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## VALIDITY OF REMAINDERS AND EXECUTORY INTERESTS AFTER A FEE CONDITIONAL ESTATE

The first question which might be asked is what is the definition, nature, and extent of an estate in fee simple conditional. At common law, before the passage of the Statute De Donis<sup>1</sup> in England in the year 1285, there were recognized two estates of inheritance. One was a fee simple absolute, which was created by a conveyance to a person and his heirs,<sup>2</sup> generally, and the other a fee simple conditional, which was created by a conveyance to a person and the heirs of his body.<sup>3</sup> During that time, it was held that since the word "heirs" was used in the creation of a fee simple conditional, that such an estate was greater than an estate for life.<sup>4</sup> The early construction of a fee simple conditional was to the effect that the birth of issue to the grantee was contemplated by the grantor as a condition to be met in order to perfect a transfer of an estate of inheritance. After the fulfillment of the condition, the grantee of such an estate has an interest which is, in many respects, comparable to an estate in fee simple absolute.<sup>5</sup> For example, the grantee of a fee simple conditional can, after birth of issue, convey a fee simple absolute by way of deed and thus bar his issue as well as the possibility of reverter.<sup>6</sup> The two estates are not similar, however, in all respects, as is illustrated by the fact that the grantee of a fee simple conditional cannot devise.<sup>7</sup>

In South Carolina, the Statute De Donis, which abolished the fee simple conditional in England, was never adopted and most of the early common law concepts regarding this estate in lands still exist and are given effect in this state.<sup>8</sup> However, in the many centuries since the conception of this estate, the courts and writers have prevailed to the end that certain of the original concepts have been changed completely.

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1. De Donis Conditionalibus, St. Westm. II, 13 Edw. I c. 1 (1285).

2. *Idle v. Cook*, I. P. Wms. 70, 24 Eng. Reprint 298 (1705).

3. *Willion v. Berkly*, I Plowd. 223, 75 Eng. Reprint 339 (1561).

4. *Id.*

5. For a discussion of all the qualities of a fee simple estate, see Anno., 114 A. L. R. 602, *et. seq.*

6. *Crawford v. Masters*, 98 S. C. 458, 82 S. E. 793 (1914).

7. *Postell v. Jones*, HARPERS LAW 92 (S. C. 1824); See Anno., 114 A. L. R. 602 for other points of difference.

8. *Creswell v. Bank of Greenwood*, 210 S. C. 47, 41 S. E. (2d) 393 (1947); *Crawford v. Masters*, 98 S. C. 458, 82 S. E. 793 (1914); *Withers v. Jenkins*, 14 S. C. 597 (1880); *Buist v. Dawes*, 4 RICH. EQ. 419 (S. C. 1829); *Mazyck v. Vanderhorst*, BAILEY'S EQ. 48 (S. C. 1828); *Cruger v. Heyward*, 2 DESAU. EQ. 94 (S. C. 1802).

## REMAINDER AFTER A FEE SIMPLE CONDITIONAL

One example of these changing concepts concerns the validity of a remainder after an estate in fee simple conditional. This change is deducible from the fact that prior to the passage of the Statute De Donis, a remainder after a fee simple conditional was recognized in the courts of England.<sup>9</sup> Such was the holding of the English courts as early as the year 1220, and in the years following, a remainder after an estate in fee simple conditional was more common than a remainder after a life estate.<sup>10</sup> Early writings by Bracton and Fleta reveal that there might have been a limitation of a fee simple conditional to several persons in succession.<sup>11</sup> Illustrative of recent indecision and doubt in regard to this point is a passage from the South Carolina case of *McCorkle v. Black*,<sup>12</sup> where it is stated that the early case of *Cruger v. Heyward*<sup>13</sup> intimated that a fee simple conditional is a particular estate, like a fee tail, capable of supporting a remainder for the reason that after a fee simple conditional, a reversion of the estate remained in the transferor, of which reversion he had a right to dispose; the court hastily added that it doubted whether this intimation would be followed should the occasion arise to pass on the question. The early holdings and writings notwithstanding, the reports of later vintage are replete with decisions to the effect that no remainder can be limited after a conveyance of an estate in fee simple conditional.<sup>14</sup> The cases so holding take the position that after a conveyance of the fee, whether conditional or absolute, there is no remainder, as the conveyance carries the whole estate and nothing remains to be the subject of further conveyance. Because of the abundance of such holdings in South Carolina, it seems to be a well settled rule of property law in this State that there can be no remainder after a fee simple conditional,<sup>15</sup> and there is slight probability of change, regardless of the apparent inconsistency with the thirteenth century decisions and various writings on the subject.

9. II POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 23, 24 (2d Ed. 1899).

10. *Id.*

11. BRACTON, Lib. 11, c. 6; FLETA, Lib. 3, c. 9.

12. 7 RICH. EQ. 420 (S. C. 1855).

13. 2 DESAU. 94 (S. C. 1802).

