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Future Interests--Fee Simple Absolute or Fee Simple Subject to a Condition Subsequent or Fee Simple Determinable

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apply should they find from the evidence any facts to which it was applicable. Though not necessarily misleading, it placed upon the jury the responsibility of applying the law, which is rightly the duty of the court. *Parker* case, *supra.*

Upon this theory, there would have been no error in refusing the instruction as offered. But in changing it from a binding to a permissive one, the court not only failed to remove the objection, but permitted it to misstate the principle of law it was intended to set forth. Upon any theory, the instruction deprived the defendant of the defense of contributory negligence and the court should have taken notice of that fact.

L. L. P.

FUTURE INTERESTS—FEE SIMPLE ABSOLUTE OR FEE SIMPLE SUBJECT TO A CONDITION SUBSEQUENT OR FEE SIMPLE DETERMINABLE.—In 1904 property was conveyed to *P* "upon condition that the same shall be held and possessed by the party of the second part only *so long as* the said property shall be used for school purposes." A school building was erected on the property, and was continuously used for school purposes until March, 1956. *D* contracted to purchase the property from *P*, then declined to accept a tendered deed on the ground that *P* could not convey a fee simple title. *Held,* affirming lower court, that the language did not impose rigid restrictions upon the title or create a condition subsequent, but indicated the motive and purpose of the transfer, as no power of termination or right of re-entry for condition broken was expressed. *Washington City Board of Educ. v. Edgerton,* 94 S.E.2d 661 (N.C. 1956).

The court in the principal case apparently considered only the question of whether a fee simple subject to a condition subsequent was conveyed to the grantee. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple; and provides that upon the occurrence of a stated event the conveyor or his successors in interest shall have the power to terminate the estate so created. *Ohm v. Clear Creek Drainage Dist.,* 153 Neb. 428, 431, 45 N.W.2d 117, 119-120 (1950); *Queen City Park Ass'n. v. Gale,* 110 Vt. 110, 115, 3 A.2d 529, 531 (1939). The interest remaining in the grantor after such a conveyance has been termed a power of termination. RESTATEMENT, PROPERTY § 155 (1936). It has also been called a right of entry or a right of re-entry. See 1 AMERICAN

LAW OF PROPERTY § 4.6 (Casner ed. 1952). In North Carolina, a statement of a condition, without an express provision for the right to re-enter, is not sufficient to create a fee subject to a condition subsequent. *First Presbyterian Church v. Sinclair Refining Co.*, 200 N.C. 469, 157 S.E. 438 (1931). There is authority to the contrary, however, that an express provision for a right to re-enter is not necessary to create a fee subject to a condition subsequent. See *Dunne v. Minsor*, 312 Ill. 333, 143 N.E. 842 (1924); 1 SIMES, FUTURE INTERESTS § 163 (1936); 1 TIFFANY, REAL PROPERTY § 190 (3d ed. 1939). In view of the North Carolina requirement that there be an express provision for a right of re-entry, the decision in the principal case would not be questionable if the real problem was whether or not a fee subject to a condition subsequent was created.

However, the court should have considered whether or not a determinable fee—a fee simple determinable estate—was created. An estate in fee simple determinable is created by any limitation, which, in an otherwise effective conveyance of land, creates an estate in fee simple, and provides that the estate shall automatically expire upon the occurrence of a stated event. *Ohm v. Clear Creek Drainage Dist.*, 153 Neb. 428, 430-431, 45 N.W.2d 117, 119 (1950); *Betts v. Snyder*, 341 Pa. 465, 469, 19 A.2d 82, 84 (1941). The interest remaining in the grantor after such a conveyance is a possibility of reverter. RESTATEMENT, PROPERTY § 154g (1936); 1 TIFFANY, REAL PROPERTY § 220 (3d ed. 1939). The words "so long as", which were used in the principal case, without an express reverter clause, are sufficient to create a fee simple determinable. *North Hampton School Dist. v. North Hampton Congregational Soc'y*, 97 N.H. 219, 84 A.2d 833 (1951); *Lynch v. Bunting*, 42 Del. 171, 29 A.2d 155 (1942); *Eyssen v. Zeppa*, 100 S.W.2d 417 (Tex. Civ. App., 1936); 1 AMERICAN LAW OF PROPERTY § 4.13 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS § 181 (1936). *In re Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N.E. 218 (1929), appears to be the only prior case holding that the use of the words "so long as", without a provision for reverter, conveys a fee simple estate. There, also, the court failed to recognize the distinction between a determinable fee and a fee subject to a condition subsequent. But the scope of the *Copps* case, *supra*, has been restricted by *Burdette v. Jones*, 47 Ohio L. Abs. 593, 72 N.E.2d 152 (1947), which recognizes that an express reverter clause is not essential to the creation of a determinable fee.

The words "upon condition that", which were also used in the conveyance in the principal case, are sometimes used in the creation

of a fee subject to a condition subsequent. See *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10 (1901). But the use of the word "condition" does not necessarily indicate a condition subsequent. *Clark v. Grand Rapids*, 334 Mich. 646, 653-654, 55 N.W.2d 137, 141 (1952). Moreover, in North Carolina an express provision for a right of re-entry is essential to the creation of a fee subject to a condition subsequent. *First Presbyterian Church v. Sinclair Refining Co., supra.* It appears then, that the word "condition" was used in a nontechnical sense, perhaps synonymous with "provision" or "stipulation". But the court might have been misled by the words "upon condition that", and consequently failed to give effect to the limitation on the fee imposed by the words "so long as".

North Carolina has recognized the validity of a determinable fee estate where there is an express reverter clause. *Charlotte Park & Recreation Comm'n v. Barringer*, 224 N.C. 311, 88 S.E.2d 114 (1955).

With the exception of the *Copps* case, *supra*, the scope of which has already been restricted, the authorities have agreed that the words "so long as" in a conveyance, without an express reverter clause, create a determinable fee estate in the grantee, and a possibility of reverter in the grantor. And the validity of the determinable fee has been recognized in North Carolina. It would seem to follow that, had the court recognized the problem, the only sound decision would have been that the grantee had a determinable fee estate which terminated upon the cessation of use of the premises for school purposes, and that the title to the property then reverted to the grantor.

The problem in the principal case has not been presented to the West Virginia court. If it should be called upon to determine the effect, in a conveyance, of the words "so long as", the principal case should be viewed with caution. It may seem that the principal case is good authority for the proposition that the words "so long as", without an express provision for reverter, create a fee simple absolute instead of a fee simple determinable. But since the court apparently did not recognize what appears to have been the real issue and did not even discuss the question of whether or not a fee simple determinable was created the principal case is of doubtful authority.

R. M.