1-1-1963

Real Property

Maynard Jackson

150 SHEETS

WIDE LINES

THREE INDEXED DIVIDERS

NAME

ADDRESS

NATIONAL

Made in U. S. A.

No. 33-383

DATE DUE	ASSIGNMENT	REFERENCE AND PAGE

REAL PROPERTY

MRS. DEDMOND

References:
- Fraser on R.P. - Casebook
- Moynihan on Real Prop. (Hornbook)
- Burke on Real Prop. (Hornbook)
- * Smith on Real Prop. (Hornbook)

4 FEB. 63

INTRO. TO MEANING OF "PROPERTY"

Old French - propriete
Old Latin - proprietas - means one's own.

The exclusive right to possess, exclude and despose of, is property.

Estates may be divided into:

(1) Estates of Duration
  (a) Possessory
  (b) Non-possessory

Definitions of Property

Prop. broadly is any valuable right or interest that can be legally protected.

It is an aggregate of rights that can be legally protected.

It is everything that is capable of ownership, whether corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal property.

Two broad classes of property: (1) Real (2) Personal.

"Real" meant that the court would give him the res itself; but if the court would give substitutional redress, that would be "personal."

EXCEPTION: Leasehold interests were interests in land but were not originally regarded as real. Thus this did pose an exception to the gen. definition of real prop. The lease was orig. regarded mainly as K rel. of another part of a real prop. nature.

Not until the 15th Century did the lessee have the right to get the land. Before then, the lessee who was dispossessed would have recourse only against the lessor on the K.

Corporeal - the right in the land + poss.

Incorporeal - the right in the land w/o poss. e.g., X → "To A for life remainder to B and his heirs." B has a fee simple subject to an outstanding life estate in A. So, B's estate is incorporeal.

Hereditaments - interests in prop. capable of inheritance.

Real v. Personal —

Real — passes immediately upon death to heirs of the decedent, or to the devisee under a will upon its probate.

Personal — goes to the administrator or executor of the estate.

Dower v. Curtesy — these are marital estates and are found only in real property. N.C. has abolished these by statute as of July 1, 1960. But, these are still important even in N.C. Not found in personal prop.

Real v. Personal: Mode of Transfer

Personalty can be transferred merely by delivery. But, real prop. can be transferred only by formal conveyance.

Real v. Personal: Conflict of laws

Disposition of realty is governed by the lex loci rei sitae (or lex situs). But, personalty is governed by the law of the domicile of the owner.

Remedies: in personalty the remedy for b/k is usually money damages. In realty, it is

also a right to spec. performance. Real actions are local. Personal actions are transitory.

* The main distinguishing features of English real prop. law are:
(1.) Tenure.
(2.) Estates.

*Mimeographed material - pp. 1 - 3.

6 FEB. 63

The basis of these two doctrines is that all land is owned by the Crown, and that the subjects may hold the land as tenants but cannot own it. i.e., "Is no ALLODIAL LAND (land owned absolutely and independently). "Is no land w/o a Lord (nulle terre sans seigneur)" is an old maxim of feudal land law in England. All land is held subject to the Crown's right of EMINENT DOMAIN. i.e., Allodial ownership means no more than ownership freed from the oppressive duties of service and fealty.

Some States have abolished all

by legis. fiat.
feudal aspects of tenure, (Conn. & Va.).
Ga. and N.Y. said that all tenure shall be allodial. As a practical matter, except in Pa., many lawyers say that tenure makes no difference.

Each set of services in return for a type of land holding was known as a type of tenure. The services required deter. the type of tenure.

Tenant (feudal times) = vassal or man of the lord.

* The Doctrine of Estates was directed toward the length or duration of holding, and so could be different types of tenure under this doctrine.

Two Main estates:

FREEHOLD ESTATES

(1.) Fee Simple – of potentially infinite duration. The largest interest in land. Endures as long as the tenant or any of his heirs survives.

(2.) Life Estates.

DE DONIS CONDITIONALIBUS – created new interest in land (1285); set up ...

(3.) Fee Tail – lasted as long as the tenant (holder or owner) or any of any lineal heirs lived. i.e., Not of infinite duration like fee simple.

These are the three freehold estates. These show that the

I did not own land itself, but merely an estate in the land, that is the Doctrine of Estates.

* History of English Law of Real Prop. *

There are seven (7) main heads:

(1.) Norman Conquest (1066)
(2.) Formative period (1066 - 1400)
(3) Growth of Equity (1400 - 1535).
(4.) Statute of Uses (1535 to 1660).
(5.) Development of Modern Law (1660 — 1830)
(6.) Age of Reform (1830 - 1926)
(7.) Social Control of Land (1926 —)

* (1.) Period Before Norman Conquest - Principal features:

(a.) Liberty of alienation of land that could be freely alienated (Bocland so-called) either inter vivos or by will.

(b.) Publicity of a transfer by enrollment either in the shire book or a Church book.

(c.) Equal partition of an estate of a decedent among sons, or absent sons, among daughters.

(d.) Cultivation of land by

serfs of various degrees owing rents in money or labor.

(c.) Variations by custom tending to become uniform thru similarity of court approaches to the various tenures.

(d.) Trinoda necessitas — T's obligations of military service, duty to repair bridges and maintain fortifications.

The ownership of land conferred terr. juris. on the lord. He ruled his manor.

(2.) Formative Period —

(a.) This saw the development of C.L.

(b.) Full development of feudalism. All land was deemed owned by the King, but there could be subinfeudation (system of lords and overlords, and each held of another) wch was a system of tenure. i.e., there were mesne lords (an intermediate lord), and these all held dual positions: they were lords and tenants. The lord holding directly of the King was not a mesne lord: they were called lords paramount, but were technically mesne lords. They were TENANTS IN CAPITE.

(c.) Classifications of Tenure —
Two main categories:
(1.) Free
(2.) Non-free.

Free tenures — by free-men.

NOTE: The basic social relationship in feudalism was lord—T. The lord owed duty of protection and the T owed fealty, or faithfullness. The BENEFICIUM (or FEUDUM) was the land held. Out of that arose the feudal concept of fief (later called fee) or feud. All meant the land held.

Beneficium
feud
feudum
fief
fee
} the land held.

8 Feb. 63

The land of a tenant was called a tenament.

TYPES, OR CLASSES OF TENURES:

(1.) Two main classes:
(a) Free
(b.) Unfree

Free tenures - involved dignified tenures:
(1.) Tenures in Chivalry — military.
(A.) Knight Services - the lord promised to furnish his overlord w/ Knights. During war, and according to

MIMEO. MATERIAL - LANDMARKS IN LAW OF REAL PROP.

Assignment: ESCHEAT. v See N.C. Const. Art. 9, sec. 7; G.S. 116-20 to 26; 13 N.C. L.R. 346; 73 F. 2d 661; 182/405; 203/558*; 209/788; 224/861.

"The word ESCHEAT, as used in Art. IX, sec. 7 of N.C. Const., embraces every case of prop. falling to the sovereign for want of an owner," and in N.C. escheat is to the U. of N.C.

"Upon the repeal of the charter of the city such prop. passed under the immediate control of the State, the power, once delegated to the city in that behalf, having been withdrawn." 203 N.C. 558 (U.N.C. v. High Point, City of)(1932).

size of land. The knights served 40 days.

(B.) Escuage (or SCUTAGE) - Later, there could be money pymts. in lieu of knights, and King would pay soldiers himself. This evolved about the middle of the 15th Century.

(C.) Serjeanty - Rendering of personal honorary services to the King, e.g. furnishing armor. This was GRAND SERJEANTY. PETTY SERJEANTY later became free and common Socage, and involved less dignified services (e.g., making the sword of the King rather than carrying it for him into battle).

(2.) Tenure by SOCAGE - The services were fixed and certain, not tenuous and uncertain like Chivalry. Involved pecuniary or purely nominal pymts. e.g., One rose a year (petty serjeanty).

(A.) Gavelkind - all sons could take the land at death.

(B.) Burgage

(c.) Borough English – youngest son could take at death. Contrary to then prevailing PRIMOGENITURE.

(3.) FRANKALMOIGN – ecclesiastical tenure. Lay persons could not hold in this tenure. The land was granted in exchange for religious services: prayers and masses.

* Unfree Tenures – usually menial services by un-free persons, e.g., bonded servants. There were various classes of VILLEINS. Later, their services could be commuted to money. Later, their tenures became COPYHOLD. Copyhold was a big advance from the earlier way of holding purely at the whim of the overlord. They were later allowed to transfer by SURRENDER AND ADMITTANCE wh substituted another villein who would perform the same services as the transferor. The transfer was registered in the Registry of

Enrollments where it became a matter of copy.

The copyhold tenants could only get relief in Manorial Courts, not cts. of the King.

In late 19th Cent., the copyholders due to statute could convert to Socage.

The villeins did the plug. labors on the lord's land.

Manorial courts:

1. Courts Baron - civil matters.
2. Courts Leet - admin. matters (taxes) and some criminal juris.

The manorial system depended upon SUBINFEUDATION, a manner of land alienation on the grantor could transfer but still remain in the chain of title and would still owe services. The transferor always kept a part for himself.

Feudal Incidents -

Every lord was entitled to some feudal incidents. The

Rule in Shelley's Case was an attempt to protect these incidents.

(1.) Homage - ceremony estab. rel. of lord and T. Always accompanied knight service, and could accompany the other services

(2.) Fealty - incident to all tenures except frankal-moign. Oath of faithfulness.

(3.) Aids - orig. optional, later compulsory. Types:

(a.) Ransom - the vassal (T) had to pay lord's ransom if lord were taken prisoner.

(b.) Expenses of pomp and ceremony in marriage and knighthood of oldest son.

(c.) Dowery for lord's oldest daughter.

(4.) Relief - a fine or pymt. to lord for taking up the estate of a deceased tenant at whatever time it lapsed. Payable if the T's heir had reached

21 at death of the T. He was not entitled as a matter of right to succeed to the estate, because he had only the privilege to pay the relief to take up T's estate.

(5.) Primer Seisin — paymt. of yearly rents.

(6.) Custody — paymt. for the care of son (less than 21) or daughter (less than 16) of T who died.

(7.) Marriage — lord had the right to marry off infants of Ts and get the value of the marriage from the suitor.

(8.) Fine — for alienation w/o consent of the lord.

(a.) Attornment — lord could not alienate T's land w/o T's permission.

(9.) Escheat — breach of cond., death, treason, et al., could result in escheat.

Two modes of alienation: (1) subinfeudation, (2) Substitution.

12 Feb. 63

4 were simultaneous interests in the land. The holder was SEISED IN DEMESNE and the lord had SEIGNORY (seised in service). The services due the lord were burdens on the land (forerunner of liens).

Right of distress - a remedy of the lord upon failure of the tenant to meet the services whereby lord could seize chattels in satis., and later could seize the land itself.

Gen., feudal tenure before 1100 was no more than life estate. A stat. of King George (1100) said that the land could be hereditable.

D'Arundel's Case (1225) - consent of the heir apparent was no longer necessary to the alienation of land.

Two methods of alienation:

1. Subinfeudation - the lords did not like this because they often lost valuable incidents. This created new tenures.

(2.) Substitution – the new taker would stand in the shoes of the grantor. Objections by lords were heard here, too, because the new taker may be inept in battle and, therefore, not supply the lord w/ military services.

Despite these objections, the idea of free alienation gained.

MAGNA CARTA OF 1215 – primary significance in the law of real prop., not in the political sphere. Designed to protect the landed Barons. King John granted this under pressure and restricted the king's powers. Endeavored to place England in the hands of the great Barons. However, this did subject all (King, too) to the law, and is the greatness. A restatement of feudal privileges.

Statute Quia Emptores (1290)
Barred alienation inter vivos by subinfeudation; that is can be alienation w/o having to pay a fine to the lord; that if a loss a feoffment of only part of the land held by the feoffor, the feoffee would still have to render a proportionate amount of services; applied only to estates fee simples, and not to life estates; that there could be alienation by substitution.

Statute of Mortmain - (decreased tenure by frankelmoign, & tied up the land so given in the Church: "dead hand") the stat. of Mortmain abolished mortmain. Quia Emptores further ltd. frankelmoign tenure; said no new estates could be created. Quia emptores was the beginning of the end of feudalism.

The incidents became burdensome. So, then came the next big statute:

(1660) The Statute of Tenures - Abolished military tenures; abolished Court of Wards and Liveries; all lay tenures became free and common socage & pymt. of an annual rent and thus gave the King the revenue that had been gotten by feudal incidents. Did not affect frankelmoign and copyhold tenures.

Tenure in America

There were patents granted to great "lords" like Baltimore and Penn. The rents (annual) were just nominal. The quit-rents under this socage tenure were obnoxious to the proprietors like Penn and Baltimore. Thus, many states passed stats. abolishing tenure and saying that all land would be held allodially. Ga. and N.C. never passed these stats., but did reach the same result by judicial decision.

Pa. has never abolished tenure and has never stated that land would be allodial. Same in Baltimore. So, in those places, "ground rents" or quit rents remained (Some Ohio cities too) so that when a fee simple holder transfers all of his rights, etc., he retains the right to "quit rents" (or ground rents).

Eminent domain is an incident or prerogative of sovereignty, not of tenure.

Today's tax stamp on deeds and charges for registration = old feudal fine; land tax = old feudal aids; inheritance taxes = old feudal relief.

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14 Feb. 63

If it is not tenure, Quia Emptores is futile. If it is tenure but Quia Emptores is not the law, it is possible to have subinfeudation (Pa. and S.C.).

MIMEO. MATERIAL – N.C. Cases on Fee Simple.

2/405 - "our land is now held allodially."

ESCHEAT

Eschrat is found in all states. Orig. meant the falling in of land by accident to the lord of whom the land was held because the decedent had no successors. It denoted the termination of an estate and a reversion to the orig. owner. In American cts, escheat is statutory, and means the falling of an intestate's estate to the gen. funds of the state on y are no successors. See 242 N.W. 5?? (personalty escheats, too). Rests on the ultimate ownership in the State of all prop. in the juris. of the state.

At C.L., realty escheated to the immediate overlord; or to the King if the land grant was directly from the Crown.

At C.L., personalty went to the Crown under the doctrine of bona vacantia (vacant goods). The Crown took by virtue of its prerogative. Applied on there were no kin living — no ultimate heirs (ultimus haeres).

302/558

The crown lost personalty not by escheat, but as the "ultimate heir."

Escheat = forerunner to the future interest of REVERSION. This was the feudal view of escheat: the grantor gave less than he had, and will take upon failure of heirs. Went to lord of fee under feudal. Based upon ~~sovereignty~~ tenure.

⊛ Escheat v. forfeiture — the loss of lands for committing a crime. Went to crown (escheat) (feudal) went to lord of the fee. Escheat of whole; forfeiture could have been of any part.

⊛ Escheat v. Reversion — reversion differed.

⊛ Escheat v. Succession — devolution of title upon death of owner intestate to an heir = succession. No heir in escheat.

Grounds of escheat:

(1.) Prop. held by corp. beyond certain time or a holding of too much prop.

(2.) Gen., stat. governs.
Escheat is not favored by the law.

(3.) Death intestate w/o heirs is universally recog. as a ground of escheat. The intestacy may be whole or partial. So, an ineffectual bequest (personalty), legacy (money) or devise (realty) on y are no heirs (172 S. 772) = escheat.

Property subject to escheat: all of any kind, even of aliens. 126 S. 44. Legal and equitable interests can escheat now; but no equitable interests could escheat at C.L.

Only after all creditors have been satis. and costs (65 Fed. Rep. 2d 65) & admin., will the balance (79 A.L.R. 1375) escheat.

Escheat v. Eminent domain—
245/249, Hedrick v. Graham (96 S.E. 2d 129). the State has the power to condemn or severly curtail a private owner's access to an abutting ltd. access highway by virtue of eminent domain.

The case then defined

Definition

Eminent domain = the power of the State to take or condemn prop. from a private owner for a public use upon pymt. of just compensation. Gr. v. Chattanooga, 264 U.S. 472: E/D is an attribute of sovereignty, essential to the life of a state & cannot be conveyed to another.

Escheat in N.C. - goes ultimately, by virtue of the N.C. Const., to the University of N.C. G.S. 116-21 & 22 were repealed and re-written in 1951: re proof required by U.N.C. of no heirs. G.S. 116-21: real & personal prop. escheats; & U.N.C. has right to begin civil action to get escheated prop.

Adams County v. State (p. 34)

Quaere: Is the State liable for the pymt. of inheritance tax on prop. which has escheated to it? = Ct. held NO. The stat. (inheritance tax of Nebraska) was intended clearly to apply to successions, not reversions, and escheat = reversions.

Court does not make clear whether escheat depended upon tenure or was simply an incident of sovereignty (See p. 35.), but that is today largely academic.

Today, an interest in land can escheat or revert.

Assign: Estates in land (fee simple absolute + defeasible).

15 Feb. 63

Mimeographed material: outline.

Escheat re Corps. -

Early law: escheat upon dissolution of corp. to the grantor.

Corp. sole - one man reps. the institution.

When corp. is dissolved, assets (today) go to creditors first, then to the stock holders. The "early law" no longer holds sway.

Eleemosynary institutions (charitable)

(majority rule) ← 73 F. 2d 661, Rose Campbell Mission Case - heirs of donor or the donor would take due to the statute. W/o statute, same result. But, y is split of opinion. S.C. and some states: pay creditors 1st, then to the "members." Ga. (70 GA. 604) and some states: escheat to the State. Calif says: if the grant was for value, escheat to state.

(Ga. 70 GA. 604)

Cy Pres Doctrine sometimes used to deter. this question of eleemosynary organizations.

(CHAP. III) INTERESTS IN LAND PER THEIR POTENTIAL DURATION

ESTATES AND LEGAL RELATIONS OF TENANTS IN POSSESSION

(SEC. 1) CONCEPT OF ESTATES

Definition

Estate – the rel. of an indiv. w/ ref. to the land and numerous other indivs. by w/h he has certain rights, privileges, powers and immunities. The peculiar combination of the rights, &c., constitutes the extent and nature of the estate.

