was a possibility of reverter, while in the other it was a "bare right of entry for breach of condition subsequent."

On the facts of those two cases this might be considered a distinction without a difference.

12. The quantity of the estate, or the interest, remaining in the grantor, and that estate or interest transferred to the grantee by the creation of the possibility of reverter is, in some jurisdictions at least, determined by the method by which the estate or interest is transferred. This topic is distinctly different from the topic covering the language used in such transfers.

(a) *Grants of rights of way by Congress:* Thus where a right of way was granted to a railroad company by an Act of Congress (approved June 8, 1872), through public lands of the United States, the grant was held to be a limited fee made on an implied condition of reverter in the event the company ceased to use or retain the land for the purpose for which it was granted. Hence where a railroad company was, by an Act of Congress, granted a right of way over public lands and afterwards a tract of such public lands was patented to complainant's predecessors in title under homestead entries, subject, however, to the railroad's right of way, the railroad company, by abandonment, lost its title to such right of way, and the same reverted to the complainant under Rev. Stat. of Colorado, 1908, Sec. 5519, which provides for a

reverter in case of a new location for an existing line on repayment of any sum therefor. *Denver & Rio Grande R. Co. v. Mills* (Colo. 1915), 138 C. C. A. 77, 222 Fed. 481. It must be noted that this right of way under consideration in the above case was an absolute grant "of a limited fee made upon an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted"—*Northern Pacific Ry. v. Townsend*, 190 U. S. 267; *Northern Pacific Ry. Co. v. Ely*, 197 U. S. 1; *Union Pacific R. Co. v. Snow*, 231 U. S. 204. Some have given such rights of way the name of "easements." But they are not easements. In a true easement the fee simple absolute remains in the grantor. *(Continued in August Issue)*

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