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The Fee Simple Conditional in South Carolina

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THE FEE SIMPLE CONDITIONAL IN SOUTH CAROLINA

The fee simple conditional estate limits descent to some particular class of heirs to the exclusion of all others.[1] This class of heirs is designated by the terms that form the estate. The nature of these terms divides the fee simple conditional into two divisions, general and special.[2] The general fee simple conditional is formed by a grant "to A and the heirs of his body" or language of similar import. In such a case the estate may descend only to the lineal heirs of A.[3] The special fee simple conditional has two subdivisions. The first includes all estates limited to the heirs of A by a particular spouse. For example, "to A and the heirs of his body by his wife, Mary" would create such an estate.[4] The second includes a fee simple conditional in which only the heirs of a particular sex would meet the requirements such as "to A and the male (or female) heirs of his body."[5] All fee simple conditional estates can be included in one of these categories.

The fee simple conditional and the fee simple absolute were the only two estates of inheritance possible before 1285 by the common law.[6] In that year England adopted the Statute de Donis which replaced the fee simple conditional estate in land with the fee tail.[7] Since South Carolina has never adopted the

1. Various aspects of the fee simple conditional have been examined in several sources. Annot., 114 A.L.R. 602 (1938); Note, 5 S.C.L.Q. 69 (1952); Note, IX YEAR BOOK OF THE SELDON SOC'Y 63 (1947); Note, VII YEAR BOOK OF THE SELDON SOC'Y 42 (1943); RESTATEMENT, PROPERTY §§ 59-77 (1936).

2. This division is made by the annotation on the subject in 114 A.L.R. at 602. Most of the examples given in subsequent text and footnotes deal with the general fee simple conditional for convenience. A special fee simple conditional would be treated in like manner. Some examples of each type follow. General Fee Simple Conditional: Owings v. Hunt, 53 S.C. 187, 31 S.E. 237 (1898); DuPont v. DuBos, 52 S.C. 244, 11 S.E. 1073 (1898); Hull v. Hull, 2 Strob. Eq. 174 (S.C. 1848); Murrell v. Mathews, 1 Brev. 190 (S.C. 1802). Special Fee Simple Conditional: Blume v. Pearcy, 204 S.C. 409, 29 S.E.2d 673 (1944); Davis v. Dalrymple, 163 S.C. 490, 161 S.E. 738 (1931); Adams v. Verner, 102 S.C. 7, 86 S.E. 211 (1915); Lipscomb v. Hammett, 56 S.C. 549, 35 S.E. 194 (1900); Graham v. Moore, 13 S.C. 115 (1880).

3. Hay v. Hay, 4 Rich. Eq. 378 (S.C. 1852).

4. Lipscomb v. Hammett, 56 S.C. 549, 35 S.E. 194 (1900).

5. Buist v. Dawes, 4 Strob. Eq. 37 (S.C. 1850).

6. Idle v. Cook, 1 P. Wms. 70, 24 Eng. Reprint 298 (1705). Willion v. Berkeley, 1 Plowd. 223, 75 Eng. Rep. 339 (1561).

7. De Donis Conditionalibus, St. Weston II, 13 Edw. I c.1 (1285). This statute replaced the fee simple conditional with the fee tail in all real prop-

Statute De Donis,[8] many of the early common law concepts are the present law of this jurisdiction.[9]

I. CREATION

A. By Deed

When a deed is granted creating a fee simple conditional, the limitation is normally "to A and the heirs of his body" or some like coverage. However, South Carolina courts have been lenient in allowing variations of this basic wording.[10]

One variation which has caused problems of interpretation is an attempt to make substitutions for the word "heirs." Although the common law would not allow a substitution of the word "issue" in a deed,[11] in South Carolina it has been recognized that this term is usually a word of limitation rather than a word of purchase[12] when used in this context. Therefore, a deed "to A and his issue (or the issue of his body)" may create a fee simple conditional in this state.[13] However, this is a rule of construction and not a rule of law. If there is a sufficient showing that a fee simple conditional was not intended, "issue" is not construed as a word of limitation. For instance, if there were issue living at the time the deed was made, intent may be shown that this word

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perty. Certain copyholds and annuities were not covered by the statute (See Annot., 114 A.L.R. 602, 606, 625-27 (1938). However, South Carolina does not allow personal property to be held by fee simple conditional. Personal property granted in this manner passes to the grantor in fee simple absolute. Hay v. Hay, 4 Rich. Eq. 378 (S.C. 1852).