The estate is separate and distinct from the land per se. The concept of estates is on a plane of time, not a plane of space; and y may be simultaneous interests in land.

Interests v. Estates

Q. Are interests and estates in ~~property~~ land the same?
No. All estates are interests, but all interests are not

substantial enough to = estate.
e.g., An expectancy of an heir apparent is an interest, but not an estate.

Interest — generically, the aggregate of rights, powers, etc., that one has in land; distributively to mean any one of the rights, powers, etc.
Rest. of Prop. sec. 5 (c) - one has an interest in land if he has any right, power, privilege or immunity in re the land which is not shared by the gen. public.
Rest / Prop. sec. 9 - lists the future interests.
sec. 9: An ~~estate~~ in land is ~~One~~ an interest in land wh
(a.) is or may become poss.
and (b.) is ownership measured in terms of duration.

Estate

Lawyers often say "estate" and mean only a fee simple of a life estate.

Hohfeld

* Words of Limitation and Words of Purchase

hypo: X (fee) → "To A for life."
"To A" = words of purchase

because they indicate who is to take under the conveyance.

Purchaser - one who takes by way of any method other than by act of law (e.g., descent, escheat and the like).

"for life" - words of lim. and indicate the size, quantum or nature of what is taken.

bypo: X(fee) → "To A and his heirs".
Quere the words "and his heirs"? - Are they words of purch. or lim.? - Due to historical development, they are deemed words of inheritance or words of limitation. They indicate the estate is inheritable and is to be the largest estate in land. IP Problem: heirs will take not by virtue of the instrument (i.e., not as purchasers), but only by descent.

Conveyance "To A forever" = life estate in A.

"Heirs" is a word of art,

and so is "forever." "Forever" is a word of limitation and will convey only a life estate.

Some authority says that "A & his heirs" = fee simple.

These words must be in the granting or habendum clauses.

Estate in fee simple could be made w/o the words "and his heirs" under exceptional cases at C.L.:

(1.) Conveyance to a trustee would give whatever estate was necessary to carry out the terms of the trust.

(2.) Corps. - "and its successors" were used at early C.L., & were no big corps. Two types:

(A.) Corp. Sole - An informal organ. rep. by one man. e.g. a Bishop. The conveyance would be to the office of Bishop and would use "and his successors."

(B.) Corp. aggregate - biz corp. like we know today. The words "and his successors" need not be used to convey a fee in the absence of

evidence au contraire.

(3.) Wills — the intent of the testator will control regardless of the words used.

(4.) Statutes — today "nearly all" states allow an estate in fee simple to be conveyed w/o words of inheritance.

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19 FEB. 63

218/251 - def. of "estates:" degree, quantity, nature or extent of one's interest in land. Applies to poss. rights and expectant rights.

Some interests don't const. estates:

(1.) Incorporeal interests
(2.) Inchoate dower -
(3.) Tenancies by sufferance - non-freehold interests.
(4.) Rights of entry for cond. broken (& powers of termination)
(5.) Possibility of reverter.
(4 and 5 are now regarded as estates by modern authorities)

Mimeographed materials.

Estates are classified by (1) quantum or potential of duration; (2) Time of enjoyment (present or future); (3) Number and connection of tenants (estates in severalty [generic term]), (4) Vested or contingent — ⊛ vested can mean a present and immediate, fixed right of present or future enjoyment. 202/454; 185/40; 175/248. ⊛ Contingent estate — the right of enjoyment is dubious and uncertain because conditioned upon the happening of a contingency.

MAXIM

Nemo est haeres viventes = "a living person can have no heirs." e.g. "To A for life, rm. to the heirs of B." or "To A for life, and if B attains age 21, then to B & his heirs." See 130/8, Church v. Young.

(5) Legal or equitable — depends on whether the estate can be enforced at law or in equity.

Freehold Estates - an estate of indeterminate duration other than tenancies at will and sufferance. There are 3 freehold ests. of inheritance:

(1) F.S.A. (2) F.S.D. (3) F.S.S.C.S.

Estate of freehold not of inheritance: Life Estate.

Non-freehold estates: the tenancies.

THE FEE SIMPLE ESTATES

"To A and his heirs."

"To A and the heirs of his body."

The words following "To A" became magic words (of art) and a conveyance "to A forever" at C.L. = only a L/E.

4E = life estate

"To A or his heirs" - by the better rule at C.L. and per Rest./Prop. this would convey a FSA: A did not have heirs while A was living, so the grantor must have intended the words as words of inheritance.

Exceptions to requirement of words of inheritance to create FSA:

(1.) On conveyance is to a trustee - whatever estate is necessary to allow the trustee to carry out the terms of the trust (173/569) will be found. "To T."

(2.) Conveyance to corporations - "To A corp. and its successors" - must be used in a conveyance to a corp. sole; but a FSA could be conveyed to a corp. aggregate w/o the word "successors" unless

an intention to convey less is shown.
(3.) Wills – presumption that one intends to get rid of all he owns upon death. The intention of (118/202) the testator will be respected regardless of the words used.
(4.) On one co-tenant releases his share in a FS, the words of inheritance need not be used. True of joint tenants (own all together) and tenants by the entireties (H+W) and co-parceners (on daughters took land: held undividedly, but all were considered as one tenant). DOES NOT apply to tenancy in common.
(5.) Inter vivos conveyance to a government will = FS w/o use of words of inheritance unless a lesser estate was shown intended.
(6.) Equitable estates – this exception recognizable only in ct. of eq.
(7.) Modern stat. exception – in the absence of words of ~~exclusion~~ limitation a FS will be presumed (deeds & wills) unless y is evid. of an intent to create a life estate.

Wills – (G.S. 31-38)
Deeds – (G.S. -39-1)

F/S:

(1.) Potentially infinite duration.
(2.) Greatest estate possible.
(3.) In event of intestacy, this is the only estate that will pass to heirs generally.

Essential elements:

(1.) Potentially infinite duration.
(2.) Inheritability.

Statutory Exception to Requirement of words of limitation ("and his heirs.")

See G.S. 31-38 and 39-1

Most states have stats. that provide that the words "heirs" need not be used for a F/S.

N.C. developed the position that a F/S could be conveyed even w/o "heirs" on the basis of the presumption that the word had been omitted inadvertently, the ct. saying that the intent of the grantor (104/248) was that there was a F/S intended. Must look at the language. This began in Equity only as an action for reformation of the deed upon mistake or inadvertence.

Assignment - Canons of descent (p. 45) + bank brochure.

21 Feb. 63

ca. 1450 A.D. - contingent remainders were recognized. Before this time and around the 13th Cent., "heirs" took as purchasers. Not so today, because they take, if at all, by descent. "Purchase" means any mode other than by descent, escheat or the like.

INTESTATE SUCCESSION (AND "HEIRS")

An intestate is one who dies w/o will. His prop. descends per statute of descent and distribution (or intestate succession) in the juris. At C.L., realty passed by PRIMOGENITURE to the eldest son." never existed in U.S. At C.L., personalty passed to the admr. of the estate for the next of kin (those nearest the intestate by blood relation). Still the law today.

One who took realty = heir.
" " " personalty = next of kin (brothers + sisters) (determ. by civil law). Heirs took by C.L.

Descent - orig. meant prop. passed down lineal line

from father to son. It could not descend at c.l.
Today, it (descent) includes ascent; the taking of any realty by any heir of blood relation.
Consanguinity - blood relations lineal and collateral.
Affinity - relation by marriage. Only in 1960 in N.C. did wife become an "heir" of deceased H.
Lineal - that relationship on one is descended from the other directly.
Collateral - common ancestor.
Civil law method of computation - used to compute degrees of consanguinity. Counting generations.
Counting collateral heirs: count from the one in question up to a common ancestor, then down to the collateral relative.
Taking per capita - by the head, or individually.
Taking per ~~stirpes~~ stirpes -

taking by the root, or by the right to rep. the deceased ancestor. e.g., H+W have 5 kids, A, B, C, D + E. E died leaving three kids, X, Y + Z. So, when H dies, X, Y + Z will take E's 1/5 share and divide that 1/5 only.

Adopted kids - no rights of inheritance at C.L. Today they take as natural issue.

Illegitimate kid - at C.L., it was a nullius filius (a child of no one). Today by statute, it would be the heir of the mother (as of 1960 in N.C.).

Possibility of reverter + right of entry - could pass to heirs as realty. Same today.

No heirs of a living person. An heir apparent has a mere expectancy until his ancestor dies intestate. Not an estate.

* Advancements - present transfer to an heir expectant of what he would take at death. Applies only in case of total intestacy.

Ct. will look to the intent of the donor - ancestor. Recog. for the purpose of equalizing the shares of children as heirs. It is a gift always; but every gift is not an advancement. Only between parent and child. No advancement can be taken from the donee but he must account if he wishes to participate in sharing the estate.

* TESTATE SUCCESSION *

(1.) One who dies w/ will.
(2.) Appt'd. by will to execute the will = executor or executrix.
(3.) One appt'd. by the court to administer a will = admr. cum testamento (w/ the will annexed) annexo.
(4.) Admr de bonis non - handles goods not previously administered by a previous admr.
(5.) Devise - land by will
Legacy - money " "

Bequest - personalty by will.

NOTE: (6) the C.C. right to dispose of prop. by will. Purely statutory. Must comply w/ the stat. requirements.

(7.) Will = legal declaration of one's intention to dispose of one's prop. after death.

(8.) Kinds of wills:

(A.) Written or witnessed.

(B.) Holographic - wholly written, dated + signed by handwriting of the testator. Not witnessed.

(C.) Nuncupative (oral) - witnessed.

(9.) All wills are ambulatory - may be changed at any time before death of competent testator.

(10.) Wills must be made w/ animus testandi (test: intent).

(11.) Wills must have the co-existence of:

(A.) Competent testator

(B.) Phy. compliance w/ statutory requirements.

(C.) Animus testandi.

Realty descends lineally indefinitely. But, people of collateral consanguinity do not take beyond the 5th degree of consanguinity.

Today, sons and daughters take equally under intestacy. Same for half-brothers and sisters (no distinction is made in N.C. since 1960 because the Doctrine of Ancestral Prop. has been abandoned as of 1960).

G.W.

22 Feb. 63

Two Types of FS:

(1.) Fee Simple Absolute
(2.) Fee Simple Defeasible
  (a.) FS Determinable
  (b.) F.S Subject to a Condition Subsequent.

Johnson v. Whiton (p.46)

Action in K to recover a deposit paid under an agreement to purchase land. The will said "to my granddaughter Sarah A. Whiton, and her heirs on her fathers side...." The court said

those words = FSA. But, was that the intent of the testator?

A fee tail restricts the estate to the lineal heirs of the body of the grantee in tail.

Here, the words used were against public policy and insufficient to create any estate other than the recog. estates; that these words attempted to create a new estate, and the Doctrine of Estates does not allow a testator to give full vent to his intention when the effect would be to create an estate other than those recognized.

So, "on her father's side" were given no effect.

The inheritable characteristics of a fee estate cannot be restricted. Only exception: fee tail. 189 N.W. 969 (Iowa)(1922)(In accord w/ main case).

So, it is contrary to public policy to create any novel estate in fee other than those already

recognized. This is the name case on this point. (OR

No F/T in North Carolina

In N.C., fee tail is not recognized, and an attempt to create a fee tail will automatically be converted into a FSA.

* DEFEASIBLE FEES *

May the owner of a FSA convey a lesser estate subject to a condition imposed by the grantor? And, upon the happening of the cond., can the grantor provide that the estate would be cut short by ~~term~~ reversion to the grantor or vesting of right of entry in grantor? = If so, how can this be done? = If so, what is the nature of the interest retained by the grantor? =

Lynch v. Bunting (p. 48)

Granting clause gave a fee simple determinable, but the habendum clause had language sufficient to = FSA.

FEE SIMPLE DETERMINABLE (OR F/S UPON SPECIAL LIMITATION) ("SO LONG AS")

* FSD — "As long as" are the words most often used to point up the condition. FSD also called FS upon a special limitation.

FSD is a form of defeasible fee. It is an estate of lesser dignity than a FSA.

"and his heirs" are words of limitation, but of general limitation. The other words including and following "As long as" are words of SPECIAL LIMITATION (they denote time: "until", "during.")

The grantor of a FSD has a POSSIBILITY OF REVERTER. If a grantee of a FSD then conveys to "B and his heirs", B would only take a FSD. Nemo dat quod non habet.

28 Feb. 63

Read: 214/121 (1938), Bernard v. Bowen — leading case on defeasible fees.

Waiver: Intentional relinquishment of a known right. Based on equitable principles. Closely associated w/ laches (a species of estoppel).

N.C. The Ct. in Bernard case found a fee S.S.T.C.S. even though "so long as" was used. So, how could you create a FSD in N.C.? You must use strictly clear language because any defeasible fee is unfavored by cts. anyway. // The Ct. is not bound by the language to ascertain intent, and looked at alternate factors. This result was desirable economically, but the reasoning does damage to the usual rules of construction. 61 Tex. 106 Ryan v. Porter - extremely high requirement of exact lang. to create a defeasible fee.

DEFEASIBLE LIFE ESTATES Life estates may be made conditional, too. The L/E may be ltd upon a certain cond. wh may happen during the transferee's life.

This would provide for the unnatural termination of the estate before death. Life estate durante viduitate a L/E determinable ("during widowhood.") ⊛ The event is usually sufficient — though not necessarily — the power of the grantee to avert or hasten, e.g., "To A ~~and for his life~~ so long as she does not remarry." See 192/191; 159/123; 150/444; ⊛ 237 N.C. 726.

Read: Roberts v. Saunders — (192 N.C. 191) — Some case on L/E determinable.

Van Rensselaer v. Ball (p. 54)

Indenture (both parties signed) wh reserved to grantor rents payable annually. FS was conveyed but the rent was reserved along w/ clause for distress (right to go on land & seize chattels to satis. rent) and a right of entry. P = son of grantor & brings this action of ejectment. Ct. found this was a FSSTCS. The cond. was lawful even tho' the cond. was

the pymt. of rents. This was not a financial agreement like a lease. This rent is also called a RENT-CHARGE (or rent seck [dry rent on the party receiving the rent has no other right in the land). Similar to an easement. The rent-charge is accompanied by right of distress (or distraint).

The future interest here is the "power of termination" (per Rest./Prop.). Language connoting condition is usually used: "but if."

At C.L., phy. entry was necessary to revest the title in the grantor; but, today a legal action will suffice.

190/350, Sharpe v. the RR - the court used confusing language. The Ct. found a FSSTCS but said there was a reverter in the grantor.

Estates subject to conds. Subsequent v. same ... conds. Precedent = In the latter, the estate will not vest until the cond. occurs. If the

cond. precedent) 109/461 (con sheet)

cond. is impossible of occurrence or illegal, the conveyance fails totally, and the estate remains in the purported grantor. See 109/461. Assign. - 54 Haw. L.R. 248 + finish defeasible fees.

1 March 63

Rosecrans v. Pacific Elec. Ry. Co. (p. 55)

The deed called for maintenance of the ry. right of way "forever."

Covenant v. Condition Subsequent — Rule of Construction

There is a preference in construction for a covenant rather than a cond." As the br/ cond. subsequent involves a forfeiture, a clause in a deed imposing obligations or restrictions on the grantee, will be construed as a covenant rather than a cond. subsequent when that can reas. be done."

"However, on the words employed show a clear and unmistakable intention on the part of the grantor to create

a cond. subsequent it will be upheld." — The Ct held that "the compl. stated a c/a in view of the provisions of the deed as pleaded." J/D/Rvsd. — The deed created a conditional fee: a FSSTCS.

(1932) Chouteau v. City of St. Louis (p.61)

Dry trust executed by the S/U. Ct. found that it was no conditional fee created, but that the alleged "cond" was merely "a declaration that the land donated would be used for county purposes." (See Restat./Prop. rule, p. 60.) This deed conveyed a FSA. The deed did not have an express provision for forfeiture, and absent such, the intention of the grantor must be crystal clear that a cond. be created. See rule, p.64.

Q. If the instrument does not provide for disposition of the prop. upon br/cond., is the conveyance void? =

The TEST seems to be whether a forfeiture has been provided. If so, = CONDITION.

Conditions of Support and Care

Some states say that even in

the absence of words of cord., where the conveyance is made in consid. of care + support, the ct. will imply the words of cond. N.C. DOES NOT follow this rule, but may give equitable relief by reformation, recission, etc., but gen. N.C. is not even this liberal. Actually, N.C. strictly requires that specific language be used showing upon breach:

N.C. Law

(1.) Right of entry, or
(2.) Forfeiture, or
(3.) Reverter, or
(4.) That the conveyance be null and void.

So, in N.C., "To B and his heirs, provided that B support me" would NOT create a FS Defeasible unless one of the above 4 appears.

See 126/321, Robinson v. Ingram; 144/126, St. Peters Church v. Brite-hall; Minor Case (mimeo. case); 232/725, Cherry v. Walker.

* Restrictions on Use of Land and Defeasible Fees Generally *

Conditions v. Public Policy

A cond. subsequent v. pub. lic policy is of no force (186 P. 596 [1919 - Calif.]) and effect and the defeasible fee will be construed as a FSA. In the Calif. case, the cond. restraining sale to non-Caucasians was held invalid; but the cond. restraining use and occupancy by non-Caucasians was upheld.

Partial Restraints

Partial restraints are usually upheld w/ some authority to the contrary. See 187 P. 159: ma-

Change in Conds. - Maj. Rule

jority rule: change in conds. will not be enough to justify extinguishing the cond. subsequent and the consequent power of termination in the grantor. Min. view - 10 P. 2d 496; 250 P. 2d 292.

10 P. 2d 496 (min. view)
250 P. 2d 292 (" ")

Waiver of Conditions

Ct. may extinguish the power of termination if the G^or by his conduct has waived the condition.

* On the breach is merely failure to promptly make money pymts. and G^or can show it was

52

unintentional, the ct. may prevent exercise of the power of term. of the Gr. assign. - FS Cond. and Fee Tail
See Kroyniham on Fee Tail.

