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FUTURE INTERESTS IN PROPERTY IN MINNESOTA

"Originally the creation of future interests at law was greatly restricted, but now, either by the Statutes of Uses and of Wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away. . . . This practically reduces the law restricting the creation of future interests to the Rule against Perpetuities." Generally in common law jurisdictions today there is but one rule restricting the creation of future interests, and that rule is uniform in its application to real property and to personal property, to legal and equitable interests therein, to interests created by way of trust, and to powers.

In 1830 the New York Revised Statutes went into effect in New York state. The revision had been prepared by a commission appointed for the purpose five years before. It contained a code of property law in which "the revisers undertook to rewrite the whole law of future estates in land, uses and trusts . . . . powers, perpetuities, and accumulations, and to abolish the common law rules on these subjects. . . . They undertook in like manner to re-write the law of personal property relating to future interests, perpetuities, accumulation of income, and . . . . to abolish the common law rules on these subjects." The provisions of this code relating to future estates, uses, trusts, and powers in real property were adopted, with a few unimportant variations, in the Revised Statutes of Michigan of 1847, in the Revised Statutes of Wisconsin of 1849, and in the Revised Statutes of Minnesota of 1851, and are now, with some additions, Chapters 59, 60 and 61 of the General Statutes of Minnesota of 1913. But these states did not adopt the provisions relating to personal property at all.

What the New York Revisers hoped to accomplish may be seen from the following excerpts from their report to the legislature:

1 Gray, Perpetuities, 3rd ed., Sec. 98.
2 Canfield, New York Cases and Statutes on Trusts, ii.
"The provisions in relation to expectant estates, contained in this Article, are the result of much and attentive consideration, aided by a diligent examination of elementary writers and adjudged cases. They are submitted by the Revisers in the confident belief that their adoption will extricate this branch of the law from the perplexity and obscurity in which it is now involved, and render a system simple, uniform and intelligible, which, in its present state, is various, complicated and abstruse.

"The principles by which the Revisers have been governed, in proposing the alterations contained in this chapter, and indeed throughout the revision, may be briefly stated. If a rule of law is just and wise in itself, apply it universally, as far as the reasons upon which it is founded extend, and in no instance permit it to be evaded; if it is irrational and fanciful, or the reasons upon which it is rested have become obsolete, abolish it at once. By adhering to these principles, we are well persuaded that the noblest of moral sciences may be redeemed from the complexity and mystery in which it is now involved; an immense mass of useless litigation be swept away, and an intelligent people, instead of complaining of the laws by which their rights are determined, as capricious, unintelligible or unjust, be led to confess their wisdom, and to rejoice in their mild and beneficent sway.

"We have no difficulty in believing, that every man of common sense may be enabled, as an owner of real property, to know the extent of his rights, and the mode of their exercise; and as a purchaser, to judge, with some assurance, of the safety of the title he is desirous to acquire."

The New York Revisers not only failed to attain their object but, on the contrary, they led the people of the state into a morass of litigation. The laity understands the law no better and the profession not so well. Their attempt to improve on the common law rule against perpetuities caused only a part of this litigation, but of that attempt alone the most learned American authority on the law of property has said:

"Upon considering the New York statutes two remarks suggest themselves. First. Those statutes evidently start with the theory that the immediate object of the Rule against Perpetuities is to limit restraints upon alienation. This idea has been common, and decisions have been based upon it; but the difficulties and confusion arising therefrom have caused the idea to be recognized as erroneous, and the decisions to be overruled or disapproved. This erroneous theory is crystallized in the New York Statutes.

"Secondly. The common-law Rule of Perpetuities grew out of the ordinary usages of the community, and is fitted to them. A will drawn as testators generally wish their wills drawn does
not violate the Rule. The limit of lives in being is a natural limit. The Rule strikes down only unusual provisions. But the limit of two lives, fixed by the New York Statute, is an arbitrary limit. It cuts through and defeats the most ordinary provisions. To allow future estates, and yet to confine them within bounds so purely arbitrary, would seem to be an invitation to litigation. And so the event has proved.

"The joint effect of these two causes is that in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York. Before the passage of the Revised Statutes there seems to have been but one case before the courts in that State in which the remoteness of a limitation was called in issue, and that presented only a simple question of construction. From the passage of the Revised Statutes down to the publication of the first edition of this treatise in 1886 there had been over one hundred and seventy reported cases on questions of remoteness. During the twenty-eight years since 1886, there have been some three hundred cases more, making a total little short of, if not over, four hundred and seventy cases. This enormous amount of litigation is perhaps as striking an illustration as could be found of the dangers attending radical legislation. Such legislation is indeed sometimes necessary, but it is not the simple work those engaged in it often suppose."

Minnesota has already had some unfortunate experience with the operation of these statutes. But there has been little litigation in the past compared with what the future holds in store. In pioneer times when land is plentiful and cheap, and when accumulations of wealth are few and small, dispositions of property are generally made outright, and wills and settlements are in simple form. But as land becomes valuable by scarcity or improvements, and as wealth accumulates, the desire of the owners to devote their property to charitable objects or to tie it up for the enjoyment of future generations increases. It is safe to say that the state has reached the stage where these attempts will multiply rapidly. As the law stands many proper and even laudable dispositions will be defeated and some objectionable ones will be sustained. These statutes are not yet a great part of the history of titles, or interwoven into the structure of the law of the state, as they have become in New York, but they will become so, with all their defects, unless thought is taken in time.