8. II COOPER, STATUTES AT LARGE OF SOUTH CAROLINA 401 (1837).

9. 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. 973 (1914). Withers v. Jenkins, 14 S.C. 597 (1880); Buist v. Dawes, 4 Rich. Eq. 421 (S.C. 1852); Bedon v. Bedon, 2 Bail. 231 (S.C. 1831); Mazyck v. Vanderhorst, Bail. Eq. 48 (S.C. 1828); Thomas v. Benton, 4 Desaus. 17 (S.C. 1809); Cruger v. Heyward, 2 Desaus. Eq. 94 (S.C. 1802).

10. Scarborough v. Scarborough 246 S.C. 51, 142 S.E.2d 706 (1965); Bonds v. Hutchison, 199 S.C. 197, 18 S.).2d 661 (1942); Sims v. Clayton, 193 S.C. 98, 7 S.E.2d 724 (1940); Antley v. Antley, 132 S.C. 306, 128 S.E. 31 (1925); Branyan v. Tribble, 109 S.C. 58, 95 S.E. 137 (1918); Farmer v. Corley, 103 S.C. 202, 88 S.E. 23 (1916); Carolinian Timber Co. v. Holden, 90 S.C. 470, 73 S.E. 869 (1912); Clark v. Neves, 76 S.C. 484, 57 S.E. 614 (1907); Holman v. Wesner, 67 S.C. 307, 45 S.E. 206 (1903); Smith v. Hilliard, 3 Strob. Eq. 211 (S.C. 1849).

11. 1 TIFFANY, REAL PROPERTY § 38 (3d ed. 1939).

12. Words of purchase are words which denote who is to take the estate. Words of limitation mark the duration of an estate. BLACK, LAW DICTIONARY (4th. ed. 1951).

13. Smith v. Hanna, 215 S.C. 520, 56 S.E.2d 339 (1949); Sims v. Clayton, 193 S.C. 98, 7 S.E.2d 724 (1940); Davis v. Strauss, 173 S.C. 99, 174 S.E. 908 (1934); Sligh v. Sligh, 99 S.C. 307, 83 S.E. 260 (1914); Williams v. Gause, 83 S.C. 265, 65 S.E. 241 (1909).

was used to describe a class of persons who were to take as tenants in common with the named grantee.[14] The term "bodily issue" is normally a phrase of limitation,[15] also, but here too intent may be shown that the grantees were to take only a life estate.[16]

South Carolina requires that a prior estate be granted to A for his heirs to take a fee simple conditional. If this prior estate is omitted, the normal words of limitation will act only as words of purchase.[17]

Although the Rule in Wild's Case originally applied only to cases involving wills, South Carolina has extended the rule to include deeds.[18] A general statement of the rule usually refers only to devises: "First, if there is an immediate devise to A and his children and A has no children, the will is construed as creating an estate tail in A; second, if A has children, A and his children take equally as joint tenants for life."[19] Of course, in South Carolina a fee simple conditional estate results rather than an estate tail. Following this rule our court has held that where there is a deed "to A and his children," and there are no children at the time of the conveyance, "children" is to be construed as "heirs of the body." Therefore, the grantee would receive a fee simple conditional estate.[20] It would appear that if children were alive at the time of conveyance they would take as joint tenants with the named grantee. If this occurred, the interest they would hold would probably be limited to a life estate.[21] The Rule in Wild's Case, it must be remembered, is only a rule of construction.[22]

14. Sligh v. Sligh, 99 S.C. 307, 83 S.E. 260 (1914); Guy v. Osbourne, 91 S.C. 291, 74 S.E. 617 (1912); Porter v. Lancaster, 91 S.C. 300, 74 S.E. 374 (1912); Williams v. Gause, 83 S.C. 265, 65 S.E. 241 (1909).

15. Smith v. Hanna, 215 S.C. 520, 56 S.E.2d 339 (1949); Antley v. Antley, 132 S.C. 306, 128 S.E. 31 (1925).

16. Bonds v. Hutchison, 199 S.C. 197, 18 S.E.2d 661 (1942); Campbell v. Williams, 171 S.C. 279, 172 S.E. 142 (1932).

17. McCown v. King, 23 S.C. 232 (1885).

18. James v. James, 189 S.C. 414, 1 S.E.2d 494 (1939); Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 (1907).

19. 2 SIMES, FUTURE INTERESTS § 401 (1936).