5 March 63

RACIALLY RESTRICTIVE COVENANTS

Shelley v. Kramer, 334 U.S. 1 (1948) - outlawed racially restrictive covenants. The action of the court upholding the restraint = state action, and that state action violated equal protection clause of the 14th Amend. If the court nor any arm of the State had acted, the restraint based on race could not have been found unconst.

* But, ∴ could be dams. for breach of the racial covenant as between the parties. Weiss Case (didn't reach Sup. Ct.) 346 U.S. 249 (1953), Shields v. Barrow - held that damage suits would NOT lie as between the parties for br. racial covenant.

F.S. Subject to Executory Limitation

Classes of FS estates:

(1.) FS Absolute

(2.) FS Determinable - "... so long as ..."

(3.) FS Subject to Cond. Subsequent - must provide for right of re-entry. "... provided that ..."

(4.) F.S. Subject to Executory Limitation.

A. FS Subj. to a springing use.

B. " " " " shifting " .

C. " " " an executory devise.

(1) - X (fee) "To A and his heirs but if A die w/o issue him surviving, then to B and his heirs." - Shifting use.

This estate is characterized by an interest, upon failure of cond., in a person other than the grantee or his heirs.

(2) A (fee) "To B and his heirs 5 yrs. from date of this deed." — Springing use. IP At C.L., no estates in futuro. IP the springing use could be raised by using words like "from", "when", "upon", "after." Seisin goes from the grantor to the grantee always in th

springing use.

Shifting use - seisin always goes from one grantee to another gee not from the gor to a gee. The gor has nothing left here. The classic example is #1 conveyance.

Rules of Law

Executory Devise - at C.L. there could be no fee simple in remainder following a fee simple, and a remainder could not take effect in derogation of the prior estate.

The STATUTE OF USES made these three estates valid. So, e.g., the executory devise was then valid.

How do you distinguish the following?:

FSD (1.) FS on special limitation

FSSTCS (2.) " " conditional " ,

(3.) " conditional.

#1 is called also FS Deter-

possibility of
reverter remains in D^or.
reversible: Also includes executory interest estate of the shifting type.
#2 is another term for FS subject to an Executory Limitation.

A FSSTEI MAY become a FSA upon failure of the exec. limitation on there are certain facts. ⊛ But, a FSD (ends by its own terms) does not become enlarged by failure of the exec. limit. Roxbury Institution for Savings.

74 Ga. 73 (FS Deter.), Carr v. The R.R.
139 N.E 301 (1923) - (name case) Roxbury Inst. for Savings v. Roxbury Home for Aged Women — re FSD. Contra:
75 A.2d 122 (1950) (Md.)
(Name Case) ⊛

REVIEW

7 March 63

X = FSA in B/A.
(1.) "To A."
(2.) "To A and his heirs"
(3.) "To A for life."
(4.) "To A & his heirs so long as prop. not used for business purposes, otherwise the deed is null and void."

(#1) — at C.L., A = L/E w/ reversion in FSA in X. Under modern stats., A would take FSA (N.C.).
(#2) — A = FSA.

(#3) - A = L/E, Rev. in X in FSA.
(#4) - A = FSD w/ possibility of reverter in X.
(#5) - "To A and his heirs but if A die w/o issue surviving him then to B and his heirs."
— A = FSSTEI w/ an executory limitation of the shifting type in B.

(#6) - "To A and his heirs provided that no alcoholic beverages be sold on the land, but if such beverages be sold on the land A shall re-enter and take poss."
— A = FSSTCS ; X = power of termination or right of re-entry for cond. broken.

The Roxbury case is ltd. only to FS determinables: only is a FSD (subject to expiration of its own power upon cond. broken) wh expires due to cond. broken and the executory interest fails, the possessory estate (FSD in A) will not be enlarged +

will expire in accord w/its own limitations.

But, in an estate where the poss. estate does not end automatically upon the happening of the event, the effect of failure of the succeeding executory interest will depend upon the INTENT of the grantor. It will be usually assumed that the grantor intended the poss. estate to be ended only on the limitation over could be effective. 63 Am. Dec. 725 (Mass., 1825), Church of Brattle Square v. Grant. Name case. Thus, on the limitation over could not be effective, it is assumed that the grantor intended the grantee to take FSA.

Sec. 3 F.S. CONDITIONAL AND FEE TAIL (F/T)

The F/T is largely obsolete in U.S., but it is important to know how to convert the F/T into the FSA.

Entailing of land was in heavy use in England. It was disfavored, however, by many

factors because it tied up land by a dead hand.

The purpose of the F/T was to insure the descent of the land thru lineal heirs of the orig. holder.

F/T not inheritable by any collateral heirs nor by lineal ascendants.

The identity of the successive takers was by the terms of the transfer.

F/T General—

"To A and the heirs of his body."

Inheritable by all lineal heirs.

Other acceptable equivalent words:

(1) "and his bodily heirs."
(2) "and his issue."

F/T Special—

Limited the descent to the lineal heirs of the transferee by the specified spouse. ~~wife~~. If that wife died, A =

"T.I.T.A.P.I.E." (tenant in tail after possibility of issue is extinct). This would be on the named wife dies w/o having given birth. T I TAPIE = life estate in A.

F/T Special could be:
(1.) Male
(2.) Female

F/T Male –
Only lineal male descendants could take.

F/T Female –
Only lineal female descendants could take.

The evolution of the F/T must be studied in light of legislation. The forerunner of F/T = marriagium (land ~~that~~ was given by the bride's father along w/ the girl at time of marriage) which was to provide for the children born of the marriage, and it was

understood that if the had no children during coverture, the orig donor (bride's father) was to have the land back.

About the middle of the 13th Century, there developed the FEE SIMPLE CONDITIONAL. The conveyance read ordinarily like a F/T, but the courts held that as soon as A had children of the body, A got a fee/s. But, until that time, X would have a reversion.

Upon birth of bodily heir, A would get a F/S but not absolute. If A did not alienate the land before dying, the bodily heirs would take a FS Conditional.

If A → C during A's life and before heirs of the body were born, then C would only get a life estate for the life of A. If after A → C, heirs of the body were born to A, C would get a FSA.

MOYNIHAN

In U.S. today, the most common form of ~~statute~~ converts ~~the~~ what would have been a F/T at C.L. into a F/S in the grantee or devisee. Thus, a limitation "to B and the heirs of his body" will give B A F/S; AND if no valid remainder is ltd. upon, it would be a FSA. GEORGIA follows this, along w/ (N. CAROLINA) 26 other states.

As to limitations wh would under English law create a fee tail by implication, GEORGIA says the statute substitute for the f/t a L/E in the grantee or devisee and a remainder in F/S in the issue.

Three states recog. the FSC: Iowa, Oregon and especially S.C.

The only way for the grantee to cut off the reversion of the grantor (or any issue or any remainder that may have been created) is to have heirs of the body AND alienate the land.

8 MARCH 63

Grantors said, at C.L., that their intentions were being defeated by the FSC. So, the result was legislation.

DE DONIS CONDITIONALIBUS

The grantee in tail nor any heirs in tail could alienate any estate greater than a life estate for the life of the tenant in tail.

Eliminated FSC and created the FEE TAIL, a cut-down form of fee simple. It is only an inheritable estate.

A = F/T ; X = REVERSION (retained in the grantor by ~~devise~~ operation

See G.S. 41-1.

of law.

Before De Donis, A had a possibility of reverter.

Fine and common recovery were fictive, conniving methods of evading De Donis. Taltarum's case was the judicial sanction of these methods used to BOCK OR BAR THE ENTAIL.

Assignment: go on to 4E.

12 MARCH 63

"To B and the heirs of his body, then to C and the heirs of his body." —

A = reversion
B = F/T
C = Rm. in F/T.

This is at C.L. after de Donis; but, after the S/u, there could be no fee upon a fee.

In 1572, a statute prohibited the use of RECOVERY to bar any reversion or rm. w/o consent of those parties. So, the recovery was ltd. to the F/T.

Fine – statutes were passed enabling a tenant in tail to terminate the interest of his issue by "levying a fine". The fine was a personal action; recovery was a real action. The fine would bar only the issue of the T in tail, not the reversioner or the remainderman.

Barring the entail by deed has been regularly adopted in U.S. Three classes of statutes:

(1.) Convert the F/T to FSA. (N.C. & Ga. + 25 others). G.S. 41-1.

(2.) Convert F/T into life est. in first taker w/ rem. in FSA in those who would have succeeded to the F/T upon the death of the T in tail. (Fla., Ill., Kan., Mo.)

(3.) F/T converted to an estate tail for life in the first taker w/ rem. in FSA in any person who would normally succeed to the estate at death of the T in tail. Ohio etal.

The U.S. statute eliminating the F/T do not apply to conveyances that date before the enactment of the statute.

How to create F/T—

(1.) at C.L., "heirs" was mandatory. If absent, the grantee took only a L/E. Any other words of procreation (seed, children) were valid to create a a F/T ONLY if the word "heirs" also appeared.

"To B and his heirs, (or the heirs of his body) but if B die w/o issue, then to C and his heirs." — what effect would the limitation over to C have? C.L. presumption: "but if B die w/o issue" meant indefinite failure of issue. So, B was deemed to get a F/T w/ a rem. in FSA in C and his heirs. So, it did not mean if B died w/o issue, but only when issue finally failed - ultimately.

iP In most states in U.S. today, "but if he die w/o issue" means DEFINITE failure of issue, i.e., at time of death of B. Stats. in ca. 30 states adopt this. Rest. of Prop. sec. 266 adopts this view. Some states follow this by judicial decision. See G.S. 41-4 — this view.

Read Pittman v. Stanley (mimeographed case handed out).

(SEC. 4) * LIFE ESTATE *

A freehold estate. Measured by the duration of a life (or lives). 1. Not inheritable.

A (fa) "To B for life." or,
"To B for the life of C", or
"To B for the lives of B and C."

14 March 63

1. L/E pur autre vie - a L/E measured by the life of another.

Legal v. Conventional L/E - see p. 75.

L/E p.a.v. is measured by the life of another or the

joint lives of several. There, the estate is measured by the shorter life. IP But, if the context of the grant is not for the JOINT lives of B and C, then the longer life determines. IP The no. of lives by wh the L/E is measured must not be so numerous as to make ascertainment of the ending of the lives impossible i.e.g., "for the lives of all people listed in the Durham tele-phone book." If B, the grantee is listed, the estate will be measured by his own life. IP On L/E is measured by the lives of two or more, it can be measured by:
1. life of survivor, or
2. life of first decedent.
Depends on facts (supra this page).

If grantor has a L/E or a FS defeasible upon his death or that of persons identified, it will be ambig-

cous and must be deter. by the intent of that grantor, and extrinsic facts may be considered (consideration paid, relative ages, canons of construction [e.g., conveyance will be construed to sustain it on possible, and it will be assumed that a grantor intended to convey all he had] to determine the intent.

hypo: X → "To A for life, rm. to B and his heirs." Then A → "To C ~~and~~ for life." Who did C get and for how long? By whose life would it be measured? If A = 30 years old, & C = 75 years old, it will be assumed that the estate will be measured by the life of A; same result even otherwise.

hypo: ~~X~~ → "To B for the ~~lives~~ of B+C." B dies before C. — There are two life estates in B and the L/E for the life of C continues until C dies. Thus, the estate would be open to any "common or general occupant" who settles

on the land until C dies. But, X could specify a "special occupant" (e.g., "To B and his heirs for the ~~lives~~ of B and C") to take upon B's death.

The heirs would ~~not~~ automatically take because a L/E is not inheritable. Further, it is not a chattel, so the ~~executor~~ ~~admin.~~ of B's estate could not take.

"Ofm. occupant" not recog. in America. So, absent special occupant designation, by statute the estate would be treated as personalty and go to the executor (168/4).

G.S. 29-2(1)(a) - intestate succession statute. L/E p.A.V. goes to heirs as special occupants.

Legal L/Es:

(1) "TITAPIE" -

X → "To B and the heirs of his body by his wife, C." - So, after death of C w/o issue, B would have a L/E. - Rarely found today.

(2) ESTATE DURING COVERTURE (or JURE UXORIS) - a H, upon

marriage had L/E in all lands of the wife held at marriage or acquired thereafter. He was seised w/ W, and his creditors could attach.
Ended only by: (not measured by H's life)
(A.) Death of one of the ~~parties~~ spouses, or
(B.) Divorce, or
(C.) Birth of issue alive.
Obsolete now by virtue of Married Women's Prop. Acts.

Inchoate and initiate.

(3.) CURTESY (p. 76) - H's estate.
(4.) Dower - W's estate. Is now declining in use, but still active in some states. Most states have substituted "STAT. FORCED SHARE." — Abolished in N.C. as of 1960 (July 1). It would be expedient in N.C. now for W to elect to take the life estate on the H dies insolvent.

Stat. forced share can be defeated by H's inter vivos conveyances. (But, not so of Dower). — This is a possibility ~~such~~ must be considered in light of certain ~~decedent~~ descent and distribution stats.

DEVOLUTION:
descent = realty
distribution = personalty

wh allow W to elect to take under or against the will.

Mattocks v. Stearns (p. 76)

P = creditor; D = H + W. P had levied on lands of W on the basis that H, the debtor, had a life estate by curtesy in his own right (curtesy initiate because kids had been born alive capable of inheriting the property). ⊗ Does D-H have an interest that could be levied upon by creditors? YES. J/P. H has an estate for life in his own right. It can be ended only by:

(1.) Divorce a vinculo; or
(2.) Death of H.

This has been changed by stat. in some states. G.S. 52-7 says that curtesy initiate is not subject to levy. In 1960, curtesy initiate was abolished totally.

15 March 63

GS. 29-3 - abolished distinction between realty and personalty as far as testate or intestate devolution is concerned.

29-2(4) - redefined heirs to mean anyone who might have taken personalty or realty.

No curtesy or dower in N.C. Instead, an outright portion in fee simple to vest in the surviving spouse.

At C.L., widow entitled to 1/3 for life of all realty of which H was seised during coverture. (1/3 in value)

Curtesy applied to equitable estates of W. Dower applies to only that realty of which H was SEISED during coverture.

Curtesy v. Dower

England and 2/3 of U.S. have abolished Dower and Curtesy, and instead of Dower, ~~Curtesy~~ have substituted a fractional portion of the dead spouse's estate in FS.

Rule of Law

If the W's ~~fractional~~ willed share does not equal ~~the amt. left by will,~~ 1/3 of the value of the estate, she can elect to dissent from the will and take the statutory share.

G.S. 52-16 (now repealed) * CURTESY *

Voidable marriage would suffice if it had not been avoided before death.

A life estate in a H who survives the W.

Four requisites:

(1.) Marriage
(2.) Actual seisin of W.
(3.) Issue born alive & capable of taking.
(4.) Death of W before H.

HESS v. HESS (p. 80)

For dower, seisin in deed OR in law was suff.

Seisin in deed = actual poss.
Seisin in law = constr. " , or the immediate right to possession.

" As a gen. rule, a H has no right of curtesy in lands in which his W had an estate in remainder after a life tenancy if she dies before the expiration of the life tenancy and never has a right to poss."

Seisin in law not suff to support curtesy (i.e., immediate right to poss.). Must be actual seisin (or poss.).

In accord: 95/103, Nixon v. Williams.

* DOWER *

Requisites:

(1.) W must be actual wife of decedent at time of death.

Dower
v.
Curtesy

(2.) Seisin, in deed or in law, of an estate of inheritance (FS, FS Defeas., or FT) during coverture.

Beneficial

(3.) Death of H.

Dower did not attach to any equitable estates of H. Curtesy did, provided that H was not excluded by the terms of the conveyance. — Early (and in N.C.), it was changed so that Dower could attach to equitable estates of H, & this is generally true.

H's seisin must have been beneficial even though it was in deed or in law. So, a H holding B/A in trust for another would not give dower to his wife.

Assignment: continue w/ Dower. What is the Doctrine of Instantaneous Seisin?

19 MARCH 1963

186/272 - N.C. stat. changes C.L. requirements for curtesy: may attach to estates of wh W was seised in deed OR in law. — In N.C., dower & curtesy (224/405) attach to legal and equitable estates.

Curtesy required birth of issue alive; dower does not.

Curtesy was a present estate before death of W; dower was purely expectant.

Curtesy attached to ALL of W's realty; dower attached to only 1/3 of H's realty.

Was curtesy consummate subject to the claims of the dead W's unsecured creditors? N.C. "seems to indicate that the H's claims are superior."

Dower + curtesy attached only to realty. By 28-149(8) H got child's share of personalty if other children survived, if not, H took all personalty.

28-149(8)

Factors that bar D and C -

(1.) Divorce a vinculo.
(2.) Annulment
(3.) Separation and subsequent living in adultery.
(4.) K
(5.) Conveyance in wh the spouse joins.
(5.) Felonious slaying of spouse.

(6.) Renunciation of D or C by deed of separation. But, if H + W later re-united, the deed would be void (107/273) and D or C would re-vest.

Dower –

1/3 if H dies intestate. If H dies testate, W can elect to dissent from the ~~deed~~ will and take her 1/3.

Rawlings v. Lowndes (p. 82)

Sixteen (16) days between delivery of deed to dead H and delivery of deed by H to D. P = wife claiming that H became seised of B/A during the 16 days and that she is entitled to dower. D claims that the H was never seised because the deed and mortgage = a single transaction.

The issue was whether the deed and mtge = ONE transaction so that H was not seised? Ct held NO; that to constitute "one transaction", the deed and mtge. should be EXECUTED and DELIVERED SIMULTANEOUSLY, or if

N.C. follows legal title theory of mtges. (mtgee is owner as against all the world except the mtgor.). Many states follow lien theory (mtgee only has a lien v. the land, + legal title is in the mtgor.).

EXECUTED on different days, should be DELIVERED AT THE SAME TIME. If the acknowledgment and delivery of the mtge. was 16 days later than the date of the deed.