3 Gray, Perpetuities, 3rd ed., Secs. 748-750.
4 See, for examples an article, Charitable Gifts and The Minnesota Statute of Uses and Trusts, by Professor Edward S. Thurston, 1 MINNESOTA LAW REVIEW 201, 218.
The New York property statutes even when all questions under them shall be settled (assuming that is possible) create a system of law arbitrary and crabbed in its nature. The revision had its merits, but in parts it was obscure, contradictory, and arbitrary, and as a whole incomplete. The resultant law is necessarily illogical and unsymmetrical as a system. And in Minnesota there are additional difficulties. The personal property provisions of the New York statutes were not adopted, which results in a diversity of rules in respect to subject matter which ought to be governed, and which it is the tendency of modern law to govern, by uniform rules.

The object of this article is to compare the common law rules with the statutory rules on certain matters; to indicate points of uniformity as well as of diversity; and to raise the question whether some changes should not be made in the present law.

The common law of Minnesota is composed of the common law of England as modified and amended by English statutes passed prior to the Revolution. This common law of the state is in force except insofar as it has been modified by the constitution of the United States and by the constitution and statutes of the state. To ascertain what future interests in property may be created in Minnesota it will be well to trace the development of the several future interests (1) under the common law of England; (2) under the English amendatory statutes; and (3) under the state constitution and statutes.

A. In Real Property, At Law

At law, before the Statute of Uses (1535) the important rights in real estate, future in respect to the time of coming into possession, were: (1) Escheat; (2) Possibility of Reverter; (3) Reentry for Condition Broken; (4) Reversions; (5) Remainders. The future rights brought into the law by the Statute of Uses (1535) were: (6) Springing Uses and Shifting Uses. The Statute of Wills (1540) introduced: (7) Executory Devises. Of these, the first four were rights of the grantor or of the devisor's heirs; the others were generally rights to third persons. All of these still subsist in Minnesota, although sometimes modified in name and incidents.

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5 Dutcher v. Culver, (1877) 24 Minn. 584, 617.
6 The federal constitution does not affect the subject.
7 Gray, Perpetuities, 3rd ed., Secs. 7, 52 et seq.
Escheat

Escheat under the common law is classed as a future interest. By the theory of the English common law there was no absolute ownership of land by subjects. The Crown held in allodial, that is, absolute ownership, but the most that a subject could have in land was a fee estate held, mediately or immediately, of the Crown for some kind of service. This was feudal tenure and it was attended by various incidents. One of these incidents was escheat. Escheat was the right of the lord of whom the fee estate was held to have the land back again on the termination of the tenant's estate. The fee estate might be terminated by the tenant's death without heirs of his blood, or by his committing a felony which worked a corruption of blood and blotted out its inheriting quality. The escheat was to the immediate lord of whom the fee estate was held.

Originally the tenant of the fee estate could, by subinfeudation, grant to another a fee estate in the land to be held immediately of the grantor. Thus if the Crown granted a fee to A, A could in turn grant a fee to B, and B to C, each tenant holding immediately of his grantor, but mediately of the grantor's lord, and so ultimately of the Crown. At this time one fee was not regarded as the exact equivalent of another. The practical possibility that one fee might terminate before another had recognition in the law. B or his heirs might become entitled to possession of the land by defect of heirs to C before the fee to B was determined. B had, in the meantime, the overlordship or seignory, and escheat was one of the rights of seignory. The seignory of B might escheat to A in the same manner, but that was not so valuable a right as the escheat of the land itself. "Instead of

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8 The word fee (feodum, feudum, feud, fief) has a double meaning. Originally it meant a parcel of land held as a reward for service. The fee was not necessarily held as an inheritance. 2 Bl. Com. 221. But when fees became inheritable, the word was used to denote the extent of the tenant's interest in them. It would not be incorrect to say that the tenant held his fee in fee. The word is here used in the latter sense. 2 Bl. Com. 104-106.

9 Co. Lit. 65a; 2 Bl. Com: 59, 60.

10 2 Bl. Com. 72.


12 P. & M. Hist. of Eng. Law, II, p. 3; Leake, Law of Property in Land, 2nd ed., 20. "It has been truly said; in the beginning of feudal tenure this right was a strict reversion. The grant determined by failure of heirs; the land returned as it did upon the expiration of any less temporary
enjoying the land forever, he may get but a trifling rent." This loss to the lords in the right of escheat and in other incidents of tenure, as Wardship and Marriage, led to the celebrated Statute *Quia Emptores,* which prohibited further subinfeudation. The statute permitted the tenant to alien, but provided that the alienee of the fee estate should hold not of the alienor, but of the alienor's lord. The statute made fees equivalent in law, substituted the new for the old, and wiped out the seignory of the alienor. Thereafter no more mesne lords could be interposed between the Crown and the ultimate fee tenant. On future Crown grants the rights of escheat of the land would remain in the Crown.

Tenure as modified by the Statute *Quia Emptores* is the American common law. On the Revolution the state succeeded to the rights of the Crown and of the proprietors. The right of escheat was therefore in the state.

