

1929

## Determinable Fees, Effect of Failure in Deed to Provide for Forfeiture or Reversion

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### Recommended Citation

Joseph O'Meara, *Determinable Fees, Effect of Failure in Deed to Provide for Forfeiture or Reversion*, 3 U. Cin. L. Rev. 491 (1929).  
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# With The Ohio Courts

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## EDITORIAL NOTES

### DETERMINABLE FEES

The case of *In re Matter of Copps Chapel Methodist Episcopal Church*<sup>1</sup> appears to establish that there is no longer any such thing as a determinable interest in land in Ohio. Although not made an issue by the parties, the supreme court's decision turned upon the legal effect of the following *habendum* clause in a deed:

"To have and to hold the premises aforesaid unto the said grantees and their successors so that neither the said grantor or his heirs nor any other person claiming title through or under him shall or will hereafter claim or demand any right or title to the premises or any part thereof; but they and everyone of them shall by these presents be excluded and forever barred *so long as said lot is held and used for church purposes.*"<sup>2</sup>

The court said:

"There are no words of condition or forfeiture in the deed. There is no reverter clause, nor any provision establishing the right of re-entry. Hence, taking the deed by its four corners, it shows that the grantor intended to convey, and did convey, to the grantees all of his estate in the land."<sup>3</sup>

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<sup>1</sup>120 Ohio St. 309 (1929).

<sup>2</sup>Italics added.

<sup>3</sup>Page 315.

It was, therefore, held that ownership remained in the grantees notwithstanding the land had ceased to be "held and used for church purposes".

Professor Gray and others have argued that the Statute *Quia Emptores* made the creation of a determinable fee impossible.<sup>4</sup> "It is believed, however, that this argument is historically unsound and the conclusion to which the argument leads is inconsistent with all the modern decisions . . . the fact remains that, according to the existing authorities, determinable fees and possibilities of reverter may now be created."<sup>5</sup>

In *The American Law Institute's Restatement of the Law of Property*<sup>6</sup> it is said that estates and other interests in fee simple and in fee simple conditional and fee tail, interests for life and for years, periodic interests, and interests at will and at sufferance "may be created with a special limitation and when so created are determinable interests".

"A special limitation" is defined as "a limitation that creates one or more possible alternative determinations to an estate in addition to the termination normally characteristic of the estate".<sup>7</sup> The following illustration is given: "A transfers land 'to B and his heirs so long as the town of X remains unincorporated'. In the broad and usual meaning of the term 'limitation' as used in this Restatement all the phrase above quoted is 'a limitation'. The phrase beginning 'so long as' is a 'special limitation'."<sup>8</sup>

In *Lessee of Sperry v. Pond*,<sup>9</sup> decided in 1832, the supreme court recognized the possibility and existence of determinable fees in this state. The deed in that case, which was an action in ejectment, conveyed certain premises to the grantee, his heirs and assigns "so long as he, the said Clark, his heirs and assigns, shall keep a sawmill and gristmill doing business on the premises . . . and no longer". The court held that, whether the terms of the deed should be constructed as "a limitation" (determinable fee) or as creating an estate "on condition in deed" (condition subsequent), in either event the plaintiff was entitled to the land, it having been proved that Clark's grantee, the defendant, had

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<sup>4</sup>GRAY, *RULE AGAINST PERPETUITIES* (3rd ed. 1915) secs. 32—42.

<sup>5</sup>POWELL, *CASES ON FUTURE INTERESTS* (1928), pp. 6-7.

<sup>6</sup>Tentative Draft No. 1, sec. 22.

<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*

<sup>9</sup>5 Ohio 387 (1832).

ceased to keep a gristmill doing business on the premises. The court expressly said, however: "The estate conveyed by the deed to Clark was a qualified or determined (sic) fee."<sup>10</sup>

That case was followed in 1920 by the Court of Appeals for Pickaway County.<sup>11</sup>

The ordinary words appropriate to create a determinable interest in land are words indicating duration of time, *e. g.*, "until Gloversville shall be incorporated as a village".<sup>12</sup> The phrase *so long* or *as long as* has been recognized as sufficient since before the days of Plowden.<sup>13</sup> Blackstone says:

"... when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have paid 500£, and the like. In such case the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or receives the 500£), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed*, (as if granted expressly *upon condition* to be void upon the payment of 40£, by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, etc.) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate."<sup>14</sup>

The American Law Institute says:

"A, owning land in fee simple absolute, transfers the land: 1—To the town of B 'to hold to the town *so long as* the said town shall use the said land for public school purposes'. B has a determinable fee simple. A has a possibility of reverter."<sup>15</sup>

In the case under discussion the majority rely upon cases involving a conveyance for a certain named purpose, but without

<sup>10</sup>Page 390.