If the H was only INSTANTANEOUSLY SEISED, dower would not attach because H was only a conduit thru wh legal title passed. On deed and mtge. form one transaction, H is seised only instantaneously.

(See B.U. notes on W's dower in mtged. property.)

* On mtge. or similar lien is superior to dower:
(1.) On the lien attached before marriage.
(2.) H & W join in mtge.
(3.) On mtge. given during coverture to secure purchase price of the land.

In the three above, W's inchoate dower in the land is good against all except the mtgee + those claiming under (216/237; 201/404.)

him.

When mtge. is paid off, W may redeem her dower right.

If H ⟷ mtgee. (B/A wh H owns) during coverture and W DOES NOT JOIN, W's dower is not cut off and is paramount.

On W joins, mtge. prevails over W <u>to the extent of the prop. necessary to protect the security.</u> So, her dower would be in any amount in excess of the amt. necessary to satisfy the mtgee., and her dower in that surplus is superior to the claims of any unsecured creditors. TP / N.C. follows <u>SURETY RULE:</u> W who joins in mtge w/ H stands in the nature of a surety on it is no surplus, and she would not have a superior claim to the mtgee or any secured Cors, but she merely has an unsecured claim v. the (87/817) estate. — Minority View. The majority

of states reject the Sweatt Rule.

21 MARCH 63

80/F.2d. 172; 215/565; 204/86; 187/817 – re N.C. view on mtges. v. dower. Follows view #1

Three views on W joins in mtge.:
(1.) 1/3 in all regardless of mort.
(2.) 1/3 in surplus after foreclosure by mtgee.
(3.) Nature of mtge. deter. the extent of W's dower:
(a.) If mtge = merely loan mtge after marriage on W joins, she is ~~entitled~~ entitled 1/3 of whole computed thereon; but can be satisfied only out of surplus after mtge. is paid.
(b.) On if is purchase money mtge., W is dowerable in surplus only.

Universal rule: W has equity of redemption that had been invested in H.

G.S. 30-6 – no dower in purchase money mtge even on W does not join during coverture. Same for purchase $ deed of trust. But, a solvent estate is required to redeem the mtge. so that

W may get dower in all.

⊗ Ow H owned ~~by~~ unmtgd. Land at time of ~~mtge~~ mapping; ~~to~~ his later mtged
(1.) If w does not join, mtgee takes subject to dower of w.
(2) Or w does join, is she entitled to eq. of redemption? Two views:
(Mass.) (a.) No, joining = absolute release.
(n.c.) (b.) Yes because dower is a prop. right & she can (187/817) require the estate to redeem the prop. from the mtge. She is Ctd. to the capital value of W's right of redemption.

In states limiting w to surplus on sale has joined in mtge., she has ~~to~~ slope equally ~~decree of~~ in the surplus ~~with~~ the other unsecured creditors. But, N.C. follows (along w/ Ohio) the quasi-Surety theory (p. 77, supra), and has signed the mtge. only for the benefit of the mtge and his others. 197/152.

Sec 197/152.

217/555 - leading case, Brown v. McLean

⊗ If W joins in mtge that turns out to be void, her dower (in any state) is left intact.

Brown v. McLean — In "surplus theory" states, → ow joined
if y is no personality remaining, the w cannot be satisfied out of unencumbered realty. Unsecured Cors are satisfied out of personality only, and she is treated as an unsecured Cor. But she can:

(1.) Have the intgc. satisfied by selling first the 2/3 of the land not covered by dower, and if that still is insuff, she can also sell her remainder interest in that 1/3 of the land; or —

(2.) She can allow sale of all realty and become Cor of H's estate to the extent of her dower sold but unsatis. by the surplus. Here, the dower status is abandoned.

No state gives w a standing of a priority Cor in the surplus (i.e., the personalty). Note: remember that w has dower in 1/3 of the value of realty, but it is paid out of personality, or she can request it in the home place (e.g.) for life.

Interests Subject to Dower -

(1.) Crops and timber - if in states (145/55) which allow dower only in realty, it would not attach to any timber severed at any time before death of H.

(2.) Adverse Poss. - at C.L., right to bring ejectment ≠ seisin, and W would not get dower if H had never had seisin during coverture. Same in U.S., and applies (46/43o.[1854]) to a H who only had an unexercised right of entry.

W of H/pos gets dower, but it, like her H's title, is defeasible until the statute runs and ripens his title.

* Assign. - Quare dower in defeasible fees or any type of defeasible estate? See Burbee, p. 282 + 283, footnotes 32 + 33 ("Buckworth rule").

34 Haw. L.R. 592 - RE A/P.

Buckworth v. Thirkell (1785) - (contra to Rest. of Prop., §54) on a H, owner of B/A in FSD, dies and the cond. then occurs, held:

"During the life of the W she cont'd. seised of a FS to wh her issue might by possibility inherit. I am of opinion that the D is entitled to be tenant by the curtesy."

(So, the remainderman was cut off.)

82

22 March 63

G.S. 30-5 - Dower: read this thoroughly!

[The W's dower is to the extent of 1/3 of the value, but it is in the land and other realty. She can get a cash settlement only in some few circumstances.]

At C.L., the right to maintain ejectment ≠ seisin. Some for a (486/430) mere right of entry for cond. broken.

Re A/P, see Thompson v. Id.

* A dissessor (H/pos) has tortious seisin, suff to give W of the dissessor dower. But, it is defeasible dower until the S/L has run. 32 N.E. 267.

* Dower applies only to estates of (191/227) inheritance (legal at C.L., legal or eq. widely by statute) by issue. 190/102.

* Exchange estates - e.g. H owns B/A; X owns W/A. They exchange during coverture of H. - W cannot have dower in both. She must elect. But, it must have been a mutual exchange of equal estates.

Dower existed as to estate of H owned as T in common (1/3 of 1/2).

Same for J.T. on right of survivorship has been abolished (41-2, g.s., has done so). Otherwise, no dower in J.T. 199/612; 214/441. IP In co-tenancy situations, dower is subject to the right of the co-T to have partition made. 167/67.

Estates by the Entireties - another form of co-tenancy. Between H and W. Recog. universally. On unmodified by stat., no dower can attach because y is an incident of survivorship and the inheritability is (188/200) thereby destroyed.

Re partnership prop. - apart from K or stat., dower attaches to Pr realty subject to pymt. of Pr debts and adjustment of Equities. 59-55(b)(5) - now holds no dower attaches. U. Pr. Act in accord. 243/18, Ewing v. Caldwell (1955).

No dower in L/E, not even pur autre vie.

No dower in perpetual leases. A fortiori, no dower in any lease.

* No dower in estates at will.

Dower in Determinable Estates –

Gen. rule – the fact that H's estate of inheritance has a deter. quality ~~—~~ will not defeat dower; but on the determination (192/221; 190/85; 186/349) occurs, the dower must fall.

So, dower attaches to a defeasible fee until the cond. occurs. But, the point of contention is in regard to F.S.S.T.E.L., because it has been held that on the exec. lim. occurs, the dower will ~~not~~ attach anyway. — "To A & his heirs, but if A die w/o issue him surviving, then to B and his heirs." — F.S.S.T.E.L. Split of authority – Rest./Prop. says (§54) that the dower would fail if A dies w/o surviving issue. The contra: Buckworth case: her dower is independent and would survive.

(This split applies also to one H has power of appointment.) The Buckworth case says that even tho' no issue survived H, this was still an inheritable estate because if issue had been born & survived, they would have inherited. — This Buckworth case was a holding of curtesy + has been applied by analogy to dower. It is an anomalous rule + only 11 states follow this rule (N.C. does: 190/815, Alexander v. Flemming).

* Powers of Appointment (EXAM!!) — e.g., life tenant has power of apptmt. (77/430). The power does not enlarge the L/E, so W of the life tenant would not get dower. If he appointed the fee to himself during coverture, W gets dower. If H has a FS + power of apptmt., H = defeasible fee + W gets dower.

No dower in W of remainderman or reversioner.

No dower out of dower — (dos de dote peti non debet) a

190/815; 92/72

... if the rm^man or reversioner predeceases the ~~life~~ tenant.

W is not dowable, out of lands assigned to another woman in dower.

hypo: "To A + his heirs." A dies, + W of A gets 1/3 dower. The 2/3 goes to S, son of A + W. S is married. S predeceases W, his mother (S = remainder-man). Does W-2 (W of S) get dower in the 1/3 gotten by W? No. But, if W had never been "assigned" dower (set aside, i.e.), W-2 would get dower in the 2/3 and the 1/3. — If there was assignment of dower to W, that assignment would not be a bar to W-2's assignment of dower.

26 March 63

Seisin of [redacted] widow (W) in dowable realty relates back to time of death of H. The son gets seisin in 2/3 and a reversion expectant in the 1/3 of W.

hypo: A owns B/H in fee simple absolute. W = wife of A. A $\xrightarrow[B/A]{\text{deed of sale}}$ S. S is seised of the whole. If W did not join,

at death of A, the seisin of A is fictionally interrupted so far as 1/3 of B/A is concerned in favor of W's dower.

hypo: H owns B/A in FSA. A + W, married. W, predeceases A. A marries W_2. A dies. — W_2 gets dower. — (Naturally!!)

Stahl v. Stahl
114 Ill. 375, 2 N.E. 160 (1885) → Our two wives are entitled to dower, first wife takes first, and second has dower subject to W,'s dower.

N.Y. recog. dower only as to people who married before 9-1-30, and attaches only to prop. owned before 9-1-30. — W's distributive share is in lieu of dower (on applicable in N.Y.), and W in N.Y. (before - 9/1/30 - marriage) must enter upon the land before the expiration of 6 mos. next following H's death.

Dower is strong in Va. Code 64-27. In Va., if H dies intestate w/o heirs, she gets dower in ALL, not only 1/3.

Georgia - dower in 1/3 of realty of wh H DIED possessed. And W can get cash instead. W entitled to

Ga. Code 31-101
" " 31-108

live in dwelling house before assignment of dower. Some at C.L. for 40 days; right of quarrantine.

Taxation of Dower —

Is dower subject to inheritance tax? * Minority rule (N.C.) - dower is inherited. * Majority - ~~w~~ takes by purchase, not by inheritance, and, therfore, inheritance taxes would not attach.

G.S. 105-2(2)

In N.C., dower & W's year's (17A-67) allowance are deemed subject to the inheritance taxes. But, first $10,000 is exempt from tax anyway.

Allotment of Dower —

G.S. chap. 30 (Procedure)

Methods:

① Agreement w/ heirs - Official deed (G.S. 30-11) agreeing on assignment of dower. Best method because least expensive, better family relations fostered, doesn't tie up

the estate nor deplete it.

(2.) Petition to court — by W, or heirs after three mos. if W has not petitioned. Could be part of partition proceeding. W could intervene or be impleaded. County of last usual residence of D = proper place for petitioning. All interested parties must be made parties. Cors not interested parties necessarily, but they may join, and should be invited to intervene. Realty must be accurately described. W must specify her preference as to the form in which she wishes to take dower, altho' she cannot elect: she has no choice as of right. This stmt. of preference will be considered by the jury (but not binding on jury). Homesite must be awarded unless W requests otherwise, provided that does not exceed 1/3 of value of the estate. W can request that the value of her dower be compiled

and given her in F.S.A.

G.S. 29-30 (new stat.) - W, on H dies intestate, can elect life estate instead of stat. distributive share. If estate is small, insolvent or she is independently wealthy, better that she take the 1/2 in 1/3 rather than the distributive share. If H dies testate, she has the above two choices plus the choice of the testamentary disposition.

"Widow's" year's allowance now goes to any surviving spouse. Out of personalty, and may be taken in form of personalty or cash. By stat. in N.C., W = $1000.00, each child = $300.00

28 March 63

Valuation of Dower —

Dower Consummate —

(1.) Value of realty - depends on productive value. 25/61.
(2.) Age of W
(3.) Life expectancy ~~tables~~ of W — the life exp. table is only evidentiary, not controlling.
(4.) Habits, constitution & healthy.

Dower Inchoate —

Same 4 factors above as they affect W AND H. See ⊛ 197/152.

Value is the test rather than quantitive factor. The 1/3 goes to value rather than quantity. 25/61. G.S. 30-5; 215/565 — get the full value of all realty, ~~encum~~-cumbered or unencumbered.

Valuation of dow. inchoate usually only done to, e.g., let a lienor know the extent of her claim.

10 year S/L for W seeking assignment of dower IF she is out of poss. If she is in poss., no S/L. If she later relinquishes poss. before seeking assignment of dower,

the 10 year S/L then starts to run. 176/270; 161/541 = re 6 mos. S/L to dissent from will and take stat's share.

Eg. of redemption of mtgor. will be lost if not exer. during 10 years of mtgee's poss. But, failure of mtgor to redeem w/in 10 years of mtgee's poss., will not affect W's dower in the mtged. prop. She would still have 10 years from H's death to assign dow.

* L/Es Created By Act of the Parties *

Zimbler v. Abrahams (p. 85)

P brings ejectment alleging the document = lease and that he had the ~~right~~ power to eject D even though P might be liable for br/covenant. D alleges the document = deed of a L/E because it was not under seal & the stat. here said that all leases must be under seal; that, therefore, it failed as a lease; that some effect should be given to it; that

DEMISE = lease, or let

Since D could have sought sp. perf., it should be deemed effective as a deed of a L/E because D could possess "as long as he lives in the house and pays rent regular."

Did this document create an immediate interest in the land in the D, and, if so, what interest? Ct. said no immediate interest was created because it would have required a formal deed. But, even though no interest in the land was created, it didn't create a mere tenancy from week to week, it did create a lease for life subject to [redacted] two conds.: payment of rent regularly and living in the house. This = a K to let the premises for life because D could have sought and obtained sp. perf. of the K. — This was a lease at the will of the lessee.

The modern view is that a lease at the will of the

lessee creates a L/E at least, depending on (35 Mass. 527) the language used. Sometimes may create a F.S.

Cts. distinguish between a lease presently operative, and a ~~lease~~ K to create a lease in the future.

Statutes usually provide that a deed is needed to create a conventional L/E, and other formalities may be required. Failure to comply = tenancy at will.

Thompson v. Boyter (p. 88)

NAME CASE

Purchaser of leased prop. takes subject to the rights of the tenant.

"... while he shall wish to live in Albert Lea ...." D says he has a L/E determinable. The court agreed, and it was "terminable only at his death or his removal from Albert Lea." T/D/Aff'd.

* A L/E may be created by lease, deed or devise,

Min. View – Where ~~y~~ is no fixed or ascertainable term, the lease is at will. And a lease at will of the Lee is also at the will of the Lor. (followed by N.C.)

Rule of Law

and a tenancy terminable at the will of the lessee only creates a L/E. That is the majority Rule and w/ author. ✱ See Rest. Prop. §§18, 23, 21. (Case on cbk. 137 = min. view followed by N.C.)

Assignment

✱ Restatement of Prop. ✱

Sec. 18 – An estate for life is an estate which is not an estate of inheritance, and

(a) is an estate wh is specifically described as to duration in terms of the life or lives of one or more human beings, and is not terminable at any fixed or computable period of time; or

(b) though not so specifically described as is required under the rule stated in clause (a), is an estate which cannot last longer than the life or lives of one or more human beings, and is not terminable at any fixed or computable period of time or at the will of the transferor.

Sec. 21 – An estate at will is an estate wh is terminable at the will of the transferor and also at the will of the transferee and which has no other designated period of duration.

Sec. 22 – Estate at Sufferance

An estate at sufferance is an interest in land wch exists when a person who had a possessory interest in land by virtue of an effective conveyance, wrongfully continues in poss. of the land after the termination of such interest, but w/o asserting a claim to a superior title.

Sec. 23 – Special Limitation

The term "special limitation" denotes that part of the language of a conveyance wch causes the created interest automatically to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest.

29 March 63

Estate at Will —

If term. by will of L^or, L^ee may also terminate. Blackstone.

If term. at will of L^ee, it is also terminable at will of L^or. per Coke. And on accompanied by livery of seisin at c.l., it amounted to L/E determinable. This same idea is followed by many courts and is the holding of THOMPSON v. BAXTER, (p. 88.)

An estate "during widowhood" (durante viduitate) = L/E determinable.

Utty Dale's Case (p. 93)

Grant "To J.S. for life and for the lives of A and B." J.S. died. — The estate was for the lives of each and would last until the last one died. Thus, after J.S. died, the estate cont'd. — If A and B then granted to X, X = "special occupant."

If "To J.S. for the joint lives of A & B", the estate would terminate upon the death of the first of A & B to die.

Incidents (Rights and Duties) of 4E —

Murch v. Smith Mfg. Co. (p. 95)

D denies liab. for tax arrearages existing at time D took by judgment. — HELD, the only right of the D corp. in this prop. is as purchaser of the L/E of Murch under a judg. It STANDS IN HIS SHOES, TAKES ONLY THE INTEREST WHICH HE HAD, AND WITH IT ITS LIABILITIES.

Duty of Repair

The life T is bound to keep the premises in as good repair as they were when the life tenancy began; he is bound to make those rendered necessary by actual wear and tear; to renew the roof and repaint when required to prevent decay.

Suppose

Taxes

X (fee) "To A for life, then to B for life rem. to C and his heirs." A fails to pay taxes. After B takes, city sues B for tax arrears accruing during A's tenancy. — T/B: here, B did not stand in A's shoes, but took directly from X, and would not take subject to A's liabilities.

Computed on aggregate basis.

The liability, as a rule, of a life T for taxes is ltd. to the income received, or the rental value of the property in case it is occupied by the life T.

195/399 – in accord w/ main case (ntt/authority).

Loss Due to Fire – If house burns down, life T does NOT have a duty to rebuild: he's not liable for damage caused by an act of God. He is liable if he caused fire.

(Texas) Minority View – 276 S.W. 680 – non-productiveness of prop. does not relieve life T of duty to pay taxes.

So, duty to pay taxes exists except:

(1.) On transferor provides otherwise.
(2.) On life T and remainderman agree otherwise.
(3.) On the land is unproductive. (Majority rule).