The constitution of Minnesota provides that "All lands within this state are declared to be allodial, and feudal tenures of every interest. 'Twas no fruit but the extinction of tenure (as Mr. Justice Wright says), 'twas the fee returned." Per Lord Mansfield in Burgess v. Wheate, (1759) 1 W. Blk. 123, 163. Compare the right of a tenant for life in reversion subject to a long term for years.

13 P. & M. Hist. of Eng. Law, I, p. 311; Digby, Hist. Law Real Prop. Chap. 4 Sec. 5.
14 (1290) 18 Edw. I Chap. 1.
15 The statute did not abolish the subinfeudation already effected.
16 The Crown was not within the statute. The immediate tenant of the Crown could not alien without license, but by license of the Crown he could alien the fee to be held of himself. Leake, Dig. Land Law 28; Challis, Real Prop., 2nd ed., 20. Some of the original proprietors in America were authorized by their charters to grant the land to be held of themselves. Lucas, Chart. 95, 117, quoted. Gray, Cases on Property, I, p. 330; The People v. Van Rensselaer, (1853) 5 Seld. (N.Y.) 334.
17 Van Rensselaer v. Hays, (1859) 19 N. Y. Rep. 73. "Land was held of the Crown in Colonial times, and it does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty. Tenure still obtains between a tenant for life or years and the reversioner; and so in like manner, it is conceived, a tenant in fee simple holds of the chief lord, that is, of the State." Gray, Perpetuities, 3rd ed., Sec. 22.
18 Whether tenure ever existed in Minnesota is doubtful, and now immaterial. On this question see Gray, Perpetuities, 3rd ed., Sec. 23; an article, Land Tenure and Conveyances in Missouri, by Prof. M. O. Hudson, The University of Missouri Bulletin, Law Series 8; Cf. Minneapolis Mill Co. v. Tiffany, (1876) 22 Minn. 463; Dutcher v. Culver, (1877) 24 Minn. 584, 617.
description, with all their incidents, are prohibited." This provision might have destroyed the state's right of escheat and enabled any occupant to hold lands of an intestate decedent with-

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20 (1857) Art. 1, Sec. 15. Although courts have frequently referred to the abolition of tenure, it is doubtful if such legislation has any practical importance. Technically it changed the nature of escheat. Also a rent reserved by the state on the grant of a fee would be not a rent service but a rent charge or rent seck, which have somewhat different incidents from a rent service. But it has no other practical result. Tenure was originally attended by various services and burdensome incidents. But by Statute 12 Chas. II (1660) Chap. 24 military tenure was abolished and turned into socage, and several incidents of socage were abolished. Co. Lit. 93b, Hargrave's note 95. The tenure established in America was socage. Van Rensselaer v. Hays, (1859) 19 N. Y. Rep. 73. By force of Quia Emptores, the tenant in fee held, after the Revolution, directly of the state. On this tenure the only service was the fixed rent reserved by the state, and the only incidents that could remain to this tenure in America were reliefs; escheat, and fealty. Relief was a year's rent, and if no rent was reserved there was no relief. Co. Lit. 85a, Hargrave's note 55. A fee held of the state without reservation of rent is for practical purposes the equivalent of allodial ownership with escheat provided for by statute.

"This tenure (free and common socage) has all the advantages of allodial ownership. The dominium utile vested in the tenant comprises the sole and undivided interest in the soil. Escheat is the only material incident of this tenure beneficial to the lord; and while there is an heir or devisee, he can in no way interfere.

"The tenant in fee simple of socage land can of his own authority create in it any estates and interests not contrary to the general rules of law; he can alien it entirely or devise it to whom he pleases, and the alienee or devisee takes directly from him, so that the title is complete without the concurrence or privity of the lord." Real Prop. Comrs., Third Rep., (1833) 7.

The mere abolition of tenure did not affect the great structure of real property law which had been builted under its influence. A perpetual rent may still be reserved on the conveyance of a fee. Minneapolis Mill Co. v. Tiffany, (1876) 22 Minn. 463. (Quaere as to agricultural lands. Const., Art.1, Sec. 15, Clause 2.)

"The principles of the feudal system, in truth, underlie all the doctrines of the common law in regard to real estate, and wherever that law is recognized recourse must be had to feudal principles to understand and carry out the common law. The necessity of words of limitation in deeds—the distinction between words of limitation and words of purchase—the principle that the freehold shall never be in abeyance, that a remainder must vest during the continuance of the particular estate or eo instanti that it determines, that the heir cannot take as a purchaser an estate the freehold of which by the same deed is vested in the ancestor—and many more rules and principles of very great practical importance, and meeting us at every turn in the American as well as in the English law of real estate—are all referrible to a feudal origin. 'The principles of the feudal system,' said Chief Justice Tilghman, 'are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture.' Lyle v. Richards, 9 S. & R. 333. 'Though our property is allodial,' said Chief Justice Gibson, 'yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee.' McCall v. Neely, 3 Watts 71." 2 Bl. Com. 78, Sharwood's note.
out heirs. But the statutes provide that "if the intestate leave no spouse nor kindred, his estate shall escheat to the state." This escheat by statute is a right of succession, instead of the reversionary interest which it was at common law. Escheat is therefore no longer a future interest in Minnesota.