20. James v. James, 189 S.C. 414, 1 S.E.2d 494 (1939); Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 (1907).

21. Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 (1907); Izard v. Middleton, Bail. Eq. 228 (S.C. 1831); Annot., 114 A.L.R. 602, 613-14 (1938).

22. See James v. James, 189 S.C. 414, 1 S.E.2d 494 (1939).

Although the Rule in Shelley's Case[23] was abolished in this state by statute in 1924,[24] it remains important when dealing with grants made prior to the time the statute took effect.[25] When there is a limitation by deed or will "to A for life, remainder to the heirs of his body" the Rule in Shelley's Case operates in such a way that A gets both a life estate and a remainder so that merger will act and give A a fee simple conditional.[26] Variations in the wording have been allowed in South Carolina[27] such as the substitution of the word "issue" for "heirs." When used in this context "issue" has been applied as a word of limitation and thus passes a fee simple conditional unless additional language clearly shows that "issue" was to be used as a word of purchase. An example of such a conveyance would be a grant "to A for life and then to her issue (or bodily issue)."[28] Normally a similar deed to "children" does not convey a fee simple conditional[29] unless "children" can be shown to mean "heirs of the body" by additional language in the deed.[30]

B. By Will

The normal language used in the creation of a fee simple conditional by devise is the same as that used in a conveyance by deed—"to A and the heirs of his body." Similar variations have

23. The Rule in Shelley's Case was named after the famous English case of Wolfe v. Shelley, 1 Co. Rep. 936, 76 Eng. Rep. 206 (K.B. 1579-81), but it had been an operative rule of law for many years before the decision of this case. 2 TIFFANY, REAL PROPERTY 82 (3d ed. 1939).

24. Rule in Shelley's Case abolished in certain respects.—The rule of law known as the rule in Shelley's Case is hereby abolished in the following particulars, to wit: When, by deed or will or by any instrument in writing, a remainder in lands, tenements, hereditaments or other real estate shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall take as purchasers in fee simple, by virtue of the remainder so limited to them. The provisions of this section shall not affect wills, deeds and other instruments in writing executed prior to October 1, 1924 or the construction of such wills, deeds and other instruments in writing.
S.C. CODE ANN. § 57-2 (1962).

25. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959); Blume v. Pearcy, 204 S.C. 409, 29 S.E.2d 673 (1944).

26. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959).

27. Sims v. Clayton, 193 S.C. 98, 7 S.E.2d 724 (1940); Clark v. Neves, 76 S.C. 484, 57 S.E. 614 (1907).

28. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959); Smith v. Hanna, 215 S.C. 520, 56 S.E.2d 339 (1949); Green v. Green, 210 S.C. 391, 42 S.E.2d 884 (1947); Sligh v. Sligh, 99 S.C. 307, 83 S.E. 260 (1914).

29. Clark v. Neves, 76 S.C. 484, 57 S.E. 614 (1907).

30. Branyan v. Tribble, 109 S.C. 58, 95 S.E. 137 (1918); Clark v. Neves, 76 S.C. 484, 57 S.E. 614 (1907).

been allowed in this area, also.[31] If this wording shows a clear intent to create a fee simple conditional, additional clauses of unclear meaning will not affect the devise.[32] But if there is a clear intent shown that this estate was not desired, the entire will may be considered to determine the actual intent of the testator.[33]

In this area, as in most others concerning this estate, a problem arises when there is an attempt to substitute another term for "heirs" even though this word has never been required in wills for the creation of an estate of inheritance.[34] South Carolina courts have recognized that a devise "to A and his issue" creates a fee simple conditional.[35] However, before "children" may be substituted for "heirs" to create this estate, the intention for such a result must be found.[36]

The Rule in Wild's Case has always been important in the interpretation of wills. The rule applies to a devise "to A and his children" in the same manner as it applies in a deed which was discussed earlier. However, under a will two situations are possible. If A has no children alive at the time of the testator's death, the critical date, the devisee receives a fee simple conditional.[37] If A does have living children on the critical date, he and the children would take as tenants in common. They