Remainderman can recover damages from Life T for failure to pay taxes. Some for waste.

A subsequent life tenant will take the land subject to any outstanding liens on the land. (Quaere: see hypo, this lecture, supra.)

Remainderman can get receiver appt'd. to collect the rents, etc., and apply them to taxes on life T fails or refuses to do so.

S/L = 10 years to foreclose lien from date tax accrues.

— G.S. 105-422 ; Assignment 105-110 (forfeiture of life T for failure to pay) + 233/190 (read this, she said. Maybe on exam.), and read fire cases. Can life T get dams. from 3 party tort feasors, if so, how much? Re waste, G.S. 1-533 thru 538.

2 APRIL 63

223/550 – tax foreclosure sales.

Re tax sales, see a hornbook K. She spent some time on this.

G.S. 105-422 – S/L on foreclosure of liens and special assessments = 10 years from due date.

Absent local (county), stat., N.C. imposes no S/L on foreclosure of tax lien when attempted by a taxing unit. And see 105-391. G.S. 1-56 (gen. residuary S/L) applies to foreclosures for taxes, by private persons. Private persons have a longer S/L than municipalities.

Q. What [redacted] quantum of estate does a purchaser at tax sale get on it is subject to two or more successive estates? Two theories:

(1.) (N.C.) Purchaser takes whole estate not subject to the present poss. and succeeding estates.

(2.) That the purchaser takes only what the present possessor has, and the succeeding estates would be unaffected.

185 S.E. 157 (Ga. 1936) – H/E = primarily liable for taxes on entire prop.

Uniform Principal & Income act = allocation of liabilities to L/T and remaindermen. 37-1 to 15

Does a L/T forfeit for failure to pay taxes? G.S. 105-410 sets up if L/T fails to redeem w/in apt time (4 yrs). 105-387 to 393 have affected the in-

terpretation of the stat. 222/226, Crandall Case — leading case!
No forfeiture automatically under 105-410; it is subject to judicial determination (232/539, Eastman Case). — Crandall held it would be no forfeiture at all.

Rayburn v. Wallace (p.97)

H = L/T (P), D = child of H and deceased W. Should L/T pay total amt. of assessments for improvements on streets abutting, or should D - remainderman be required to contribute? Held, for D: contribution must be ~~determined~~ Confined to cases of assessments for improvements, which, in their nature, are permanent (i.e., not requiring periodic replacement or renewal).

Assessments for Improvements

"If, however, an assessment is made v. the estate for something in the nature of a permanent improvement or betterment of the whole estate, the

assessment may be ratably and equitably divided between the L/T and the remainderman."

Chambers v. Le (p. 100)
Contribution allowed because the assessment was for permanent improvements (curbing and a sewer). They were exceptional and extraordinary in their character.

Taxes
As between parties, the L/T is only primarily liable; but as to the taxing unit, the L/T holder (~~the remainderman~~) is liable.

2 N.E. 2d 581 (1936) — personal liab. for taxes or assessments not allowed. The tax, etc., is v. the land. However, the person is personally liable on he has promised to pay (See 39 S.E. 2d 277 [Va. 1946]).

Action of contribution is based on theory of subrogation in mtge. cases.

224 N.C. 677, Beam Case. Reason: the party seeking subrogation was under obligation to pay. He must not be a mere volunteer.

Rekowsky v. Kisczinski (p. 101)

Forced Sale (Equity)

Despite unproductivity of a L/E, Equity will not compel sale on to do so would extinguish future interests, except on the sale is necessary to preserve all the interests involved. 225/520; G.S. 41-11 (247/584).

On sale is compelled by Eq. all interests are preserved and each holder of an interest will get his ratable share.

Eq. has inherent power to force sale on appropriate; and Equity's power is not dependent on statute.

4 April 63

G.S. 41-11 - sale for re-investment.
247/584

* LT can compel sale of land wh is unproductive for the purpose of reinvestment.

All interested parties must be represented in the proceeding under G.S. 41-11, and be parties to the suit.

If one of an interest refuses to join as a party P can be made a party D. 200/237, Stepp v. Sl; 223/421.

The receipts of the sale are impressed w/ the same limitations & contingencies as were on the prop. it-self.

Under 41-11, ct. may order the sale of any part of or the whole prop. if the interests of the interested parties will be served. & may order a mtge. if that will best serve all interests (no matter how contingent).

Rogers v. Atlantic, Gulf & Pac. Co. (p. 103)

A LT may recover dams. for injuries caused by a third party tortfeasor to the LT's interest AND to the remainder. The LT recovers

rest on the theory of waste, but on the theory of trusteeship.

Waste: Liability of L/T for ...

As a general rule, the L/T is liable to the reversioner (or remainderman) for all injuries amounting to waste, by whomsoever committed, even by a stranger, the only exceptions noted being injuries caused by the act of God, the public enemy, or the reversioner or remainderman himself, and the obligation of the L/T is frequently likened to that of a common carrier.

Rogers Case = minority rule.

(65 N.C. 2d 814) Majority view = L/T can recover only for injuries to his life interest. Sec. 118 of the Restat. of Prop. in accord. Also, N.C. (195 N.C. 415).

(195/415)

L/T is entitled to emblements (crops, etc.) produced by the industry and labor of L/T.

T-planted
If the L/T dies before the crops can be harvested, the admr. had a right of entry to harvest them.

WASTE
-unreas. use of right of enjoyment that results in appreciable permanent injury to the realty.

A L/T and any T for years has the duty not to commit waste.

Rights of use of land Ltd. by:
(1.) Rights of adjoining landowners.
(2.) Stat.
(3.) Outstanding subordinate interests (easements, etc.).
(4.) Ltd. period of time on the holder has less than a fee, and by duties owed to any holders of future interests.

Holders of future interests have a right of entry to deter. if waste is being suffered or committed.

*Three approaches to law of waste:
(1.) attaches liab. to certain acts despite the context in wh the acts

take place. Most superficial and least desirable approach. e.g., "cutting timber = waste", etc.

(2.) Functional Approach — majority rule in U.S.A. & England. — An act = waste only when it prejudices the inheritance. This is good view but begs the question: what does "prejudice" the inheritance?

(3.) (Better view) Intention approach — sets out the true rationale of waste. The intention of the donor will control whether implied or expressed. If the donor did not intend that the questionable act is waste, that will prevail. The test: the usual intention of the donor is that the land be used reas. to accomplish the purposes of the transferred prop. In the cases of AMELIORATIVE WASTE, the test is whether the

alleged wasteful acts have departed from the standard/conduct on the T by:
(1.) Terms of the instrument;
(2.) Custom of community;
(3.) Requirements of public policy;
(4.) Standard of reasonableness.

Kinds of Waste:
(1.) Voluntary – affirmative waste by T.
(2.) Permissive – failure to act on y is duty to act.
(3.) Equitable waste – even tho' the T would not be otherwise liable for waste, if T does malicious acts, eg. may enjoin same.

Acts gen. constituting waste:
(1.) Any act changing appearance of realty – C.L. rule. Today, not so, would have to apply one of the three approaches.
(2.) Cutting timber – exceptions:
A. for fuel, fencing or repairs on gen. operation. – Called PRIVILEGE ~~[illegible]~~ of ESTOVERS. The "common of Estovers" – ~~timber from~~ land of another.

(3.) Removal of minerals — except:

(a.) on land was already used for removal of minerals at time of poss. of the land.

(b.) as necessary for cultivation.

(4.) Removal, alteration or destruction of structures — only on the T = a short-term T. Not waste on T = L/T or long-term T.

G.S. 1-533 to 538 — set out actions for waste & the remedies.

Contingent r/men cannot sue for waste. See 75/193, 139/8. But, he can go into Equity for injunction. Reason: impracticable to assess dams. Contra: 128 S.W. 2d 581 (better view), but only very few cts. allow dams. by contingent r/man.

Common remedy; apply to ct. for receiver who will take the rents etc. & apply them.

Other remedies:
(1.) Mandatory injunction (can allowed).
(2.) Contin. r/man would pay himself, and then sue T in (restitution) Assumpsit.

Assign: L/E w/ power of disposition.

5 April 63

(1.) 51 A.L.R. 2d 1374 - re timber rights of L.
(2.) Re duty to pay taxes, 126 A.L.R. 862, 94 ALR 311; 17 ALR 1384
(3.) Re dams. for injuries, & 9 ALR 2 1107;
(4.) 170 ALR 133 + 142 - re consumables.

Is ~~a~~ forfeiture for waste? Quaere in N.C. GS. 1-533 refers to it but the question has not been judicially determined.

Hypo: John Doe = L/T by curtesy of house & lot. A, B & C = heirs at law of deceased W of Doe. Doe has $2500 ins. on prop. It burned due to negligence of Doe. He put all $2500 in bank acct. under his own name. He died ~~destute~~ leaving "all prop." to A, B & C make a claim -v- the $2500 claiming 1/3 each; that A is entitled to 1/3 only as heir,

224/505, In Re Wilson
212/231, Stockton v.
Maguire
→ on N.C. Bar as
real prop. question

not as devisee. — A L/T has an insurable interest, and if Doe had insured only his L/E, B+C are out. If Doe had insured the interests of the remaindermen also, they would have gotten their rotable shard.

But, nothing else appearing, it will be assumed the L/T has insured only his interest.

sec. 124 Real/Prop.

Creation of Interests by L/T

See Rest./Prop. sec. 124.

A L/T can convey any and all that he has. When he purports to convey an estate greater than a L/E, no estate greater than a L/E will be found to have been conveyed.

If grantor provides in document of conveyance that the L/E shall end if the grantee attempts any alienation, that will control and limit the power of alienation.

If a state (G.S. 41-11) has a stat. empowering a L/T to institute an action to convey a F/S upon sale of the prop., that enlarges the power of alienation. But, these statutes usually respect the rights of future interest holders. Upon approval by the judge, the proceeds will inure to the benefit of the fut. int. holders, or it may be reinvested and the fut. int. holders' rights will attach to the new prop.

46-23 } partition by L/T
46-25 }

Partition (G.S. 46-23 to 25) no part. by L/T v. r/man, but part. between L/Ts okay; and part. by r/man v. L/T okay.

Power to Convey

(1.) Effect of attempt to create a F/S — L/T can convey a L/E and lease for period, for years or at will.

At C.L., if L/T tried to convey more than what he had, this was called a TORTIOUS FEOFFMENT deemed intended to cut off the reversioner or r/man. Thus, the

reversioner of the estate or r/man could treat it as a forfeiture, and he would often have a right of entry. This was when the conveyance was by enfeoffment and livery of seisin.

The Stat. of Uses (1540) eliminated enfeoffment + livery of seisin (58 S.W. 2d 403, 1933 Ky.) and ended tortious feoffment because it would not longer be forfeiture.

The L/E conveyed by a L/T to X would give X a L/E pur autre vie the life of the L/T. Depending on construction of the orig. deed, the estate will be for the life of the orig. grantor, or the life of the grantee - L/T who grants to X.

a lease will end on the death of L/T, absent stat. or contraire. — after death of L/T, status of (147 N.E. 541 (N.Y.)) lessee is disputed by cts. — By stat.

58 S.E. 388 (Ga.)
78 S.E. 85 (S.C.)

in two states, the lease continues after death of L/T — grantor to the end of the lease year.

Hayward v. Briggs - 227 N.C. 108 - death of L/T terminates all rights of lessees, including rights to improvements & fixtures.

A L/T may be given the power to use all of the prop. as he sees fit, or consume any and all personalty. This can take the form of:

1. Power of appointment
2. Power to consume corpus.

(177 S.E. 898 - W.Va. - Min. view) [hypo:

X → "To W for life w/ the right to convey, use, etc., during her life as she sees fit, rem. to C (his heirs" W died w/ will to B of B/A. B v. C = T/C; the will did not take effect "during her life." — But, this ct. went off on the idea of W getting a F/S, and thots contra to majority rule (no F/S because the rem. is repugnant to concept of ~~Fee~~ F/S in W).

N.C. 196/470
200/89
180/369 # 195

The majority rule further says that only a L/E is created, but the power of alienation effer. during life will result in a F/S in the taker from the L/T. The power to alienate does not enlarge the L/E.

9 April 63

hypo: Civil action for construction of Martin Grades' will. Ps = heirs at law of nephews of M.G., the testator. Ds = heirs at law of M.G.'s W, Jennie. Will devised all to Jennie for life w/ power to convey a F.S.A., but if she should not exr. that power, then rem. to Chas. Black and his heirs. Jennie died before she conveyed anything — Rem., an unrestricted devise carries w/it a fee simple. See 216 N.C. 702, Keeper v. Thorne — did Jennie take a F/S or did she take a L/E w/ power to dispose? Cf. 180 N.C. 195; 189/628.

-80/195 References:

(B.) ESTATES LESS THAN FREEHOLD

* LANDLORD AND TENANT *

172/5 16 - Treasury.

Lease began to be used as a device to avoid usury laws which fixed the amt. of interest returnable on money loaned.

Lee could use reas. force against anyone attempting to unlawfully eject him.

1235 - Quare ejecit: An action which gave Lee (T) a right of action (a remedy) v. third parties to recover dams. Later, allowed recovery of poss. Then known as action of EJECTMENT.

Owners of non-freehold estates do not have seisin. Not was one of the reasons for denying T the real actions to support his rights.

Economic factors finally gave T real actions. The action of ejectment actually turned out better than the real actions.

Before 1677, leases could be oral, and could be created to commence in future. After S/F, any lease for

longer than 3 years (?) would be ineffective!

Definition when an owner of an interest in land transfers a lesser interest and exclusive poss. for a time, and retains a reversion, that = LEASE.

If the LL assigns his reversion to X, the legal rels. between X and T are the same as they were between LL and T. There is privity between X and T.

After execution of lease but before T takes poss., T has only an interesse termini (right to enter). At C.L., T only had a K right before entry. (Gen. Today, cts. don't follow "interesse termini", but S.C. still does). It used to work this way:

(1.) Lease to begin Jan 1. & end on July 1st. After Jan. 1st, and before July 1st, T still has not taken poss.

(2.) On lease is to commence in future.

These two cases usually raised the question of T's status before entry.

In N.C., 50 p 72, it was said that it is no necessity for relying on the doctrine of interesse termini (109/789) due to S/L. But, the question is still unclear.

Lease v. Other Forms of Transfer.

(1.) Lease gives T exclusive right of poss., except that LL has a right of entry on provided by the lease, and (by law) to enter to make repairs, etc.

(2.) License - a revocable privilege to enter on the land, but has no dominion or control and no poss.

(3.) T v. lodger - lodger has a mere license to use the room, but he does not have legal poss.

(4.) Guest - transient person who resorts to or is rec'd at an Inn (146 N.C. 366) to obtain the accomo-

dations wh the law purports to offer. — a lodger abides at a place (146/36) usually for a set time.

TEST

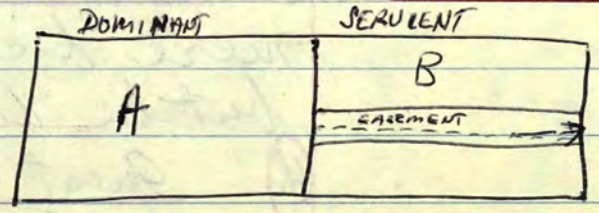
In all of these, the test of distinction is the intention of the parties.

So, the lease is distinguished from others by the exclusive right to poss. of a specified area for a time.

(5.) Easement — an interest in the land of another. e.g., a right-of-way. May arise by:

(a.) Express grant
(b.) Prescription.

It is a non-poss. interest in land. The land subject to the easement, the burden, is called the servient tenement or estate. The land benefitted by the easement = dominant estate.



11 APRIL 63

Signs usually create only an easement. But, a huge billboard w/ lights, steel girders, etc., will be evid. of an intent to create a leasehold interest.

An easement must be by written grant and (189/589) is w/in the S/F. 237/540; 238/77 — unwritten deed. Y can be an implied easement: [on grantor grants B/A wh is (241/583; 245/483) dependent on easements, it will be implied that the easement was intended to be conveyed, also]. An easement can be raised by PRESCRIPTION, 400. 226/492; 235/186; or by DEDICATION [by deed, other written instrument, or estoppel]; or by RESERVATION (if reserved in fee, must be reserved by grantor to himself "and his heirs").

A lease is different from a "share-cropping K"; A s/c is one hired to cultivate land and is paid by giving the s/c a share in the proceeds. It gives the s/c no estate in the land at all. He cannot maintain Ires. or (48/61) ejectment. He is merely a laborer.

Under G.S. 42-15 (Landlord's Liens Act) — under this statute, no distinction is made between a lessee and a S/C. Gives LL right of action v. S/C or Tenant in tort for conversion (20 N.C.L.R. 216) if the crops are sold before the LL's prefered lien is satisfied. He gets lien v. crop ins. proceeds on appropriate.

Always you must ascertain the intention of the parties. In most cases on the cultivator of land is free from control of the landowner as to how he will do the work, etc.) that will be a LL-T rel. On the landowner controls the cultivator, = M-S rel.

164/290 — mere sharing of profits will not create a partnership. 231/386, Perkins v. Langdon (name case — must read — on bar exam often); 236/40.

LEASES AND THE S/F

In majority of states, leases for more than 1 year must be written. G.S. 22-2 requires that leases for more than 3 years be written (the C.L. view, too).

"Void" in N.C. and many states has been interpreted to mean voidable. So, the party taking advantage of the S/F must plead it.

Mining leases in N.C., regardless of duration, must be in writing.

Computation of time is from the date of the execution of the lease, and not from the date the lease is to take effect. 172/700; 179/628; 198/104; 226/113, Wright v. Alry - oral lease for 1 yr. w/ privilege of renewal for 4 yrs. - Held, this contemplated maximum term of five years, and fell w/in the S/F. Despite the fact that T may not have renewed, if T had renewed,

LL would have had to lease for the remaining four (4) years.

A lease (226/252) for life or any indefinite period comes w/in the S/F.