Possibility of Reverter

Possibility of reverter is the interest remaining in a tenant in fee simple after he has granted a fee determinable by a special or collateral limitation. All estates in land may be made deter-

21 The Crown's right of escheat depended on tenure and extended only to lands held immediately of it. Williams, Real Prop., 17th ed., 60. Conversely, interests in lands not connected with tenure of the Crown did not escheat to the Crown. On this principle there was no escheat of an equitable fee. Burgess v. Wheate, (1759) 1 Eden 177. (Otherwise now in England by statute 47 & 48 Vict., Chap. 71 Secs. 4, 7. Challis, Real Prop., 3rd ed., 38.) So there was no right in the Crown to an estate pur autre vie on the death of the tenant before the other life, but it went to the first occupant. Co. Lit. 41b; See Lord Blackburn in Bristow v. Cormican, (1878) L. R. 3 App. Cas. 641, 647. The Crown succeeded to personal property on the death of the owner without kin, as ultimus haeres. Lord Mansfield in Burgess v. Wheate, (1759) 1 W. Black, 164, 2 Bl. Com. 505. This is a right of succession and is to be distinguished from escheat, or a "falling back" of the land to the lord. So the Crown succeeded to a trust of personality on the death of the cestui que trust without kin. Gray, Perpetuities, 3rd ed., Sec. 205, note. It was said obiter in a celebrated case that tenure ceased ipso facto on the Revolution, and that, in the absence of statute, the state would succeed to land, on the death of the owner without heirs, not by escheat but as ultimus haeres; and on that principle should likewise succeed to an equitable fee. Matthews v. Ward, (1839) 10 Gill & J. (Md.) 443. But in a very recent case the same court decided that the state could not, without the aid of a statute, take an equitable fee owned by no one, because "under the common law the trustees were competent to receive and hold the property as against the state, and because they could render the services required by the feudal principles of tenure." State v. American Colonization Soc., (Md. 1918) 104 Atl. 120.

22 G. S. Minn. 1913, Sec. 7238 (8). There was a statutory provision for escheat carried over from the Territory of Wisconsin, in force before the constitution was adopted. Laws of Minn. 1849, Chap. 63 Sec. 38. Whether there would be escheat of an equitable fee under the present statute is undecided. See note 21, supra. Cf. the right of a widow to dower in an equitable fee under the first part of the same section, which right would not exist at common law. Kasal v. Hlinka, (1912) 118 Minn. 37, 136 N. W. 569; 2 MINNESOTA LAW REVIEW 61. An equitable fee was held to escheat without express statutory provision, in Johnston v. Spicer, (1887) 107 N. Y. 185. 13 N. E. 753. There is no escheat for felony. Const., Art. 1, Sec. 11; G. S. Minn. 1913, Sec. 8499.


minable by a special or collateral limitation. When the estate created leaves a reversion in the grantor the future interest arising by force of the special limitation is incident to and merged in the reversion and is not regarded as a separate interest. Thus on an estate to B for life while she remains single, the reversion in the grantor may be accelerated by the special limitation, but the possibility of acceleration is not considered as an interest apart from the reversion. But a fee determinable by a special limitation is not regarded as leaving a reversion in the grantor, but only a possibility of reverter. These bare possibilities are here considered.

There is no doubt that by the early common law A might convey land to B and his heirs while they continue tenants of the Manor of Dale, or to B and his heirs so long as the land is used for the support of a school, or on other special limitations. B's present estate is most accurately called a determinable fee. This estate might come to an end by force of the special limitation and A be in of his former estate without entry or other act. A had in the meantime a possibility of reverter.

Several learned writers maintain that fees could not, on principle, be created determinable by a special limitation after the passage of the Statute Quia Emptores, that the special limitation would be void, and the fee a fee simple absolute. The argument runs that the possibility of reverter is a reversionary interest which implies tenure; that the statute prevented tenure arising between the grantor of an estate in fee and his grantee; and that there can consequently be no possibility of reverter remaining in the grantor upon the conveyance of a fee, and the attempted limitation to that end is of no effect. Two other opinions on

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25 Tiffany, Real Prop. p. 190.
26 See Challis, Real Prop., 3rd ed., 255, for many examples. Apt words to introduce the special or collateral limitation are. while, so long as, until, during. Mary Portington's Case, 10 Co. 35a, 41b, 77 E. R. 976.
27 Sometimes called a base, or qualified fee, or a fee subject to a special or collateral limitation. The first two terms have other more proper uses. Tiffany, Real Prop. p. 192, note; an article, Determinable Fees in American Jurisdictions, by Mr. John Maxey Zane, 17 Harv. Law Rev. 297. Special or collateral limitation is also to be distinguished from conditional limitation, which in its proper signification is no part of the limitation of the grantee's estate, but cuts it short and substitutes another in its stead, in favor of a third party. Gray, Restraints on Alienation. 2nd ed., Sec. 22, note. For the difference between a determinable fee and a fee on condition subsequent, see post p. 335.
28 Co. Lit. 214b.
principle have been given, both sustaining the validity of determinable fees, and so of possibilities of reverter. They differ, however, as to the person in whom the possibility subsists. One claims "that when the limitation comes to an end the land will fall into the hands of the lord of the fee by a right somewhat in the nature of an escheat.\(^3\) The other maintains that the Statute *Quia Emptores* applies only to a fee simple absolute; that a tenure still arises between the grantor of a determinable fee and his grantee, and that the possibility of reverter is in the grantor.\(^3\) But whichever opinion is correct on principle, and whatever the holding of the English cases,\(^2\) the last opinion coincides with the decisions of the American courts. Both in states where tenure exists and *Quia Emptores* is in force, and in states where tenure has been abolished, possibilities of reverter have been upheld by the courts.\(^3\)