14. Selman v. Robertson, 46 S. C. 262, 24 S. E. 187 (1895); Buist v. Dawes, 4 STROB. EQ. 49 (S. C. 1850); Deas v. Horry, 2 HILL EQ. 244 (S. C. 1835); Bedon v. Bedon, 2 BAILEY 231 (S. C. 1831); Bailey v. Seabrook, RICH. EQ. CASES 419 (S. C. 1829); Mazyck v. Vanderhorst, BAILEY'S EQ. 48 (S. C. 1828); See McLure v. Young, 3 RICH. EQ. 559, 574 (S. C. 1851); Edwards v. Barksdale, 2 HILL 184, 198 (S. C. 1835); Adams v. Chaplain, 1 HILL 265, 268 (S. C. 1833).

15. *Accord*, RESTATEMENT, FUTURE INTERESTS, § 156(2) (1940).

EXECUTORY INTERESTS AFTER A FEE SIMPLE CONDITIONAL

Although the limitation of an estate over by way of remainder after a fee simple conditional appears to be precluded, there remains to be considered the possibility of effectively creating such a limitation over by way of an executory interest. This problem is divisible, according to whether the attempt to create such an executory interest is by way of devise or by way of deed.

The early cases in this state, with almost complete unanimity, held that an executory devise over on the death of the grantee of a fee simple conditional without issue was void for remoteness.<sup>16</sup> Such decisions resulted from the application of a rule of construction to the effect that the words "die without issue" were intended by the transferor as an indefinite, rather than a definite, failure of issue, and as a consequence the executory interest contingent thereon would be in violation of the Rule Against Perpetuities.<sup>17</sup> However, an Act<sup>18</sup> was passed by the legislature in 1853 which reversed this rule of construction as to the meaning of the term "die without issue" (and words of like import) from an indefinite to a definite failure of issue; thus the objection of remoteness to such an executory devise was removed.<sup>19</sup> The present status of the law in regard to this matter is that a fee simple conditional, during its continuance being the entire fee simple estate,<sup>20</sup> is as fit a subject for an executory devise as a fee simple estate.<sup>21</sup> This seems to be so well settled, that in a recent case<sup>22</sup> the question was not raised nor did the court deem it worthy of a discussion or a citation of authorities.

Although an executory interest after a fee simple conditional is valid if by devise, an attempt to create an executory interest after such an estate by way of deed is abortive under the South Carolina cases.<sup>23</sup> One of the early cases in this state rejecting such a limita-

16. *Barksdale v. Gamage*, 3 RICH. EQ. 271 (S. C. 1851); *Buist v. Dawes*, 4 STROB. EQ. 49 (S. C. 1850); *Bedon v. Bedon*, 2 BAILEY 231 (S. C. 1831); *Mazyck v. Vanderhorst*, BAILEY'S EQ. 48 (S. C. 1828). *But cf.* *Powers v. Bulwinkle*, 33 S. C. 293, 11 S. E. 971 (1890).

17. *Mangrum v. Piester*, 16 S. C. 316 (1881).

18. S. C. CODE § 8871 (1942).

19. *Strother v. Folk*, 123 S. C. 127, 115 S. E. 605 (1922).

20. *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211 (1915); *Du Pont v. Du Bos*, 52 S. C. 244, 29 S. E. 655 (1898); *Adams v. Chaplin*, 1 HILL'S EQ. 278 (1833).

21. *Dukes v. Shuler*, 185 S. C. 303, 194 S. E. 817 (1937); *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187 (1895). *But cf.*, dissenting opinion of Wardlaw, Ch., in *Buist v. Dawes*, 4 RICH. EQ. 421, 495 (S. C. 1852).

22. *Cannon v. Ballanger*, ..... S. C. ...., *Westbrook's Adv. Sheet*, July 12, 1952.

23. *Antly v. Antly*, 132 S. C. 306, 128 S. E. 31 (1925); *Allen v. Fogler*, 6 RICH. L. 54 (1852). *Contra*, RESTATEMENT, FUTURE INTEREST, § 25.

tion after a fee simple conditional, while recognizing that the limitation would be valid if by devise (no question of remoteness being involved), based the rejection on Fearne's statement that "a fee at common law cannot be mounted on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, then to another; this last is void".<sup>25</sup> Four years prior to this rejection of an executory limitation after a fee simple conditional, the court, in the case of *Edwards v. Edwards*,<sup>26</sup> had rejected an executory interest after a fee simple estate by way of deed, the limitation in the *Edwards Case* being, *to A, his heirs and assigns forever, but should A die without issue of his body, over . . .*<sup>27</sup> It appears that it was not until 1925 that an executory interest after a fee simple estate by way of deed was upheld by the court.<sup>28</sup> The limitation was in the form; *to A, but if he dies without issue, over, . . . habendum, to A, his heirs and assigns*. The court appeared to reason that the condition of defeasance and the limitation over were inserted prior to the creation of the fee estate in A, due to the omission of the words of inheritance from the granting clause, and therefore the executory interest was inserted before the estate to A became a fee simple. The resulting estate, called a fee defeasible, was subsequently upheld on what was apparently the same line of reasoning.<sup>29</sup> Although the court's trend of thought concerning the validity of an executory interest limited after the *whole* estate in fee simple conditional by deed has apparently remained unchanged since the recognition of the fee simple defeasible estate,<sup>30</sup> it should be noted that, apparently, no case has arisen where the limitation was in such a form as follows: granting clause, *to A, but if he die without leaving issue, over, habendum, to A and the issue of his body*. Under the case of *Smith v. Clinkscates*,<sup>31</sup> which first recognized the fee simple defeasible with a limitation over, there is apparently no logical reason why such a limitation should not be upheld by the court. The question may have become academic as to this latter limitation, however, for the strained reasoning of *Smith v. Clinkscates*<sup>32</sup> and *Wilson v.*

24. *Allen v. Fogler*, 6 RICH. L. 54 (1852).