If y is an oral lease for less than three (3) years and the T is not in poss. a grantee will take free of the lease because y would be no constructive notice to anyone of the lease (y would be neither a writing nor poss.).

G.S. 42-4 (120/113) - action for use and occupation - in the nature of restitution. This is on y is a voidable lease and LL gets something in the nature of rat for the use and occupation of the premises. 225/211.

Dw y is entry and occupancy under a VOID leasey the rd -

relationship of tenancy at will is raised. But, entry and occupation under an executory K for the sale of the lands does not create a tenancy, under the ~~not~~ / author. But, on this latter point, is much disagreement.

Oral assignment of an unexpired term of lease ~~or~~ will still have more than three years from the (145/22) date of the assignment to run = ~~no~~ in S/F.

Only "the party to be charged" need sign the writing. i.e., The one sued = "the party to be charged." But, practically both parties should sign. 244/195.

Seal Lease not required to be under seal, so an agent may sign for LL or T, and his authorization need not be under seal. If he signs his own name ~~that~~ (111/166) may be sufficient under

S/F, and parol evid. may be intro. to show agency.

Under S/F, the lease must adequately describe the land.

90/106; 137/183 — does not recog. the part performance doctrine as taking the transaction out of the S/F. But, most states recog. part performance.

A lease must be recorded to give notice. Assignment of accruing rent (an interest in realty) must be written and recorded. Rent already accrued = personalty.

Accruing V. Accrued Rent

Missed class on 4-12 and 4-17 and 4-18-63 (Hour).

go to p. 133 from here.

2 May 63

Arbuz v. Exley, Watkins Co. (p. 174)

Fire

Distruction of the premises by fire does not discharge the obl. of lessee for rent (that is re land). If lessee had covenanted to ~~rebuild~~ leave the premises in good repair, he would have to rebuild.

Lease void under S/F = tenancy at will at the beginning; but if the lessee pays periodic rent, the lease will become a periodic tenancy. The void lease is admissible only to give evid. re rent to deter. the nature of the P/T. (year to year, mo. to mo., wk. to wk., quarter to quarter).

In questions re nature of the tenancy on ∴ is entry under an unenforceable lease it is universally held the ten. in its incipiency = T/Will. But, most cts. say that it can be converted to a ten. from year to year.

On the orig. entry ~~is~~ and occupancy were

under a defective lease for a definite term, the initial (225/211) ten. is at will. 177/318. Thus, N.C. seems to have approved the rule that a ten. from yr. to yr. arises on yearly rent is reserved, paid and accepted. But, other N.C. cases say that only a T/will can arise and a ten. from (179/628) yr. to yr. cannot arise despite yearly rent reserved, paid and accepted. 226/252. 93 S.E. 675 (1917 — recog. P/T w/o discussion of T/Will.).

Doe d. Thompson v. Amey (p. 178)

K to execute lease here. The lease was defective and the K was oral. But, the oral K was specifically enforceable and gave rise to P/T by operation of law, and the covenants of the defective lease were applicable to the rel. of LL-T.

Doe d. Tilt v. Stratton (p. 180)

D a T in poss. under an oral K to execute a defective lease wh provides for definite length of duration, entitled to

notice? Court here held no because the lease expires by its own terms at end of the definite period. — Minority Rule.

See case note p. 181 for Major. rule.

74 A. 682 — re time for pymt. of rent.

Richardson v. Langridge (p. 181)

P = sublessee.

Q. Is lessor (D) liable in tres. for entry upon land held by the T under a lease for indef. duration and w/o reservation of specific periodic rent? = Held, no. That would be a T/will, terminable instanter upon ouster by lessor w/o necessity of notice.

Humphries v. Id (p. 183)

T at will not entitled to 6 mos. notice. A lease that the T should hold only as long as the lessor wishes is not a periodic T, but is a T at will.

(3.) EXPRESS CREATION

Israel v. Beale, Admr. (p. 184)

Death of Lor or Lee does not terminate the lease for a period. But,

provision was in lease that only the named L^ll could occupy the premises. However, that could not be implied to mean that death of lessees ended the periodic lease from yr. to yr.

But, death does terminate a tenancy at will.

182/366 - oral notice okay.

G.S. 1-585 - requirement of written notices applies only to procedural notices.

B/P on party alleging notice to show notice and sufficiency.

122/195 - on bar exam. In part superseded by statute; in part good. 119/343 - rd notice, too.
See 179/335 - estopped to deny LL's title.

* (Chap. IV) Seisin, Poss. & C.L. Methods of Conveyancing

(1.) Feoffment - early C.L. Transferred poss. of freehold estates along w/ livery of seisin. Entry by transferee on the land was required. While by the transferor declared the transfer and

the quantum of estate conveyed.

On transferor took transferee only seisin sight of the land to be transferred, that was Enfeoffment in Law, and would be effectual provided that the transferee took poss. before the death of the transferor.

Enfeoffment did not create any estate to commence in future.

Two parts to Enfeoffment:
1. Entry on land + 5 words of donation;
2. Livery of seisin.

Notoriety of the transaction was important during those years.

After the thirteenth cent., clod of dirt and Charter of Feoffment came into use. The Charter spoke in past tense and represented the transfer by feoffment already taken place.

2. Fine
3. Common Recovery

Go to P. 153, infra.

23 April 63

(p. 128) Boston Molasses Co. v. Commonwealth

Issue: Is a Lee obliged to pay taxes on the leased land?

The stat. may require that the party in poss. pay taxes, but that statute does not preclude ultimate liab. on the Lor.

The gen. rule is that where the lease is silent upon the subject, the Lor has the obligation to pay the taxes on the leased prop.

HELD, the special provision in this lease that the Lee should pay certain taxes specified makes clearer the intention of the parties that he should not be held liable finally for any others. So, the final liability for the tax must, as between the parties, be cast upon the Lor.

So, in the absence of express agreement in the lease, Lee has no obligation to pay taxes or assessments. And an agreement (to pay taxes) in the

Re rent, Burby, chap. 14 esp. at p. 232.

lease does not imply an agreement to pay assessments.

TERMINATION OF LEASES

Methods:

(1.) Expiration of specified term - when the term ends, the interest ends and no notice need be given on either side. But, a demand may be required by statute before action to recover land may be begun.

Legal Counting. A lease for one year from Jan. 1st, 1962 begins at 12:01 A.M. 1-1-62 and ends on 12-31-62 at midnight. 180 So. 689; 56 S.W. 2d 159 (Mo. App. 1933)

(2.) On special limitation - on a stated event occurs, the lease ends then. Whether a cond. (159 A. 487; 16 N.E. 2d 20, 118 A.L.R. 274 at 283) is a special lim. or a cond. subsequent depends on the intentions of the parties. A spec. lim. ends the lease automatically;

10 S.E. 585 (Ga.)

a cond. subsequent, when broken, gives the Lor power to terminate, but the lease continues until Lor terminates.

(3.) Forfeiture — i.e., right of Lor to enter and terminate due to breach of some covenant by Lee. Forfeiture (an option of the Lor) ends Lor – Lee rel. But, y can be no forfeiture in the absence of expression in the lease or agreement of the parties that y be a forfeiture. Absent such stipulation for forfeiture, Lor can only seek dams. for br/covenant. No forfeiture for failure to pay rent unless expressed in lease or otherwise agreed. Any forfeiture clause is strictly construed by courts.

. N. C. has a statute that y shall be a forfeiture for failure to pay rent (G.S. 42-3) 10 days after demand by Lor. G.S. 42-33, however,

42-33

protects the L^ee against a hasty eviction. These two statutes are in pari materia (material together) (i.e., will be looked at jointly and construed in the light of each other).

L^or can waive a forfeiture or breach of covenant, e.g., Acceptance of rent w/ knowledge that there was a breach. The gen. rule is that a waiver by L^or will occur on the L^or does any act, after a breach and w/ knowledge of, which recog. the tenancy. 183/440. But, acceptance by L^or of rent due up to time of breach ≠ waiver.

(4) Surrender — a method of termination of a leasehold estate. It is the yielding up of an estate by the owner of a present possessory leasehold estate to the owner of a future interest in the same land, a reversioner or remainderman. It is the opposite

of a release (or future interest holder gives up same to the holder of a present poss. estate). The L^or and L^ee must mutually agree. Otherwise (195/274 - name case in LL-T law), it would be an abandonment by the L^ee. A surrender of an executory oral nature of a term wh has more than three years left to run (249/221) is w/in the S/F. But, if the lease has less than three years to run, the surrender may be oral.

Read (Morgan v. Litterloh) →

See 195/282, Womble v. Lee

"Acceptance" whether the L^or has accepted the surrender is a question of fact (198/112). Or L^or "accepts" the keys and enters upon the premises and re-lets them, that is not an "acceptance in law". It remains a question of fact whether L^or re-let for his benefit or for the benefit of the L^ee because in N.C. and majority of states, the L^or, in this situation, has the duty to minimize

damages. But, in practice, to play it safe, advise your client (Lor) to send a notice to the Lee that he (Lor) is re-letting for the benefit of the Lee and on his account.

Rule of Law

A right of entry upon cond. broken may exist in one w/o a reversion. Doe d. Freeman V. Bateman (p. 126.)

25 APRIL 63

* TENANCY AT WILL *

E/w = estate at will

May be terminated at any time by either Lee or Lor.

Two ways to create:

(1.) By act of parties
(2.) By operation of law.
  (a.) T in poss. under lease unenforceable under S/F.
    24 S.E.2d 678 (Ga. 1943).

[By w/t/author., an occupant under an unenforceable purchase agreement ≠ T; he's only a licensee. A person in poss. of land w/ owner's

consent pending a purchase or lease agreement, by the <u>LT/author.</u>, is only a license.

<u>Under majority view, a deter. estate for years ≠ a tenancy at will.</u>

E/W = an estate terminable at the will of either party.

<u>"To A for so long as he desires"</u> = split of authority. The <u>majority view</u> = L/E determinable (Thomson v. Baxter, p. 88). Some say this would be a FSD. Some say it would be an E/W.

On a lease is terminable by Lee alone, the minority view (and N.C.) says that it would be an E/W and would ∴ be terminable at the will of the Lor, too. Read (!!) 215/417; 225/211.

215/417
225/211

On lease says it is terminable at the will of the Lor only, the implication is that this would be term. by Lee, too. So, it

would be an E/W.

On term. by mutual agreement, some cts. say that a unilateral action would not end it, and it would be a L/E deter. if it meets the formalities of the S/F. Contra: 90 N.Y.S. 2d 957. Same on it reads "until the parties agree."

Say v. Stoddard (p. 134)

Stoddard, Sr. = LL. Adley = T. D = son of LL. P = sub-lessee. Action for damages for alleged wrongful actions of D in taking away all doors and windows during cold weather. D demurred to P's petition and was sustained.

Was D liable in dams. for the wrongful eviction of P? Held, NO. This was a tenancy at will. Provision in lease or statute for notice will not affect the status of parties to a tenancy at will.

T/w = tem. at will.

Methods of Terminating T/w

If was no privity of estate or K between Lord D.

Death of one of the parties will term. T/w (by operation of law). Other ways:

(1.) Desertion of the premises.

(2.) Assignment by the T.

If LL term. (216 S.W. 2d 898) the "lead lease", all sub-lessees' interests are also terminated. A sub-Lee stands in the shoes of the Lee.

230 S.W. 2d 770 (1950) — If are no direct rights either way between Lor and sub-Lee. But, he can pay the rent directly to the Lor due under the lead lease (the lease between Lor + Lee) to protect himself against a forfeiture of Lee.

NOTE: * A T at will has no assignable estate.

Foley v. Gansster (p. 137)

These documents were not signed by Lee, not sealed and not recorded.

those facts = noncompliance w/ S/F. This distinguishes this case from the case on p 88.

When a lease ~~it~~ is for an indefinite period and gives the Le right to term., the lease = E/W and either Lor or Lee may terminate.

MINORITY VIEW

12/9/96 - demand for poss. by Le.

The main case (Foley) = leading case for minority view. Major. view = this would be a L/E determ. or a FSD PROVIDED the instrument satisfies the S/F.

MAJORITY VIEW

Restat Prop., vol. 1, sec. 21; Smith p. 4.

Anderson v. Riss (p. 140)

Dispossession by election - or Le elects to dispossess the sublessee.

Ps = H+W in apt. as Ts at will. W/ owners acquiesence, the Ps sub-let the whole pad "until such time as he should return from the armed forces." Some of the rent was tendered to and rec'd by Lor - owner. When P got out of Army, Ds - sub-Lees

A sublease by aT at will is good as between the parties on the sublessee enters under the sublease and enjoys the premises.

refused to give up poss. This action by Lee's from owner for wrongful detention against sublessees.

Ct. held that the sub-lease created LL-T rel. and gave the Ps right to recover in this action, and notice (required by statute) was not required.

Absent statute or lease provision, no notice required to end an E/w. P N.C. has lodged on this point. "if notice is required, only reas. notice need be given."

At C.L., only the tenancy for a period required notice of termination.

*On stat. requires notice, failure to give notice will not effect the rel. between the L and T at will, but it will result in barring a suit until notice is given.

Assign. Periodic tenancies.

In all suits re (42-26 of G.S.) tenancies, notice is a cond. precedent to the right to bring the suit. But, failure to give notice, on required, will not change the status of tenancy at will.

EFFECT OF FAILURE TO GIVE NOTICE

26 April 63

Rule of Law

A T at will, being a determinable estate, cannot be assigned or subleased.

Rationale

Reason: the T at will does not have any definite, certain estate that he can convey, or out of wh he can convey, to the pain of the owner. The assignee or sublessee will become a disseisor only at the election of the owner (or lessor). But, the transfer, as against the sublessor, is effectual. The owner may recog. the sublessee as his T, and create a new T at will.

Sublease v. Assignment

A sublease must leave a reversion left in the sublessor. An assignment would convey all or purport to convey more than, the ~~lessee's estate~~ assignor's estate.

Periodic tenancies are favored because they protect the T more due to requirement of notice.

Most occupations of land under another, in modern times, is prima facie deemed to be a tenancy from year to year. See Humphries Case, p. 183.

26 Iowa L. R. 76 – re various notice statutes.

215/417 – after demand, LL must give reas. time for T to move his possessions.

Seavey v. Cloudman (p. 145)

Assignment of the reversion = termination of the tenancy. This was, thus, termination by operation of law. Thus, the statute, requiring 30 days notice in terminations by acts of the parties, did not apply. Therefore, since it is thus determined by operation of law, it is determined by its own limitation w/o notice.

"It is, therefore, an incident to any T/W that it is ltd. to such time as the L or shall own the estate, as it is ltd. to the lifetime of the parties.

* (Sec. 7) Tenancy at Sufferance *

T/S = one of the most shadowy tenancies. Arises on T got poss. lawfully but holds over unlawfully after his right to

poss has terminated.

T at suf cannot be subjected to dams. for tres. until a demand is made by the LL that he quit the premises. The demand terminates a T/S and an E/D instanter (instantly). See 215/47 re T/S.

Smith v. Littlefield (p. 149)

No notice was required to a T at suf. as a cond. precedent to termination of the tenancy. There is no privity of estate or of K. Notice should be required only if the T had remained in poss. an unreas. length of time after the end of his term of the express or implied permission of the LL.

See G.S. 42-4, 42-26, 42-28; 229/252 (or 52?).

The LL cannot enter & forcibly eject the T at suf. T may then get dams. (nominal) for tres (106/499 - on bar oham); and even exemplary

dams. for personal injuries. Bet LL can peaceably enter + eject.

Felt v. Methodist Educational Advance (p.151)

Action of Ejectment. J/D below on the ground that D = T at sup. and should have been given 3 mos. notice per statute. D = T at sup. because the tenancy it had had w/ LL (a life T) ended w/ LL's death and D's continued occupancy for two more years = T/S.

D T is estopped to attack the LL's title. A vendee under K of purchase cannot attack the vendor's title.

Pen., no notice is required to end T/S.

Assign. - all of periodic tenancy.

30 April 63

* PERIODIC TENANCIES *

Three ways to create P/Ts:
(1.) Holding over
(2.) General letting
(3.) Express creation.

Created to endure for a certain period of time AND will continue for the same periods unless terminated by due notice.

Any ensuing period after holding over, becomes a part of the orig. term.

May arise from (1) holding over, (2) a gen. letting, and (3) express K.

*(1.) HOLDING OVER *

Right v. Darby (p. 155)

Lease for a term of years. Was the notice given sufficient to terminate the periodic tenancy which had arisen by holding over?

There must be six mos. notice, and those six mos. must immediately precede the end of the term. Some courts require half a year's notice.

Rule of Law: The notice must be directed to the end of the term.

G.S. 42-14: N.C. requires one mo. or more before the end of the term.

A periodic tenancy will

continue until due notice is given.

Parties may agree to any notice they wish, and that will control.

Keppi: Periodic ten. from yr. to yr. Commenced Jan. 1, 1960 to end on Dec. 31, 1960. LL gives notice on July 23, 1960. — That would be too late to end the ten. on 12-31-60, but if LL directed the notice to 12-31-61, it would be effective.

Moore v. Dimond (p. 156)

Minority Amer. rule. T holding over after 5 year term ended, paying weekly rent. Court held that T became a periodic T from week to week.

Under majority rule, a periodic tenancy can arise out of a tenancy at sufferance regardless of the intent of the parties.

Minority Rule (+ English Rule) = a per. ten. arises only by K.

that's the Moore v. Dimond rule.

But, all courts agree that (6 N.E.2d 584) Moore v. Dimond applies w/ respect to the T's power to hold the LL.

(p. 163) Providence County Savings Bank v. Hall

is a T from yr. to yr. who holds over after notice to quit liable for another years rent. Ofrs. a T holds over at his peril, and it will be presumed that the T intended that. So, this new ten. from yr. to yr. arises by operation of law, and intent of T is immaterial.

It is optional w/ LL to treat T as T or waive his wrong and treat him as a per. T. LL can make election. It is presumed that a holding over T holds over w/ LL's consent.

Some stats. favor Ts + (79 N.Y.S. 2d 856 - 1948) by giving T all rights w/o regard to intent.