It is to be remembered that all three opinions make determinable fees depend upon tenure, and tenure is abolished in Minnesota. It might seem that, if *Quia Emptores* would prevent the creation of determinable fees in land because under the Statute no tenure could arise between the grantor and grantee thereof, the abolition of tenure would work a like result. And the late Professor Gray, the most earnest advocate of this view, so maintained.\(^3\) But does this result necessarily follow? It might be argued that it was the new tenure created by the Statute *Quia Emptores* between the grantee and the grantor's lord, and not merely the prohibition of tenure between grantee and grantor, that prevented determinable fees, and that the entire abolition of tenure would leave the grantor free to create such estates upon such limitations as were allowed by the common law. There is a rule that estates unknown to the law cannot be created; but determinable fees were not unknown to the law. The abolition of tenure does not prevent the creation of estates less than absolute ownership held by an "imperfect" tenure\(^5\) of the owner or held of no one.\(^3\)


\(^{31}\) 3 Law Quart. Rev. 399; Challis, Real Prop., Appendix IV.

\(^{32}\) See Gray, Perpetuities, 3rd ed., Secs. 32-37.

\(^{33}\) See Gray, Perpetuities, 3rd ed., Secs. 38-40a (collecting cases); Kales, Future Interests, Sec. 126.

\(^{34}\) Gray, Perpetuities, 3rd ed., Sec. 39.

\(^{35}\) Tiffany, Real Prop. p. 85, 271.

\(^{36}\) At common law if A conveyed to B for life, B held of A; but if A gave remainder to C in fee, B did not hold of A or of C, but both B and
land is conveyed to A and his heirs so long as it is used for
the support of a school, may there not be such an imperfect tenure
between the grantor, tenant in fee simple absolute, and the
grantee, tenant of a determinable fee? Or does the abolition of
tenure make the interest conveyed, not only alodial ownership,
but an unqualified alodial ownership? Professor Gray admitted
that since rents charge are not held of anyone, an existing rent
charge may be granted in fee simple determinable.37 Does not the
same reasoning apply to lands which are not, in the feudal sense,
held of anyone?

In Minnesota, apart from the constitutional article abolishing
tenure, there is no legislation to prevent the creation of deter-
minable fees. The provision as to present estates reads: “Every
estate of inheritance shall continue to be termed a fee simple, or
fee; and every such estate, when not defeasible or conditional,
shall be a fee simple absolute or an absolute fee.”38 This language
is broad enough to permit of determinable fees. In Flaten v.
Moorhead39 land was conveyed to a municipal corporation “to
be forever held and used as a public park” and it was held that
“an absolute title in fee did not pass to the village.” Cases in
New York and Wisconsin, which have no tenure and have statutes
identical with Minnesota’s, sustain the validity of determinable
fees, and the possibilities of reverter attendant upon them. In
Leonard v. Burr40 land was devised to A “until Gloversville be
incorporated as a village,” and it was held that on incorporation
the land reverted to the devisor’s heirs. And in Daniels v. Wil-
son41 land was conveyed to a county for county purposes so long
as the county seat remained in the village where the land lay, and
it was held that on removal of the county seat the land reverted
to the grantor. There would seem to be little doubt that land in

37 "Rents charge are not held of anyone; and if A, who has a rent
charge in fee, grants it for a less estate to B, B does not hold of A; so it
would seem that the statute Quia Emptores does not inhibit a rent charge
being created de novo in fee simple determinable, nor an existing rent
charge being granted in fee simple determinable; and that the law is the
same as to other like incorporeal hereditaments, such as profits and ease-
ments in gross. There is next to nothing in the books on the subject;
ed., Sec. 31, note 4.
38 G. S. 1913, Sec. 6653.
39 (1892) 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195.
40 (1858) 18 N. Y. 96.
41 (1871) 27 Wis. 492.
Minnesota may be limited in fee determinable by a special or collateral limitation, leaving a possibility of reverter in the grantor.

There is one class of cases in which the problem of determinable fees is of present practical importance. The Minnesota statutes have been construed to abolish charitable trusts.  

So a gift of property to natural persons as trustees for a charitable purpose where the beneficiaries are indefinite is void. But the courts, in their commendable endeavor to sustain charitable gifts, have held that gifts to a corporation organized, or about to be organized, for charitable purposes, to be applied to these purposes, are "valid not as a trust, but as a gift upon condition, though the ultimate beneficiaries of the gift are more or less uncertain." Since the gifts are ex ratione not in trust, the limitations as to use must inhere in the legal title of the donee corporation.