25. FEARNE, REMAINDERS, c. 6, § 8, p. 371.

26. 2 STROB. EQ. 101 (1848).

27. It should be noted that no question of remoteness was involved in this limitation.

28. *Smith v. Clinkscates*, 102 S. C. 227, 85 S. E. 1064 (1915).

29. *Wilson v. Poston*, 129 S. C. 345, 123 S. E. 849 (1924).

30. *Antly v. Antly*, 132 S. C. 306, 128 S. E. 31 (1925).

31. 102 S. C. 227, 85 S. E. 1064 (1915).

32. *Antly v. Antly*, 132 S. C. 306, 128 S. E. 31 (1925).

*Poston*<sup>33</sup> has apparently been abandoned. In *McDaniel v. Conner*,<sup>34</sup> decided in 1945, the limitation was in the form: *to A, and his lawful heirs after him, but if he should die without lawful heirs of the body, over, habendum, to A, his heirs and assigns forever.* The court sustained the validity of the limitation over and rejected the argument that the validity of the limitation should depend on the presence or absence of words of inheritance in the granting clause. Under this liberal view, which certainly appears to be a reversal of the position taken by the court in some of the earlier cases,<sup>35</sup> the court should have little difficulty in sustaining an executory interest after a fee simple conditional, especially since it appears that the reason previously given for striking down such interests was due to the fact that a fee simple conditional was, during its continuance, the entire fee simple estate.<sup>36</sup>

### CONCLUSION

It is difficult to perceive any logical reason why an executory interest after a fee simple conditional estate, created by deed should not be held valid. As illustrated by the *McDaniel Case*,<sup>37</sup> the modern trend of the courts is to relax the technical restrictions on the alienability of interests in property. By the recognition of the validity of an executory devise after a fee simple conditional, the courts have allowed, in effect, subject to limitations, the devise of an estate equivalent to that interest a deviser or his heirs might take under a possibility of reverter,<sup>38</sup> despite the fact that the South Carolina decisions continue to verbally support the view that a possibility of reverter,

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33. 129 S. C. 345, 123 S. E. 849 (1924).

34. 206 S. C. 96, 33 S. E. (2d) 75 (1945).

35. *Glenn v. Jamison*, 48 S. C. 316, 26 S. E. 677 (1896); *Edwards v. Edwards*, 2 STROB. EQ. 101 (S. C. 1848).

36. *Allen v. Fogler*, 6 RICH. L. 54 (1852). See *Antly v. Antly*, 132 S. C. 306, 128 S. C. 31 (1925).

37. *Supra*, note 33.

38. For a complete discussion of this paradox, see UNIVERSITY OF S. C. SELDEN SOCIETY YEARBOOK, vol. VII, p. 42 (Jn-1943). This view is fortified by the holding that the taker under an executory devise after a fee simple conditional is barred by an alienation after birth of issue by the grantee of the fee simple conditional, just as the deviser would be barred thereby from ever taking under the possibility of reverter. *Robert v. Ellis*, 59 S. C. 137, 37 S. E. 250 (1900); *Buist v. Dawes*, 4 RICH. EQ. 421 (S. C. 1852); *Bailey v. Seabrook*, RICH. EQ. Cases 419 (S. C. 1829). It should be noted that a possibility of reverter, not being an estate, *Waller v. Waller*, 220 S. C. 212, 66 S. E. (2d) 876 (1951), is not affected by the rule against perpetuities, GRAY, RULE AGAINST PERPETUITIES, § 313 (2d Ed. 1906); STILES, III FUTURE INTEREST, § 506, but an executory interest is subject to being invalidated under the rule. *Barksdale v. Gamage*, 3 RICH. EQ. 271 (S. C. 1851).

not being an estate, cannot be devised.<sup>39</sup> Recognition of the validity of an executory limitation after a fee simple conditional by way of deed would similarly extend the alienability of interests arising out of an estate most often resorted to for its inalienable characteristics.

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39. *Waller v. Waller*, 220 S. C. 212, 66 S. E. (2d) 876 (1951); *Burnett v. Snoddy*, 199 S. C. 399, 19 S. E. (2d) 904 (1942); *Blount v. Walker*, 31 S. C. 13, 27, 9 S. E. 80 (1888); *Burnett v. Burnett*, 17 S. C. 545 (1882). This view is not followed in all jurisdictions. *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N. E. (2d) 922 (1951).