<sup>11</sup>Phillips v. Board of Education, 12 Ohio App. 456, 459 (1920).

<sup>12</sup>Leonard, *et al.* v. Burr, 18 N. Y. 96 (1858).

<sup>13</sup>2 Plow. 557.

<sup>14</sup>2 COMM. 155.

<sup>15</sup>*Supra* note 5. Italics added.

any special limitation or condition subsequent expressed. That such a conveyance does not create a determinable interest appears to be nowhere questioned. The inquiry with respect thereto is whether the language specifying the purpose for which the land is to be used, creates a condition subsequent or merely a covenant, and the latter is strongly favored. These authorities are wholly irrelevant. Nevertheless, in purported conformity therewith the court held that the language in the deed before it was not sufficiently clear to create a condition subsequent, saying:

"... the statement in this deed is . . . but a mere covenant that the property shall be used in a particular way."<sup>16</sup>

*In Board of Chosen Freeholders of Cumberland County v. Buck*,<sup>17</sup> the court said:

"It will thus be observed that, while it may at times become difficult to determine whether a given provision in a deed or devise is to be recognized as a condition or a mere covenant or trust, the essential qualities and characteristics of a limitation are too clearly defined to be easily confused."

The majority opinion cites Kent to the effect that *conditions subsequent* are not favored in law and are strictly construed. On the same page the great Chancellor expressly refers to his discussion of determinable fees in a former lecture, in which he says:

"A Qualified, Base, or Determinable Fee (for I shall use the words promiscuously) is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent. . . . A limitation to a man and his heirs, so long as A shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B; or so long as St. Paul's Church shall stand, or a tree shall stand, are a few of the many instances given in the books, in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations, or when the qualification annexed to it is at an end."<sup>18</sup>

Nowhere in the majority opinion is any reference whatever made to determinable fees. This omission is the more remarkable

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<sup>16</sup>Page 319.

<sup>17</sup>79 N. J. Eq. 472, 82 Atl. 418 (1912).

<sup>18</sup>4 KENT'S COMM. 9.

for two reasons. First, the court mentions *Lessee of Sperry v. Pond*. In that case, as above stated, the conveyance was to Clark, his heirs and assigns, "so long as he, the said Clark, his heirs and assigns shall keep a sawmill and gristmill doing business on the premises, . . . and no longer." The court distinguishes that decision on the ground that "The significant 'and no longer', which existed in the *Sperry* case, is absent".<sup>19</sup> The authorities already cited show that the phrase *so long as* is sufficient to create a determinable fee. It was expressly so stated in *Board of Chosen Freeholders of Cumberland County v. Buck*.<sup>20</sup> In the present case, however, the court does not say that the deed failed to create a determinable fee because the additional words *and no longer* were not used. It simply dismisses the earlier case with the remark above quoted, and the whole tenor and tone of the majority opinion indicate that if "the significant 'and no longer'" had been used, the court would have treated the estate as one with a condition subsequent, *not* as a determinable fee. Indeed, the court expressly says:

"The circumstances present in that case (*Lessee of Sperry v. Pond*), which led this court to declare that a *condition* existed, are not present here. . ."<sup>21</sup>

Second, in his dissenting opinion Chief Justice Marshall says:

"This deed, strictly speaking, does not contain a condition subsequent. The *habendum* clause creates a determinable fee, . . ."<sup>22</sup>

Chief Justice Marshall also says:

". . . once in a while a case is found which deliberately hangs a few cobwebs in places where they did not exist before. We fear that this case must be placed in this classification."<sup>23</sup>

It is made pretty clear, however, that determinable interests will not be recognized in this state. There would seem to be no escape from this unless the court should be prepared to overrule itself, or contrive some way of distinguishing the present case. This would appear to be very hard to do. JOSEPH O'MEARA, JR.

<sup>19</sup>Page 319.

<sup>20</sup>*Supra* note 16.

<sup>21</sup>Page 319. Italics added.

<sup>22</sup>Page 335.

<sup>23</sup>Page 329.