The gifts upheld by this reasoning were of mutable personalty or convertible realty, and it is difficult to explain, on recognized principles, how either conditions subsequent or special limitations can be made to qualify the legal title not only to the original property, but also to the property that may be substituted in its stead. But when the gift is of real property and the donor limits the very property donated (as distinguished from the proceeds) to be used only for the purpose specified on the donation, the problem offers no difficulty. Such gifts would, however, be fees determinable on a special limitation, leaving a possibility of reverter in the donor, rather than fees on condition subsequent, with a right of re-entry in the donor. It is contrary to all rules of construction to hold that a restric-

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42 See article by Professor Edward S. Thurston, Charitable Gifts in Minnesota, 1 MINNESOTA LAW REVIEW 201, 224.
43 Shanahan v. Kelly, (1903) 88 Minn. 202, 92 N. W. 948.
44 Per P. E. Brown, J., in Young Men's Christian Ass'n v. Horn, (1913) 120 Minn. 404, 415, 139 N. W. 806; and see cases cited 1 MINNESOTA LAW REVIEW 224, note 100.
45 In Cone v. Wold, (1902) 85 Minn. 302, 88 N. W. 977, it was held that there was a resulting trust of the funds when the corporation could no longer carry out the conditions annexed to the gift. But since there can be a resulting trust only when the trustee's legal title outlasts the equitable, the decision connotes that the corporation has the absolute legal title and that only the equitable title is qualified. And this qualification of the equitable title imports a trust in the corporation. (See Gray, Perpetuities, 3rd ed., Sec. 603.) But the reasoning of the cases under discussion is that there is no trust at all.
tion as to use, without more, creates a condition subsequent. It is, on the other hand, sound on principle, and supported by authority to construe such gifts as creating determinable fees. Under such a construction the donor cannot insure that his purposes will be carried out, but he can secure to himself, or to his heirs, a right to recover the property, if the purposes for which it is limited are disregarded.

If the donor does not expressly limit the fee to determine upon cesser of the use, but conveys it to the charitable corporation without qualification, a different problem arises. It is said by Coke that the law will annex the purpose of the corporation to the fee, so that it will be determined by the dissolution of the corporation, and the land will not go to the lord by escheat but will revert to the donor. Professor Gray maintained that the lands escheat to the lord of whom they are held and that Coke was misled by the cases where the escheat was to the donors because the fees were held of them in frankalmoign tenure. And the English decisions support this view. But one American jurisdiction supports Coke's statement and holds that on the dissolution of a charitable corporation lands donated to it will revert to the donor or his heirs.

The possibility of reverter was, at common law, inheritable and releasable, but not alienable or devisable. It is a bare possibility, not an estate, but "the mere remembrance of a condition upon which a present estate may be defeated, and a future one

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46 In Farnham v. Thompson, (1885) 34 Minn. 330, 26 N. W. 9, a deed of land to a charitable corporation "for the purpose of erecting a church thereon only" was held not to create a condition subsequent. The court said: "Such conditions are not favored in law because they tend to defeat estates vested and are in the nature of forfeitures. Therefore it is in such cases a rule recognized by all the authorities that an estate on condition cannot be created by deed except when the terms of the grant will admit of no other construction." The question whether the gift might not be construed as a determinable fee is not discussed.


48 Gray, Perpetuities, 3rd ed., Secs. 44-51a; Mott v. Danville Seminary, ubi supra; Kales, Future Interests, Sec. 126.

arise."50 And as rights of re-entry for breach of a condition subsequent continue inalienable under the Minnesota statutes, possibilities of reverter are also likely to be so held.51

Possibilities of reverter are not affected by the common law rule against perpetuities (remoteness).52 Neither does the statutory rule against perpetuities (restraints on alienation) apply to them. They may be released by the donor or his heirs, and so there are always persons in being capable unitedly of conveying an absolute fee simple in possession, which satisfies the statutory rule.53

It is a question whether the power to create determinable fees is not contrary to sound public policy.54 It has been said that the event upon which a determinable fee is limited "must be of such a kind that it may by possibility never happen at all."55 The same learned author distinguishes fees determinable upon an event "which admits of becoming impossible to happen," such as the marriage or death of a person, and those determinable upon an event "which must forever if it does not actually happen, remain liable to happen," such as the fall of a particular building. Fees of the former class must either determine or become fees simple absolute at the death of the person named, and are not objectionable. But fees of the latter class can never be enlarged into fees simple absolute, except by a release of the possibility of reverter.56 Such are open to the objection that the possibility hinders the full enjoyment and alienation of the estate by the tenant.57 There is no limit in time either by the common law or by the statutes of Minnesota within which such fees must determine, or beyond which the possibility of reverter in the grantor, or his heirs, may not ripen into a right to possession of the land.58

51 See note 73, post.
53 G. S. Minn. 1913, Secs. 6664, 6665.
55 Gray, Perpetuities, 3rd ed., Sec. 312.
57 Ibid., p. 254.
58 Determinable fees are alienable unless the alienation brings the special limitation into operation, in which case the fee will be determined. First Universalist Society v. Boland, note 47, supra. But they continue subject to the special limitation in the hands of aliens.
59 In Attorney General v. Cummins, [1906] 1 I. R. 406, a possibility of
RIGHT OF RE-ENTRY FOR CONDITION BROKEN

All estates in land may be granted on condition subsequent. Such a condition does not hinder the creation of the estate, or its becoming a right in possession, but it introduces a contingent right in the grantor to end the estate before it would determine by the terms of its own limitation. This possibility ripens into a present right to end the estate upon breach of the condition. Thus the condition creates a possibility of a right of re-entry, which the breach turns into a present right, the exercise of which destroys the estate of the grantee and restores the grantor to his original relation to the land. As a future interest it would be more descriptively called a possibility of a right of re-entry.