31. Lucas v. Shumpert, 192 S.C. 208, 6 S.E.2d 17 (1939); Cureton v. Little, 119 S.C. 31, 111 S.E. 803 (1922); Boyles v. Wagner, 91 S.C. 183, 74 S.E. 380 (1912); Bethea v. Bethea, 48 S.C. 440, 26 S.E. 716 (1897); Selman v. Robertson, 46 S.C. 262, 24 S.E. 187 (1896); Renwick v. Smith, 11 S.C. 294 (1879); Dehay v. Porcher, 1 Rich. Eq. 266 (S.C. 1845); Laborde v. Penn, McM. Eq. 448 (S.C. 1842); Deas v. Horry, 2 Hill Eq. 244 (S.C. 1835); Jones v. Postell, Harp. 92 (S.C. 1824).

32. Lucas v. Shumpert, 192 S.C. 208, 6 S.E.2d 17 (1939); Adams v. Verner, 102 S.C. 7, 86 S.E. 211 (1915).

33. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959); McWhite v. Roseman, 114 S.C. 177, 103 S.E. 586 (1920); Adams v. Verner, 102 S.C. 7, 86 S.E. 211 (1915).

34. 1 TIFFANY, REAL PROPERTY § 31 (3d ed. 1939).

35. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959); Lucas v. Shumpert, 192 S.C. 208, 6 S.E.2d 17 (1939); Dukes v. Shuler, 185 S.C. 303, 194 S.E. 817 (1938); Federal Land Bank v. Wells, 172 S.C. 1, 172 S.E. 707 (1934); Baxter v. Early, 131 S.C. 374, 127 S.E. 607 (1925); Strother v. Folk, 123 S.C. 127, 115 S.E. 605 (1922); Adams v. Verner, 102 S.C. 7, 86 S.E. 211 (1915).

36. Simpson v. Antley, 137 S.C. 380, 135 S.E. 469 (1926); Strother v. Folk, 123 S.C. 127, 115 S.E. 605 (1922); Smith v. Hilliard, 3 Strob. Eq. 211 (S.C. 1849).

37. Simpson v. Antley, 137 S.C. 380, 135 S.E. 469 (1926); Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 (1907); Renwick v. Smith, 11 S.C. 294 (1879).

would get a fee simple absolute by statute.[38] As has been stated, this is a rule of construction only.[39]

The Rule in Shelley's Case operates upon a devise in like manner as upon a conveyance. A devise "to A for life, and at his death to the heirs of his body" will pass a fee simple conditional, also.[40] "Issue," "issue of his body," or "bodily issue" may be substituted in the devise with the same result.[41] However, the word "children" cannot be used to pass the fee simple conditional unless the intent that it means "heirs of the body" can be shown.[42] Since the Rule in Shelley's Case is a rule of law and overrides any intent of the testator, where a fee simple conditional is created under this rule, additional words of unclear meaning will not affect the devise.[43]

C. By Implication

A majority of the South Carolina cases have denied any possibility of the creation of a fee simple conditional by implication.[44] However, there are some cases which seem to indicate that an implied creation might be recognized in certain circumstances.[45]

II. INCIDENTS

A. Descent and Reverter

When the holder of a fee simple conditional dies leaving heirs who meet the requirements of the estate, his interest vests in them immediately. This interest passes to his heirs *per formam*

38. S.C. CODE ANN. § 19-232 (1962).

39. See James v. James, 189 S.C. 414, 1 S.E.2d 494 (1939).

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

41. Green v. Green, 210 S.C. 391, 42 S.E.2d 884 (1947); Strother v. Folk, 123 S.C. 127, 115 S.E. 605 (1922); Farmer v. Corley, 103 S.C. 202, 88 S.E. 23 (1916); Boyles v. Wagner, 91 S.C. 183, 74 S.E. 380 (1912); Simms v. Buist, 52 S.C. 554, 30 S.E. 400 (1898).

42. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959); Strother v. Folk, 123 S.C. 127, 115 S.E. 605 (1922).

43. Green v. Green, 210 S.C. 391, 42 S.E.2d 884 (1947); Lucas v. Shumpert, 192 S.C. 208, 6 S.E.2d 17 (1939); Cureton v. Little, 119 S.C. 31, 111 S.E. 803 (1922); Annot., 114 A.L.R. 602, 624 (1938).