Some stats — pymt. of rent = periodic tem. See 192 P. 2d 294.
Other stats — 32 A. 2d 247.

192 P. 2d 294
32 A. 2d 247

(27 N.C. 571) →
122 N.C. 195
164 N.C. 50
240 N.C. 652

The tenancy arising from a holding over is generally held to be a new P/T wh continues until terminated by one of the parties.

Q Absent stat., does acceptance of rent by LL from T holding over = consent to ~~new~~ periodic tenancy (renewal or extension)? Yes. Most gen. rule. There must be free acceptance.

Exceptions: (i.e., no ACCEPTANCE)

(a) Mere receipt or retention of rent check w/o cashing it ≠ acceptance. 59 N.Y.S. 2d 892.

(b) Rent rec'd by third party w/o author. to receive. 83 N.Y.S. 2d 385.

(c) Rent paid during hold-over period during wh LL + T are negotiating for new lease. See 228 F. Rep. 858; 24 S.E. 2d 3; 66 N.E. 2d 727 (Ill. App.).

(d) Receipt of rent accompanied by a prior or contemporaneous express refusal to extend term. 69 N.Y.S. 121.

(e) Lease provides against this. 54 N.W. 2d 628 (Mich. 1952).

(f) Ow money is applied to unpaid rent under expired prior lease. 172 Ill. App. 505 (1912)

(g.) Parties mutually agree that receipt of rent will affect no rights of the LL (or of T). See 6 Ohio Dec. Rep. 1038.

(h.) Part-payment. 32 P. 337

Montgomery v. Willis (p. 168)

Gen. rule that acceptance of rent = renewal of lease does not apply on new K was made. LL acquiesced in T's desire to stay as T only as long as T desired, paying ~~weekly~~ monthly rent.

So, the gen. rule = presump. wh can be rebutted.

SEE NOTES, p. 166, 167 & 168. (T.I.)

See 164/50 - re ill Ts who hold over; & G.S. 42-23 (rights to harvest crops).

Accord: 120/408, Hardy v. Harris.

* (2.) GENERAL LETTING *

Spiritwood Grain Co. v. N. Pac. Ry. Co. (p. 170)

Is a P/T one long K going continuously, or does a new K arise each year? If the latter, Statute could affect the tenancy even though passed after the orig.

letting.

<u>L/T fall into two classes:</u>

(1.) Those created by act of parties or tenancy created by lease for indefinite period but reserving annual rent.

(2.) Those created by oper. of law or tn. results from holding over after a definite term expires but wh reserved annual rent.

<u>In #1,</u> the K is continuous. <u>In #2,</u> a new K arises each year. So, the stat. here did not affect the lease because it was #1 situation.

Assign. Go on to next Chap. and to Chap. 5.

2 MAY 63

See page 127.

3 May 63 M. H. J., SR. (69 yrs old)

No writing of deed of seisin was required before the S/F (1677). But, leases even before 1677 were ord. in writing. Writing necessary to support action of COVENANT.

Before Entry, the T only had an INTERESSE TERMINI, wh was assignable.

Surrender - a yielding up of estate by lessee by mutual agreement (Acceptance sometimes is implied) to owner of a future estate. S/F required but surrenders to be written.*

Abandonment - a unilateral yielding up by lessee to a future interest holder.

Acceptance of surrender is a question of fact going to question of "mutual agreement."

There may be surrender by operation of law by:

(1.) Acceptance by T of new lease from LL.

(2.) Entrance by LL into new lease w/ third party inconsistent w/ lease w/ T and w/ T's knowledge.

(3.) Abandonment by T of leased prop. and execution of new lease to third party. Creates question of fact whether there was acceptance.

(4.) 45 A. 969 (1903) No surrender after abandonment by T on LL executes new lease to third

* ...except those arising by operation of law.

The LL is said to be agent for T in giving the new lease.

56 N.E. 903 (1900)

party after giving notice that he does not accept the yielding up. Minority view? 56 N.E. 903 (N.Y. 1900).

(5.) O or T gives up the land and L takes over for any purpose other than improvement of the premises.

Release — method of conveyancing w/o necessity of livery of seisin. This is the transfer of future interest to the owner of the present poss. interest in the same land. So, the method of LEASE AND RELEASE arose. The lease did not require livery. The lease and release required two ~~documents~~ deeds, and under the DOCTRINE OF MERGER the lessee got all. The release presupposes a lease. Used to avoid Stat. of Uses and Statute of Enrollments. Release now known as quit claim deed (no warr. of quan. or qual.)

Reversion – residue of estate of grantor after grant of lesser estate than grantor had. Arose by oper. of law.

Remainders – created by mere declaration. A fut. int. Int. to take effect upon term. of prior estate and created at same time as the prior estate. Only fut. int. at C.L. created by feoffment.

There could be no abeyance of seisin, and no estates could be created to commence in future.

The ~~possessor~~ ~~Remainderman~~ was deemed an "agent" of the remainderman.

"Deed of grant" – created or transferred incorporeal hereditaments.

* SEISIN *

Orig. meant only poss. Later, it came to be "peaceable poss. of a freehold estate in land." ✱

At C.L., possession and title

were deemed inseparable and both had to be simultaneously conveyed.

Re seisin, Moynihan pp. 187-192.

After disseisin, the disseisor got rights of ownership and disseisee only retained the right of entry (would have to bring action of ejectment).

* [CHAP. V.] C.L. NONPOSSESSORY INTERESTS * REVERSION

① A → "To B for life."
B = L/E
A = reversion

② A → "To B for life, then to C for life"
B = L/E
C = L/E
A = rev.

③ A → "To B for life, then to heirs of A."
B = L/E
A = rev. (due to doctrine of worthier title.

④ A → "To B for life, rem to A and his heirs"
same as #3.

A not = assignment

(5) A → "To B for life, then to the heirs of C."
B = L/E
C = Contingent rem.
A = rev.

(6) A → "To B and the heirs of his body."
B = F/T
A = rev.

REMAINDER
A → "To B for life, rem. to C & his heirs."
B = L/E
C = Rem. in FSA.

Rights of Reversioner:
(1.) Waste against possessor.
(2.) Compel pymt. of taxes by possessor
(3.) Present estate in interest.

McKinley Realty & Constr. Co. v. Rosenblum (p. 202)

There cannot be an assignment or the lessor reserves some portion of his term, even 12 hours. Thus, the sub-lessor's lessor has no right against the sublessee.

The reservation of time by the sublessee, no matter how small, = a subtenancy, and not an assignment of the main lease.

Sublease v. Assignment

Merely because the parties denominated their agreement a "sublease" would not make it so, if in fact it were an assignment.

If a lessee, by any instrument whatever, whether reserving conds. or not, parts w/ his entire interest, he has made a complete assignment. If he retains a reversion in himself, he has made a sublease.

The name or label of the transfer is not controlling.

An assignee would be liable to the main LL for rent due to privity of K.

7 May 63

Free Transferability Rule

T for years may freely transfer his interest absent restriction expressed in the lease or a statute forbidding same.

Assignment v. Sublease (cont'd.)

Transfer of part of prop. for full term = assignment. But, transfer of all of prop. for only part of the term = sublease.

At C.L., T at will could not assign. But, some cases say that, as between the parties, it would be valid. But, it would have no bearing on the LL. 73 S.W. 143 - stats. restricting alienation will be strictly construed.

Percentage lease - exception to free transferability rule. Ow ant. of rent to go to LL depends on (147 N.Y.S. 283, aff'd. 106 N.E. 1036) ant. of T's income, that's a personal K

and cannot be assigned or sublet — ~~y~~ can be no transfer. The ~~2~~ depends on the personal efforts and abilities of lessT for deter. of the rent.

Amt pro tanto - partial Amt. An Amt of entire interest of T in a physical part of the property.

Hypo: A, owner of B/A, transfers to B for 7 years commencing Oct. 15, 1950." A = reversion. B = estate for years.

Hypo: On 3/2/53, B leases to C for 4 years commencing Oct. 15, 1953. C covenants to repair, paint & pay rent of $300.00 per month, and y will be forfeiture upon failure of C to perform the covenants, and B will have right of re-entry for covenants breached. — This would be beginning 10-15-53 an Amt vs C getting an estate for years S.T. C.S. B would have (power of termination) right of entry for cond. brok-en. A = reversion

Between 3/2/53 and 10/15/53; B would have still an estate for years; C = K right. (chose in action); A = reversion.

Sipton v. Chicago Storage Co. (p. 205)

These rights (re-entry, rent) (etc.) do not = a reversion. This was not a reversion in the sense that any part of the estate wholly conveyed is retained. This was an Amt: or Lee transfers his whole estate = Amt. Main/or will be in privity of K/estate with Assignee.

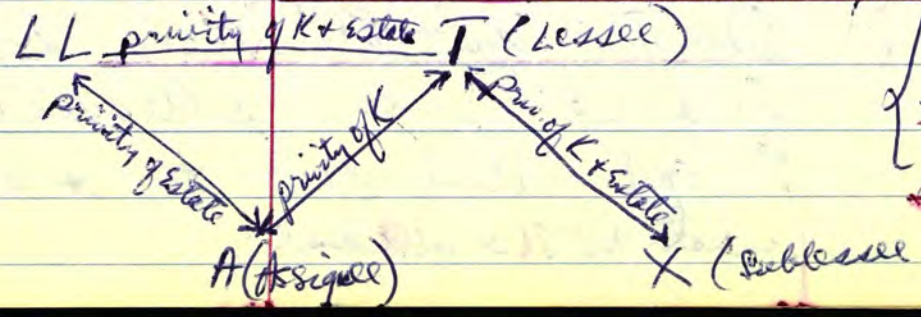
Right of entry = mere remedy of enforcing K rights of sub-lessor. It may be defeated by tender of performance.

Mass. Rule + transfer of right of entry = sublease even though the full term is transferred. + (Min. Rule.)

In an Amt, the Lor and Aee are liable to LL, but the Aee is PRIMARILY liable.

MASS. (MINORITY) RULE

(Substantial minority of states follow Mass. Rule).



{ No direct rights between LL and sub-lessee.

Sefton Case like Doe d. Freeman (p. 126.)

Jaber v. Miller (p. 212)

"Intention of Parties" Rule

This applies "intention of parties" rule. Whether the transfer was a sublease or Asst will be deter. by the intention of the parties based on all the facts. - Min. Rule. A'mt here.

9 MAY 63

So, 4 are 3 rules:

(1.) Major. Rule
(2.) Moss. Rule
(3.) Jaber v. Miller Rule - "intention rule"

Equitable remedies of LL:

(1.) LL may enforce a restrictive covenant v. sublessee by specif. perf. E.g. only requires that the sublessee have notice of the covenants and that LL have an interest in the land.
(2.) Enjoin sublessee from waste.
(3.) Assert Equitable lien of preference over sublessee's (ors to get rent due to sublessor under the sublease.

Crowder v. Fordyce Lumber Co. (p. 218)
Under C.L. and code pleading, an owner of a non-poss. estate can recover for injuries to his own interest. But, if one seeks dams. for injuries to the poss. interest, that party must have poss. of the land.

(Sec. 2) Possibility of Reverter and Right of Entry (Power of Termination) for Condition Broken

* Possibility of Reverter *

Hypo: A + B = Ts in common in B/A + W/A.
A + B —B/A→ "C + his heirs so long as used for private school + so long as no student is excluded due to race, religion or nationality." (1930) In 1940, A → quit claim deed to B/A and to W/A to D and his heirs". Then, A died, and A, JR. was sole heir under A's intestacy (1945). In 1950, school excluded Negro due to race.

In 1930, A+B had possibility of reverter.
C = FSD (or F/S on Spec. Lim.)
In 1940 - deed gave nothing in to B/A D because A possib. of reverter is not alienable inter vivos. At C.L.b. But, D would be T in common of B in W/A.
In 1950, C's interest terminated, and B and A'JR. will get B/A back (due to possib. of reverter) as Ts in common. A

possibility of Reverter is descendable at C.L.

Under some statutes, possibility of rev. is alienable; so I would take my B as T in common, and A, Jr. would take nothing.

See North v. Graham re hypo, (page 219).

Possibility of reverter is a reversionary interest which is left in the grantor of a FSD (or F/S cond. in S.C.).

Re descendability of P/R, see Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943)

By major. rule today, possibility of reverter is alienable & devisable. Irby v. Smith, 147 Ga. 329, 93 S.E. 877 (1917).

G.S. 39-603 - all future interests are freely alienable and devisable. The transfer will stand in the shoes of the transferor. 29-2(2)(b) - covers descent of all future interests by intestacy).

hypo

See Rice Case, p. 228 cbk.

* RIGHT OF ENTRY *

X → A & his heirs so long as used for residential purposes & if not, then X and his heirs may re-enter & eject A."

5 yrs. later, X quit-claimed to "B + his heirs". Then, A kissed to D CoRP. Then X devised the right of entry to "C and his heirs". X then died, leaving Y as his only heir.
— The attempted alienation to B extinguished the R/E, so A got FSA and lease was good. C nor Y got anything because y was nothing for them to take.

Right of entry inalienable inter vivos at C.L. and any attempt to alienate it would extinguish it entirely. True before or after breach.

Today R/E is alienable inter vivos and descendable (by the majority rule.) The Minority Rule says it is not alienable.

N.C. and Ga. follow majority.

R/E was devisable at C.L. and is today under statute by maj. rule.

10 May 63

In jurisdictions on possibilities are generally inalienable, 4 are 3 exceptions:

(1.) Estoppel by deed - requires warr. deed.

(2.) On 4 is quit claim deed supported by consideration, Equity may treat the conveyance as a K and give the transferee of the possibility specific performance of the K, if and when B's (transferee) possibility becomes a vested estate.

(3.) Release (!) by possibility holders (Right of entry) of their right of entry to the holder of the F.S. . S.T.C.S. Calvary Presbyterian Church v. Putnam, p. 232 ckk (also, Cordy. Subsequent are not favored. They are strictly construed because they tend to destroy estates. IP In a FSSTCS, the right of entry is not an estate; it is merely a right to take advantage of a breach (i.e., a chose in action) Thus, until the contingency happens the whole title is in the grantee. The R/E passes to the heirs not by descent but by force of representation.

A R/E or P/R may be released to the owner of the estate which is subject thereto or to a co-owner of the right or possibility.

Zotalis v. Cannellos (p. 236)

The L^or accepted rent w/ ~~after~~ Knowledge that a part of the bldg. had been sublet; but the remainder of the bldg. was sublet thereafter, and he is entitled to re-enter for this subsequent breach of the cond. v. subletting.

By accepting rent after Knowledge of a breach of the conds. of the lease, the lessor waives the right to re-enter for such breach, but does not waive the right to re-enter for a similar breach committed thereafter.

On the lease as originally prepared contained both a covenant v. subletting and a cond. authorizing the L^or to re-enter in case of a subletting, and the parties erased the covenant, but left the cond., the cond. remained in force.

Dumpor's Case (p. 238)

Provision in lease here that neither the Lee nor his assigns should alienate the leased prop. w/o the permission of the Lor.

If the Lor dispenses w/ one alienation, he thereby dispenses w/ all alienations thereafter. [alienation = Amt or sublease.] Held, that a single license to assign operates to extinguish the cond. v. unauthorized Amts as to all future Amts.

The rule here was abrogated in England by statute in 1859, criticized by many writers and some U.S. courts, and has found acceptance in several U.S. jurisdictions (e.g., Mass. & Md.).

But, the rule here has been ltd. to Amts and has not been extended to apply to subleases (Sewer v. Coburn, 64 Mass. (10 Cush.) 324 (1852).

Exception

The rule has been held inapplicable on the Lor in assenting to a spec. Amt has expressly reserved the right to require that no further Amt be made except w/ his consent.

Barber v. Hyder (p. 241)

This case differs from Dumpor's Case in that there is no covenant in the lease here prohibiting the lessee's assigns (P here) from assigning the lease.

Where a Cond. in a lease is single (as to person) it is wholly discharged by one waiver.

Held, after the first assignment with the lessor's consent, the covenant (which bound Lee's only) was no longer a part of the lease; and the provision in the second assignment to the effect that the Assee would "perform and observe the covenants, conds. & stipulations w/in the said lease contained," did not include the Covenant v. Assts, which bound lessee only.

Dodsworth v. Dodsworth (p. 243)

"It is well settled that where agreement is simply one for the payment of money (e.g. rent), a forfeiture of [illegible] incurred by its nonperformance will be set aside on behalf of the defaulting party, or relieved v. in

any other manner mode necessary by the circumstances of the case; on the payment of the debt, interest and costs, unless complainant has debarred himself by his own conduct. This doctrine is applied when the failure has been caused by ignorance and was not willful.

⊛ Forfeitures are not regarded with favor, and their prevention is within the protecting care of equity wherever wrong or injustice will result from their enforcement.

12 May 63

RENT

Rent = a right arising out of the ownership of a reversion. But, rent can be transferred to one not owning any int. in the prop. at all.

It may be reserved in the lease.

Reservation - a newly created int. in Lor arising out of the transferal corporeal ~~estate~~. Allows all ~~interests~~ in prop. to pass to grantee subject to some right or interest reserved to the Lor. It cannot be allowed in favor of a stranger to the grant - only in favor of the transferor.

65 A.282 - in favor of stranger makes the reser. void.

Exception - the saving out of a conveyance of an existing prop. int. already in the transferor.

When there is a provision for rent in a lease, it = reservation.

Some cts. erroneously used "exception" and "reser." interchangeably.

Methods of Reserving rent:

(1.) Reservation of rent may be by express Cov. There would be privity of K, and estate (if reversion left in grantor). * The Lee remains liable to Lor for the rent notwithstanding a subsequent assignment by Lee, absent agreement between Lor + Lee for a novation. — No privity of estate between Lor + Lee after Amt.

Rule of Law

There would also be privity of K between Lor + Asse if the Asse expressly assumes liab. on the covenants of the orig. lease. Then, Lor could enforce the agreement on third party beneficiary theory.