A right of re-entry can be reserved only to the grantor and his heirs. And originally the right could not in any case be transferred to any other person. So if a lease were made for life or years on condition, an assignee of the reversion could not re-enter by force of the condition. But by statute 32 Hen. VIII, Chap. 34, assignees of reversions on leases for life or years were empowered to re-enter for breach of the conditions in the leases. The statute made the right of re-entry pass in these cases as incident to the reversion where there was one. The statute did not affect the right of re-entry in other cases. But no reversion is necessary to the reservation of a right of re-entry. It may be made on a conveyance in fee or on the assignment of any estate, which leave no reversion in the grantor or assignor. It is with these bare rights of re-entry that we are here concerned.

reverter in a rent became effective more than two centuries after the creation of the determinable fee therein.

60 Lit. 346, 347.
61 Co. Lit. 215a.
62 In Ohio Iron Co. v. Auburn Iron Co., (1896) 64 Minn. 404, 67 N. W. 221, it is said, and in Cameron Tobin Baking Co. v. Tobin, (1908) 104 Minn. 333, 116 N. W. 838, it is decided, that a tenant of a term for years cannot create a condition subsequent, in the assignment of his term, because "The right of re-entry cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of which it is reserved." This decision is opposed to the well-considered case of Doe d. Freeman v. Bateman, (1818) 2 B. & Ald. 168, 106 E. R. 328. The English court points out that as conditions subsequent on conveyances of the fee are valid, no reversion can be necessary to create them. As the assignor of a term usually continues under contractual liability to his landlord on the covenants in the lease, he has the greater need of a right of re-entry to save himself from the incidence of that liability through repeated acts of the assignee who may become financially irresponsible. As rights of re-entry on conveyances in fee are clearly valid in Minnesota, the
Courts often fail to distinguish fees determinable by a special limitation from fees on condition subsequent. The right created in the grantor by a condition subsequent in the grant is indiscriminately called a possibility of reverter and a right of re-entry.\textsuperscript{63} They differ, however, somewhat in form\textsuperscript{64} and greatly in legal effect. A special limitation is a part of the limitation of the estate itself marking the limit of it, while a condition subsequent is extrinsic to the limitation of the estate, but provides for cutting short the estate previously limited. It follows that the estate on special limitation is determined by the operation of the limitation itself, but the estate on condition is not ended ipso facto by the breach of the condition. The grantor must claim the forfeiture of the estate in the grantee before it is determined.\textsuperscript{65} Estates may be made determinable by special limitations on an event which would be void as a condition subsequent. An estate to A so long as she remains single is good; but to A on condition she do not marry is void.\textsuperscript{66} By the operation of a special limitation the grantor is in of his former estate without any act on his part, and can restore the estate to his grantee only by a reconveyance; but after breach of condition the grantee's estate continues until the grantor enters, or does some act necessary to perfect the forfeiture, and the grantor need only waive the forfeiture, to confirm the grantee in his former estate.\textsuperscript{67} Again the grantor of the fee determinable by special limitation, being in by the operation of the limitation alone, may without entry convey his estate, a present one without entry, to another; but the grantor of the fee on condition subsequent cannot convey any interest until he has entered for the forfeiture.\textsuperscript{68} Finally, although it has


\textsuperscript{64}See note 26, supra. "While certain words are said to be appropriate for the creation of a condition, such as 'on condition,' 'provided,' 'so that,' no particular words are required, it being purely a question of the intention of the grantor or devisor as gathered from the whole instrument. Nor does the presence of such conditional words necessarily create a condition. A reservation of the right of re-entry on the happening of a contingency will usually render the estate one on condition." Tiffany, Real Prop., p. 162.

\textsuperscript{65}Tiffany, Real Prop., p. 188 et seq.

\textsuperscript{66}See note, Gray, Cases on Property VI, p. 31; and an elaborate annotation, 4 B. R. C. 106, 128.

\textsuperscript{67}McCue v. Barrett, (1906) 99 Minn. 352, 109 N. W. 594.

\textsuperscript{68}Mott v. Danville Seminary, note 47, supra; Kales, Future Interests, Sec. 126.
been strongly urged that fees determinable by special limitation were rendered impossible by the Statute *Quia Emptores*, rights of re-entry were clearly not affected by the statute or by the abolition of tenure.\(^69\)

Rights of re-entry reserved on conveyances of the fee are valid both by the common law and under the Minnesota statutes.\(^70\) Re-entry is no longer necessary, but there must be some act to perfect the forfeiture.\(^71\) The right of re-entry may be expressly or impliedly waived\(^72\) or released, but it cannot be granted or devised either before or after breach at common law.\(^73\) The attempted conveyance of the right destroys it.\(^74\) It can only descend to the heirs of the grantor. The Minnesota statutes provide that: "Expectant estates are descendable, devisable, and alienable in the same manner as estates in possession."\(^75\)

\(^69\) "The distinction between a right of entry for condition broken and a possibility of reverter is this: after the Statute, a feoffor by the feoffment substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest—a returning of the land to the lord of whom it was held, because the tenant's estate had determined." Gray, Perpetuities, 3rd ed., Sec. 31.