44. Prudential Ins. Co. of America v. Monk, 165 S.C. 111, 162 S.E. 911 (1932); Bomar v. Corn, 150 S.C. 111, 147 S.E. 659 (1929); Barber v. Crawford, 85 S.C. 54, 67 S.E. 7 (1910); Harkey v. Neville, 70 S.C. 125, 49 S.E 218 (1904); Buist v. Dawes, 4 Rich. Eq. 421 (S.C. 1852); Bedon v. Bedon, 2 Bail. Eq. 231 (S.C. 1831).

45. Harkey v. Neville, 70 S.C. 125, 49 S.E. 218 (1904); Addison v. Addison, 9 Rich. Eq. 58 (S.C. 1856); Annot., 114 A.L.R. 602, 625 n. 173 (1938).

doni and not by the Statute of Descent and Distribution.[46] The holder cannot dispose of land held in fee simple conditional by devise.[47]

When a fee simple conditional is created the grantor retains a possibility of reverter in himself and his heirs. Anytime that the requirements of the estate cannot be fulfilled on the death of a holder (the holder has no heirs to fit the description of the grant), the property reverts to the grantor.[48] In a case where the grantor is not living at the termination of the fee simple conditional, the land involved passes directly to his heirs as determined at the date of termination. This possibility of reverter is not an estate and cannot be devised or inherited in the usual sense. Since it does not pass through the grantor's estate his creditors cannot reach the property after his death.[49]

No South Carolina case has ever directly decided what limitations are placed upon the heirs who take the land at the death of the grantee in fee simple conditional. Some cases have stated that these heirs receive a fee simple conditional *per formam doni*.[50] Logically this would seem to place all the limitations of the original estate upon these heirs, *i.e.*, they would not be able to devise the land or to effectively convey it without birth of the required issue. However, there is authority for the view that although these takers could not devise the land, they should be

46. Bonds v. Hutchison, 199 S.C. 197, 18 S.E.2d 661 (1942); Lucas v. Shumpert, 192 S.C. 208, 6 S.E.2d 17 (1939); Dukes v. Shuler, 185 S.C. 303, 194 S.E. 817 (1938); Wilson v. Poston, 129 S.C. 345, 123 S.E. 849 (1924); Davis v. Hodge, 102 S.C. 178, 86 S.E. 478 (1915); Vaughan v. Langford, 81 S.C. 282, 62 S.E. 316 (1908); Mattison v. Mattison, 65 S.C. 345, 43 S.E. 874 (1903); Owings v. Hunt, 53 S.C. 187, 31 S.E. 237 (1898); Burnett v. Burnett, 17 S.C. 545 (1882); Wright v. Herron, 5 Rich. Eq. 441 (S.C. 1853); Adams v. Chaplin, 1 Hill's Eq. 265 (S.C. 1833).

47. Dukes v. Shuler, 185 S.C. 303, 194 S.E. 817 (1938); Antley v. Antley, 132 S.C. 306, 128 S.E. 31 (1925); Vaughan v. Langford, 81 S.C. 282, 62 S.E. 316 (1908); Owings v. Hunt, 53 S.C. 187, 31 S.E. 237 (1898); Blount v. Walker, 31 S.C. 13, 9 S.E. 804 (1889); Burnett v. Burnett, 17 S.C. 545 (1882); Pearse v. Killian, McM. Eq. 231 (S.C. 1841); Deas v. Horry, 2 Hill Eq. 244 (S.C. 1835); Adams v. Chaplin, 1 Hill Eq. 265 (S.C. 1833).

48. Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959); Burnett v. Snoddy, 199 S.C. 399, 19 S.E.2d 904 (1942); Pearse v. Killian, McM. Eq. 231 (S.C. 1841).

49. Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959); Burnett v. Snoddy, 199 S.C. 399, 19 S.E.2d 904 (1942); Corley v. Hoyt, 116 S.C. 110, 107 S.E. 34 (1921); Laborde v. Penn, McM. Eq. 448 (S.C. 1842); Pearce v. Killian, McM. Eq. 231 (S.C. 1841); RESTATEMENT, PROPERTY § 76 (1936).