(2.) Implied covenants - on rent is reserved in terms not sufficient = express covenant to pay rent, that would = implied Cov. to pay rent. Creates privity of K and privity of estate on transferor has reservation. Here, assent of Lor to Asst by accepting rent from Asse will operate to terminate the privity

of K between Lor and Lee. — By construction, express cov. to pay rent is for full term of lease. Implied cov. is for that term of the lease that the Lee owns the estate. — So, under implied covs., Lee remains liable for rent after Asnt entered Lor assents to the Asnt and acceptance of rent from Asee = assent. If Asee #1 assigns to Asee #2 (under implied covs.), Asee #1 not liable under privity of K (never had it) nor of estate (passes to Asee #2).

(3.) Theory of Restitution — implied in law / despite absence of any cov for rent. Fair value of rental prop.

Actions for Rent

See 200/469

213/226 — fraud in inducing Lee to sign lease may be set up as defense or as counterclaim.

213/606.

200/415.

Om T surrenders before end of term + Ld accepts, he is entitled (T is — 24/161) to have the reas.

value of the remainder of the term subtracted from the liab. on the K.

Apportionment of rent —

Rent not payable in advance absent express agreement to the contrary. Rent is not apportionable on the basis of time.

Hypo: LL assigned his reversion May 15th to X. On May 31, LL claimed he was due part of the mo. rent up to May 15th. — J/X: rent cannot be apportioned, and the owner of the reversion at the time the rent falls due is entitled to the rent for the period in question.

If estate of T is actually terminated prior to due date of rent, T's obligation for that rent is extinguished. See 200 P. 225, 18 A.L.R. 947.

Some states have statutes allowing apportionment on basis of time. E.g., on L/T dies owing rent up to time of his death, 23 N.C.L.R. 136,

the obligation to pay rent
~~It~~ will be apportioned between L/T's estate & the L/T's Ts.

Accrued rent of (owed to) deceased Lor = personalty & goes to his personal rep. Unaccrued rent owed to Lor goes to his heirs as realty.

If the Lee pays the wrong party, he may be liable for the rent again. 226/724.

Right to receive rent (41 P. 1087) may be apportioned if the reversion is split (e.g., ½ to Lor X, ½ to Lor Y).

G.S. 42-5 - provision for ~~death~~ apportionment upon death of Lor.

G.S. 42-6 - three conds. must coexist:

(1.) Rents must be payable at fixed periods to successive owners.

(2.) Right of any owner of recev. to recover is terminable by death or any uncertain event.

(3.) That right terminates during period the rent is growing due. - See 213/178 - but these cases rarely occur.

226/724

Agreements to increase or reduce rent must be supported by consid. to be valid. See G.S. 1-540 = allows reduction w/o consideration (applies also to other phases of K law).

On LL raises rent + notifies T and T holds over w/o objecting, T will be liable for the increased rent.

On T objects above but still holds over, there is a split of authority.

Action for Use and Occupation

Absent contrary intent, the law implies duty to pay for use and occupation.

So, on T holds over, the LL is entitled to reas. compensation (not exactly rent) for use + occup. The lease (expired) rent would not deter. the amt. owed during hold over; LL would only get the reas. value of the use and occup.

Sublessee not liable for use + occup. because no is no privity between LL + sublessee.

225/750

But, the sublessee would be liable for MESNE PROFITS because anyone occupying B/A w/o consent, express or implied, O/L would be so liable.

COVENANTS

Seal not essential to validity of lease, even in N.C. or the seal retains some C.L. efficacy.

Two sides to Covs:

(1.) Benefits
(2.) Burdens

No requirement ("letter view") that both sides run w/the land if one does. One side may run w/ the land and the other side need not.

As are not liable for any breaches of cov. prior to the time he acquires the estate. Under "letter view" A's would be liable (65 N.Y.S. 40) for all breaches during his term even tho' he is not in poss.

A's not liable after he assigns

to Asse #2 EXCEPT on the Asse #1 had expressly (64 P.2d 460, 1937) assumed the covenants of the head lease.

Rights & Liabilities of Remote Transferees

⊗ Rule in Spencer's Case — (re rights & liabilities of remote parties)

(1.) An ass'e of revers. or leasehold cannot be be held liable if the cov. does not pertain to a thing in being at time of orig. lease unless the cov. in the orig. lease was expressly binding on the L's "and his assigns." — Most cts. don't follow this now and don't consider the existence or non-exist. of the matter as relevant; more important if the cov. touches and concerns the land. See 64 N.C. 1.

(2.) Regardless of partys' intentions, a cov. will not run w/ the land unless it touches and concerns the land. TEST: Biglow's TEST: if the cov. tends

to increase or diminish the rights, privileges or enjoyment of the land, that cov. touches and concerns the land.

166 P. 955 (Ore. 1917)

Covs. running w/ the land:

(1.) To repair.
(2.) Rent
(3.) To insure the land.
(4.) Quiet enjoyment
(5.) Pay taxes
(6.) To patronize the LL & not compete against the LL — only the burden side will run.

* Implied Covenants: *

Two type of covs:

(1.) Express
(2.) Implied — arise upon construction to express intention of the parties. Not favored.

By majority view, no I/C in deed (N.C. in accord — 34/32; 205/357; 232/707; 239/619; 240/382; 241/240), but there can be I/C in leases.

Some I/C:

(1) Covenant to deliver poss. (by Lor to Les) — split of authority.

Name case + leading case, 154
Va. 183 S.E. 824 — no
I/C ~~4~~ ℓ's deliver poss. LL
need not oust hold-over T or
ℓ res. to have premises open
for entry by lessee. LL only
covenants that Lee has the
legal right to poss. — Called
Amer. Rule. (Pa., Ill., Ga., N.Y., Va., Mass., Miss.)
Contra: English Rule — this
I/C does exist; that LL cove-
nants to put new Lee into
poss as against prior T hold-
ing over. But, this cov. is
not extended beyond the day
the lease is to begin. N.C.
follows this rule: Sloan
v. Hart, 150 N.C. 269 (1909) —
name case [read!!]. Ala., Conn.,
Ky., N.J., N.C., Tenn., Tex., W. Va.,
Kansas.
Not clear wh is majority rule.

(7.) Cov. of Quiet Enjoyment (in leases) —
Not to be confused w/ this cov. in
deeds. — Majority rule says
this ~~sale~~ cov. (154/443; 156/255;
243/131) does exist. It means that
the T will have peaceable + quiet

enjoyment from the LL or anyone claiming under the LL, not as against some other party. — If Le wants peace + quiet as against everyone he should get express + unqualified cov. of quiet enjoyment from LL. II Protects v. easements (154/443), rights of way, encroachments, as well as any other interferences w/ quiet enjoyment by LL or anyone claiming under him. 115/553.

Some statutes forbid all I/C, but usually they are construed not to apply to leases. N.Y. [redacted] 117 N.E. 579.

(5) I/C of fitness of premises for purpose intended. — Generally, No such I/C is held by ots. Le takes the prop. as it is. He can inspect.

No I/C to repair (leases).

246/1 (1957) — lease necessarily includes all easements, appurtenances,

etc., reas. necessary to the use and enjoyment of the prop.

Lease for Unlawful Purposes

It is implied ~~that~~ the premises cannot be used for unlawful purpose, and LL cannot recover ~~least~~ rent on le leased the land for unlawful purposes. ⅔ Most states refuse LL recovery of rent if he Knows the premises will be used for unlawful purposes.
⅓ - Statutes allowing padlocking [19-1 ; 19-5] of houses of prostitution, gambling, etc. on LL knew or should have known.
217/519 (1940).

217/519 (1940)

Tort Liability

LL usually not liable for personal injuries in either tort or K, nor to ~~his~~ invitees, etc.

✳ REMAINDERS ✳

Definition | Rm is a future int. in favor of a transferee created by the transferor.

Requirements:

(1.) In favor of a transferee.

(2.) Created at the same time & in the same instrument as the supporting estate.

X → "To A for life, rem. to B & his heirs."

Hypo: On May 1, 1960, X → "To A for life." On May 5, 1960, X → "rem. to B & his heirs." — Not a rem. (requirement #2). Would be an assignment of a reversion.

(3.) Rm. must be ltd. to take effect in poss. immediately at expiration of prior estate.

(4.) The supporting estate must be of lesser duration than the interest the transferor owned at the time of transfer.

No Rm. after a F/S.

At C.L., it could be (i.e., the supporting estate) a L/E or F/T.

Classifications of Rms.

(1.) Vested
  (a.) Indefeasibly
  (b.) Defeasibly
    (A.) Wholly
    (B.) Partially
(2.) Contingent

Rm. Indefeasibly Vested —

(1.) Remark. must be in esse.
(2.) " " " ascertained.
(3.) No cond. precedent, so that the estate may be taken in poss. at expiration of prior estate.

X → "To A for life, rm. to B & his heirs"

Rm. Defeasibly Vested —

X → "To A for life, rm to B & his heirs, but if B is survived by children, then to the children & their heirs."

There is a vested rm. subject to being wholly divested due to a cond. subsequent.

" ... but if B die w/o surviving children, then to C and his heirs."
— Defeasibly vested rm.

Rm. (Vested) Partially Defeasible.

X → "To A for life, rm. to the children of B." — B is alive, and has 1 child, C. There is an irrebuttable presumption that as long as a person lives he is capable of procreating. Thus, here C has a vested rm. subject to partial divestment upon the birth of other children. (i.e., it is subject to "open up.")

"Vesting in interest" — a present fixed right to future enjoyment.

CONTINGENT RMS. 

= a rm. that will take effect in interest upon satisfaction of a cond. precedent.

X → "To A for life, rm. to B & his heirs if he attains age 21."

Two types:

(1.) Those based on uncertainty of person.
  (a.) Unborn person
  (b.) Unascertained person

e.g., X → "To A for life, rm. to the heirs of B." — Nemo est haeres viventis.

= Cont. rm.

(2) Those based on uncertainty of an event.

hypo: X → "To A & his heirs as long as no liquor is sold on the premises, but if liquor is sold on the premises, then to B and his heirs."
A gets FSD (or FS on a special lim.)
B gets an executory interest (valid only after 1545).
There could be no rm. after a fee at C.L. as the courts reasoned that if could be no rm. after a FSD.

hypo: X → "To A & the heirs of his body, then to B and his heirs."
A = F/T
B = vested rm. in Fee.

Under modern stats., A = FSA and B = nothing.

hypo: X → "To A for life, rm. to B for life."
X = rever. in FSA.
A = L/E
B = L/E (rm. in) i.e., L/E in rm. (vested).
The rm. in B is vested even if A is 21 years old & B is 90.
N.C. = may create as many L/E as you want.

16 May 63

hypo: X → "To A for life, rm. to B for life if he outlive (or survive) A."

A case of "pseudo contingency". i.e., If B is to take anyway he must outlive A. So, the "if he survive A". language may be treated as surplusage and ignored. They are words that apparently create a precedent cond. but do not actually do so. Adverbial phrases denoting time (when, of, upon, after) are words only denoting the time of enjoyment of poss., not of vesting. See 186 N.C. 313. & they are pseudo contingencies and there will still be immediate vesting at time of conveyance. 245/95 - re adverbial phrases connoting time. That's the overwhelming majority. Leading case - 112 N.C. 1, Starnes v. Hill (regarded as wrong, but still a leading case). Richardson v. Hd, 152 N.C. 705 - wrong, but a leading case. And see 145 N.C. 359.

124/51

152/705

145 N.C. 359

NO RM. TODAY AFTER A "F/T" ESTATE

Under modern stats. converting the F/T into a F/S, any rm. over a purported F/T after would fail under the rule that a F/S cannot follow F/S.

hypo: X ⟹ "To A for life, rem. to B for life if he marries, rem. to C + his heirs."

A = L/E

B = cont. rm. in a L/E

C = vested rm. in fee.

A rm. cannot take effect in defeasance of an existing estate. If a limitation does take effect thus, it would be an executory interest.

hypo: (A) "To A for life, rm. to the children of B." B has no children.

A = L/E

children of B = cont. rm.

(B.) If B has one child at time of conveyance —

A = L/E

living child = vested rm. in fee subject to open (i.e., subject to partial divestment).

The gift would be a class gift subject to open up to any members of class.

hypo: X → "To A for life, then to B and his heirs, but if B die w/o issue surviving, to C and his heirs.

A = L/E

B = rmd. in FS defeasible subject to an executory limitation (exec. devise if by will).

C = executory limitation.
Rule: there can be no rm. after a fee.

As long as ∃ are cont. rm. outstanding, ∃ remains a rever. in the grantor. Reason: the cont. rm. may fail entirely. If it does fail, the rever. may be vested in poss. — a rever. can be divested, but if it is divested, it will be TOTALLY divested.

Poss. of reverter and right of entry (or power of term.) are contingent future interests. But, for some purposes they are deemed vested: the ⊗ Rule against Perpetuities does not apply to any interest (future) left in the grantor.

Rules of Construction

Law prefers vested to contingent rms.
" " early to later vesting.

Contingent rm. = a fut. int. subject to a cond. preced., wh follows a L/E or F/T estate.

Rms. after Estate for Years

After an estate for ∞ years = what

was the nature of an estate following an estate for years?

OLD C.L. Use transfer from X "To A for 20 years, rem. to B & his heirs."
A = non-freehold estate; a chattel real (no seisin)
B = present freehold estate in F/s subject to a term of years.

Today: B = rem. in FSA.

Quaere cont. rems. after term of years? Void at C.L. as an attempt to create an estate to commence in future. —— Today, they would be valid as an executory interest, per majority rule.

Suppo: A (fee) "To B for life, then to the heirs of C in fee simple." C is living. B died. Then, A took poss. of B/A. Then, C died leaving S as his sole heir. S v. A in ejectment.

(A.) Before B's death: B = L/E (present poss.)
heirs of C = cont. rem. — nemo est haeres viventis. So, the death of C is a cond. precedent to the vesting of the rem.
A = rev. vested subj. to total divestment.

(B) After B's death: A = poss. interest; his rever. will vest in poss.

heirs of C = the cont. rm. would be destroyed.

(X) Doctrine of Destructability of Cont. Rms — a cont. rm. will be destroyed unless the rm. becomes vested during the continuance of the prior estate or so instanti upon its termination. Ryan v. Monaghan, (p. 249.)

If C predeceased B:

(1.) C's heirs would become ascertained, the rm. would become indefeasibly vested.

(2.) A's rever. would be divested.

(3.) S's estate would vest and defeat any other estates.

16 MAY 63

Rm/men may be unascertained for one of two reasons:
(1.) Unborn
(2.) Event to ascertain

Ryan v. Monaghan (p. 249)

Testator → "To W for life, rm. to the heirs of James, my son, provided that if James die w/o issue + unmarried, then to (2 brothers and one sister of T)."

James was unmarried when T AND when W died. The bros and sister of T are co-plaintiffs.

W = L/E
heirs of James = C/R
2 bros. + 1 sis. = exec. int. (or possibly a C/R).

Because the C/R in the heirs of James could not vest before or at the term. of the prior estate, per DOCTRINE OF DESTRUCTABILITY OF C/Rms, the C/R failed. Thus, since the prop. had to go somewhere at W's death, James, being T's only heir at law, took a FSD by operation of law per descent rules.

Quaere: Does the inheritance in James exist absolutely? The answer depends on whether the rem. over in the 2 bros. and one sister was a C/R or an executory interest because ~~a~~ can be no C/R after a FSA. The ct. held this was an exec int.; thus, James took a FSD by operation of law.

At C.L., ~~a~~ could be no gaps or abeyance in seisin. At C.L., the vested rem. was the only estate that could commence in futuro.

Three ways to destroy rems:
(1.) Failure to vest in interest before or at term. of prior estate.
(2.) DOCTRINE OF MERGER – if two estates are simultaneously conveyed to the same party, the smaller estate will merge into that bigger estate & cut off the C/R.
(a.) Could be by surrender.
(b.) " " " release.
(c.) " " " mutual conveyance by L/tenant & reversioner to 3rd party.

(d.) Could be by simultaneous conveyance of L/E + rem. to same party = F/S.

(3.) Forfeiture - if L/Tenant attempted to transfer to a third party more than a L/E (fortious feoffment), the ~~owner of any vested fut. int.~~ had a right of entry and the L/E would be forfeited. But, a cont. rem/man had no right of entry; thus, the reversioner could enter and cut off the C/R.

No forfeiture here today:

This doctrine of forfeiture no longer applied because, today, the L/T can only convey what he has.

In some states, the doctrine of destruc. of C/R has been abolished.

Duncomb v. Duncomb (p. 251)

Trustees to preserve cont. rm. used to avoid doctrine of destruc. of C/R. There would be a vested rem. in trustees following the L/E and preceding the C/R.

* USES *

* A → "to B and his heirs to the use of C and his heirs."

C.L. courts only recog. legal title. Thus, C (cestui que use) would not have the burdens of the fee. B = feoffee to uses (Trustee), and B had the legal title. C only got beneficial title! - Enforced by Equity.

Ways of Creation (i.e., raising a use)
(1.) Feoffment to uses - before S/U.
(2.) Bargain and Sale - after S/U.

Bargain and Sale - A would bar. + sell the legal title for a consid. to B. But, under C.L., there could be no written instrument conveying legal title (only by feoffment). Thus, Equity would deem the legal title to remain in A w/the bene. title in B.

(3.) Covenant to Stand Seised - only between blood relatives.

Resulting Use -
A → "To B & his heirs to the use of A & his heirs."

Effect of S/U

The S/U gave the cestui que use legal title. So, the S/U executed the uses (most of them).
See Moynihan on S/U. — Required.

G.S. 41-7 — N.C. S/U.

So, today uses are unnecessary because there can be trusts and by can be conveyance by deed (bargain and sale at C.L.).

Finis!

Review

1. FSSTCS v. FSD.
2. Question, p. 49.
3. Dower.
4. Rights & Duties of L/T. (p. 98).
5. 233/190 – re duties of L/T (see p. 100).
6. Monger v. Sutterlok, 195 N.C. 274.
7. X → "To A for life, then to C for life."
8. Uses

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