50. Scarborough v. Scarborough, 246 S.C. 51, 142 S.E.2d 706 (1965); Burnett v. Burnett, 17 S.C. 545, 550 (1882); Withers v. Jenkins, 14 S.C. 597, 610, 614 (1880); Wright v. Herron, 5 Rich. Eq. 441, 445 (S.C. 1853); Hay v. Hay, 3 Rich. Eq. 384, 392 (S.C. 1851); Hull v. Hull, 3 Rich. Eq. 65, 78 (S.C. 1850).

allowed to effectively convey it in fee simple absolute[51] without the requirement of birth of issue.[52]

B. Conveyances

South Carolina law clearly allows the holder of a fee simple conditional to convey the land in fee simple absolute after he has met the requirement of birth of issue. Such an inter vivos conveyance cuts off the possibility of reverter completely and divests the designated issue of any possibility of inheritance.[53] The same result will be reached even though there are no living issue at the time of the conveyance if such issue were alive at the time the fee simple conditional was granted or have been born alive since the grant and have died prior to this conveyance.[54]

A conveyance prior to the birth of issue will always be sufficient to destroy all claims of later born heirs who satisfy the provisions of the estate.[55] However, the lives of these issue determine what estate can be sold. If the issue are never born and the condition is not fulfilled, the possibility of reverter will activate and return the property to the grantor or his heirs at the time of the death of the holder in fee simple conditional.[56] When there is a conveyance prior to the birth of the required issue and such issue is subsequently born, two possibilities may occur. If

51. CHALLIS, REAL PROPERTY 266 (Sweet's ed.); 1 Cruise, Digest 28, tit.2 c.1, §7 (1st Am. ed. 1808); Co. Litt. 19a; 2 Blackstone 100 *semble* (10th ed. 1787). See Nevil's Case, 7 Co. Rep. 33a, 77 Eng. Rep. 460, 464 (1604).

52. Means, *1964-65 Survey, S.C. Property*, 18 S.C.L. REV. 106, 112 (1966).

53. Woodle v. Tilghman, 234 S.C. 123, 107 S.E.2d 4 (1959); Hewitt v. Hewitt, 187 S.C. 86, 196 S.E. 541 (1938); Davis v. Dalrymple, 163 S.C. 490, 161 S.E. 738 (1931); Antley v. Antley, 132 S.C. 306, 128 S.E. 31 (1925); McWhite v. Roseman, 114 S.C. 177, 103 S.E. 586 (1920); Branyan v. Tribble, 109 S.C. 58, 95 S.E. 137 (1918); Adams v. Verner, 102 S.C. 7, 86 S.E. 211 (1915); Lane v. Dillon, 101 S.C. 196, 85 S.E. 369 (1915); Surles v. McLaurin, 94 S.C. 308, 77 S.E. 944 (1913); Holley v. Still, 91 S.C. 487, 74 S.E. 1065 (1912); Carolinan Timber Co. v. Holden, 90 S.C. 470, 73 S.E. 869 (1912); Mattison v. Mattison, 65 S.C. 345, 43 S.E. 874 (1903); Owings v. Hunt, 53 S.C. 187, 31 S.E. 237 (1898); Powers v. Bullwinkle, 33 S.C. 293, 11 S.E. 971 (1890); Graham v. Moore, 13 S.C. 115 (1880); Dehay v. Porcher, 1 Rich. Eq. 266 (S.C. 1845); Bailey v. Seabrook, Rich. Eq. Cas. 419 (S.C. 1829).

54. Graham v. Moore, 13 S.C. 115 (1880); Barksdale v. Gamage, 3 Rich. Eq. 271 (S.C. 1851); 2 POWELL, REAL PROPERTY § 195 (1962).

55. Powers v. Bullwinkle, 33 S.C. 293, 11 S.E. 971 (1890); Barksdale v. Gamage, 3 Rich. Eq. 271 (S.C. 1851); Izard v. Middleton, Bail. Eq. 228 (S.C. 1831).

56. Barksdale v. Gamage, 3 Rich. Eq. 271 (S.C. 1851); RESTATEMENT, PROPERTY § 70 (1936).

the issue survives the parent the conveyance bars the claims of the heirs and the interest of the possibility of reverter.[57] However, if the issue predeceases the holder of the fee simple conditional, the conveyance appears to be effective only for the lifetime of the tenant. At his death the possibility of reverter would return the land to the grantor or his heirs. The person taking the property by such a conveyance prior to birth of issue would receive only a life estate *per autre vie* (for the life of the holder in fee simple conditional).[58]

C. Release, Surrender, and Merger

The grantor or his heirs may release the possibility of reverter to the holder of the fee simple conditional. When such a formal release occurs, the tenant at that time receives a fee simple absolute.[59]

The opposite of release, surrender, has been denied the holder of a fee simple conditional by some authorities. In other words, a person who holds land in fee simple conditional cannot give the land to the grantor or his heirs by a formal surrender. This is so because in a surrender a smaller estate must be absorbed by a larger estate, and the possibility of reverter is not an estate but is a mere right based on a condition.[60] However, as has been noted before, the same result may be obtained after birth of issue to the holder by a conveyance to the grantor or his heirs.[61]

Even where the possibility of reverter and the title in fee simple conditional have come together in the same person, the South Carolina courts have not allowed merger of these interests.[62]

D. Encumbrances

Land held in fee simple conditional is subject to liability for debts incurred by the owner during his lifetime. This liability survives even the death of the owner and the passage of the land

57. Croxall v. Sherrerd 72 U.S. (5 Wall) 572 (1867).
58. Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 (1907); Barksdale v. Gamage, 3 Rich. Eq. 271 (S.C. 1851); Izard v. Middleton, Bail. Eq. 228 (S.C. 1831); Kepler v. Larson, 131 Iowa 438, 108 N.W. 1033 (1906).
59. Vaughan v. Langford, 81 S.C. 282, 62 S.E. 316 (1908); Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 (1907); Pearse v. Killian, McM. Eq. 231 (S.C. 1841); Adams v. Chaplin, 1 Hill Eq. 265 (S.C. 1833).
60. Adams v. Chaplin, 1 Hill Eq. 265 (S.C. 1833); Note, VII YEAR BOOK OF THE SELDON SOC'Y 42 (1943).
61. Cases cited note 53 *supra.*

to his designated heirs whether or not a judgment has been obtained.[63]

In South Carolina the widow of a holder in fee simple conditional who has satisfied the requirement of birth of issue is entitled to dower in land so held regardless of whether the issue survived the decedent. This means that the right to dower exists even though the land has passed to the designated heirs of the deceased or reverted to the grantor or his heirs.[64] This does not apply to land that was conveyed to the husband and his issue by a former wife who does not become the widow. For example, H and W are married. W grants land to H and the heirs of his body and then dies. H later marries B. When H dies leaving B as his widow, she does not have a right to dower in the land H received from W.[65] It appears that in a normal situation the dower interest will activate even though no issue has been born to the holder before his death.[66]

If two or more persons hold land in fee simple conditional as tenants in common, South Carolina allows them to obtain partition of this land.[67] The effect of such a partition upon the later death of one partitioner without issue is an open question at this time. For instance, if G granted land to his two daughters, M and L, in fee simple conditional and after G's death M and L partitioned the land, what happens to the land held by L on her death without issue? This situation closely resembles the facts of a South Carolina case, *Barksdale v. Gamage*,[68] where the lower court held that upon L's death her share would revert to the original grantee (G) or his heirs. This case was reversed by the appellate court on other grounds, but the specific problem involved here was not discussed. The lower court decision seems to be supported by one authority in the general area of parti-

62. Adams v. Chaplin, 1 Hill Eq. 265 (S.C. 1833).

63. Bonds v. Hutchison, 199 S.C. 197, 18 S.E.2d 661 (1942); Burnett v. Burnett, 17 S.C. 545 (1882); Izard v. Middleton, Bail. Eq. 228 (S.C. 1831); RESTATEMENT, PROPERTY § 75 (1936).

64. Wright v. Herron, 5 Rich. Eq. 441 (S.C. 1853); Milledge v. Lamar, 4 Desas. Eq. 617 (S.C. 1816) (dictum); See Means, *Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers*, 12 S.C.L.Q. 491, 513-14 (1960).

65. See Means, *supra* note 64, at 514 n. 148 (1960).

66. Milledge v. Lamar, 4 Desaus. Eq. 617 (S.C. 1816) seems to indicate this result by dictum.

67. Holley v. Still, 91 S.C. 487, 74 S.E. 1065 (1912); DuPont v. DuBos, 52 S.C. 244, 11 S.E. 1073 (1898); Barksdale v. Gamage, 3 Rich. Eq. 271 (S.C. 1851); RESTATEMENT, PROPERTY § 72 (1936).

68. Barksdale v. Gamage, 3 Rich. Eq. 271 (S.C. 1851).

tion.[69] Such a result would seem to defeat the provisions of the estate itself which provide for a reversion only if there are no designated issue alive.[70] Here M, the other partitioner, was alive and met the requirements of the original grant. If the problem arose today the court would probably rule that the partition cut off all the rights of the other parties to the land taken by one of their number under the partition.[71] Therefore upon failure of the designated heirs of one partitioner the land held by him would revert to the original grantor even though other partitioners or their issue were alive.

III. LIMITATIONS AFTER A FEE SIMPLE CONDITIONAL

Before the passage of the Statute De Donis the common law of England permitted remainders after fee simple conditional estates.[72] There is some support in early South Carolina cases for this position,[73] but the overwhelming weight of the case law in this state does not allow a remainder after a fee simple conditional.[74]

In some situations a limitation over may be created by an executory interest such as "to A and the heirs of his body, but if he should die without such heirs, over to B" (or words of similar import). When such a limitation is found in a devise it is considered valid, and if A dies without birth of the designated issue, the limitation over operates rather than the possibility of reverter.[75] Before 1925 when such a limitation over was at-

69. 2 CASNER, AMERICAN LAW OF PROPERTY § 6.20 (1952).
70. Cases cited note 48 *supra.*
71. See generally 2 CASNER, AMERICAN LAW OF PROPERTY §§ 6.19-.26 (1952).
72. See Note, 5 S.C.L.Q. 69, 70 (1952).
73. McCorkle v. Black, 7 Rich. Eq. 407 (S.C. 1855); Cruger v. Heyward, 2 Desaus. 94 (S.C. 1802).
74. Selman v. Robertson, 46 S.C. 262, 24 S.E. 187 (1896); Allen v. Fogler, 6 Rich. 54 (S.C. 1852); Buist v. Dawes, 4 Strob. Eq. 49 (S.C. 1850); Whitworth v. Stuckey, 1 Rich. Eq. 404 (S.C. 1845); Deas v. Horry, 2 Hill Eq. 244 (S.C. 1835); Bedon v. Bedon, 2 Bail. 231 (S.C. 1831); Bailey v. Seabrook, Rich. Eq. Cas. 419 (S.C. 1829); Mazyck v. Vanderhorst, Bail. Eq. 48 (S.C. 1828).
75. Dukes v. Shuler, 185 S.C. 303, 194 S.E. 817 (1938); Federal Land Bank v. Wells, 172 S.C. 1, 172 S.E. 707 (1934); Baxter v. Early, 131 S.C. 374, 127 S.E. 607 (1925); Strother v. Folk, 123 S.C. 127, 115 S.E. 605 (1922); Corley v. Hoyt, 116 S.C. 110, 107 S.E. 34 (1921); Allen v. Brownlee, 110 S.C. 531, 96 S.E. 615 (1918); Surles v. McLaurin, 94 S.C. 308, 77 S.E. 944 (1913); Bethea v. Bethea, 48 S.C. 440, 26 S.E. 716 (1897); Selman v. Robertson, 46 S.C. 262, 24 S.E. 187 (1896); Powers v. Bullwinkle, 33 S.C. 293, 11 S.E. 971 (1896); Graham v. Moore, 13 S.C. 115 (1880); Hull v. Hull, 2 Strob. Eq. 174 (S.C. 1848).

tempted by deed, it was not allowed.[76] However, there seems to be some authority which would support such a limitation over in certain circumstances.[77]

IV. CONCLUSION

The fee simple conditional is one of the most involved areas of property law in this state. It has been of slight importance in all other jurisdictions for many years. However, attempts to abolish the estate have been unsuccessful, and unless there is a drastic change in the legislative or judicial mind, the fee simple conditional will continue to play its confusing role in the property law of South Carolina.

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76. Edwards v. Edwards, 2 Strob. Eq. 101 (S.C. 1848); see Note, 5 S.C.L.Q. 69, 71-72 (1952).

77. Smith v. Clinkscales, 102 S.C. 227, 85 S.E. 1064 (1915); see Note, 5 S.C.L.Q. 69, 72 (1952).