\(^70\) Dunnell, Digest, Secs. 2675-2679.

\(^71\) Sioux City, etc., R. Co. v. Singer, (1892) 49 Minn. 301, 51 N. W. 905; Little Falls Water Power Co. v. Mahan, (1897) 69 Minn. 253, 72 N. W. 69. Actual re-entry became unnecessary to maintain ejectment, because, by the procedure, entry had to be confessed by the defendant under the consent rule, in order to be admitted to defend. Abolition of livery of seisin also affected the matter, for, as the estate might thereafter begin without entry, it might be ended without it.

\(^72\) McCue v. Barrett, note 67, supra.

\(^73\) Rice v. Boston, etc., R. Corp., note 63, supra; Methodist Church v. Young, (1902) 130 N. C. 8, 40 S. E. 691; contra (as to devise), Austin v. Cambridgeport Parish, (1838) 21 Pick. (Mass.) 215. The cases are collected in 66 L. R. A. 750, 23 L. R. A. (N.S.) 938.

\(^74\) Rice v. Boston, etc., R. Corp., note 63, supra; Wagner v. Wallowa Co., (1915) 76 Ore. 453, 148 Pac. 1140, L. R. A. 1916F 303. In a valuable note to the last named case in L. R. A. and in 23 L. R. A. (N.S.) 938 the learned annotators point out that before breach rights of re-entry were inalienable, because they were mere possibilities which the early law deemed incapable of transfer, and after breach because of the statutes against champerty and maintenance, and that in both cases they were destroyed by an attempted conveyance, by force of these statutes. The judicial attitude towards the assignment of choses in action and towards champerty and maintenance having changed, the reasons for the old rules have disappeared. Yet in most jurisdictions they continue inalienable and destructible. The whole doctrine, it is concluded, "should be consigned to the judicial junk heap."

\(^75\) G. S. Minn. 1913, Sec. 6685.
ders are deemed expectant estates within the meaning of the statute and so are alienable, but it is held that rights of re-entry are not estates, but mere possibilities, and they continue inalienable as at common law.\(^{76}\) The fee subject to the condition may be aliened, but "although the same do pass through the hands of an hundred men, yet it is subject to the condition still."\(^{77}\)

There is a conflict of authority on the question whether rights of re-entry must be restricted as to time to satisfy the common law rule against perpetuities (remoteness). It has been urged that, as these rights were recognized centuries before the rule against perpetuities developed, it would be an anachronism to apply the rule to them.\(^{78}\) But in England they have recently been held to come under the rule,\(^{79}\) and consequently, where by their terms they might remain contingent more than twenty-one years after the termination of lives in being at their creation, they are void from the start. In America, however, the rule is not applied to them. After an exhaustive examination of the American cases Professor Gray says:

"Though rights of entry for condition broken are within both the letter and the spirit of the Rule against Perpetuities; though there is nothing in the history of the Rule to exempt them from its operation; though they are held to be subject to it in England; though the practical inconvenience of excluding them is very great; and though this inconvenience is especially great in America, where the heirs from whom a release must be sought may, and often do, multiply enormously with every succeeding generation,—yet in America conditions violating the Rule against Perpetuities have been repeatedly upheld, and forfeitures for their breach enforced. . . .

"This great consensus of authority, although without any consideration of the question involved, may perhaps be held to settle the law for the United States, and to create in this country an exception, arbitrary though it be, to the Rule against Perpetuities."\(^{80}\)


\(^{77}\) Shep., Touch. 120; Sioux City, etc., Co. v. Singer, note 71, supra.

\(^{78}\) Challis, Real Prop., 3rd ed., 187-190.

\(^{79}\) In re Hollis' Hospital, (1899) L. R. 2 Ch. 540, 47 W. R. 691; In re Da Costa, (1912) L. R. 1 Ch. 337.

\(^{80}\) Gray, Perpetuities, 3rd ed., Secs. 304, 310.
In Minnesota it is clear that rights of re-entry are not affected by the statutory rule against perpetuities (restraints on alienation).\textsuperscript{81} The rights may be released, and there are, consequently, always persons in being who may by releasing to, or joining with, the owner of the fee, convey a fee simple absolute.\textsuperscript{82} There is, then, no restriction as to the time within which these rights must come to an end or beyond which they may not become rights to terminate the estate and to have possession of the land.

These perpetual rights of re-entry are open to the same objections as possibilities of reverter and to the additional one that they are more frequently created. They hinder, although they do not prevent, the use and, consequently, the alienation of the estates subject to them.\textsuperscript{83} Reserved, perhaps, to protect some other interest of the grantor, they may become valueless to him, but yet remain encumbrances on the estate conveyed. While always releasable, it becomes increasingly difficult to procure a release, as the number of persons to whom they go by descent may greatly increase on each succession. There is one special statutory provision affecting them in Minnesota.\textsuperscript{84} “When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.” The statute as construed appears to be of little worth. It creates no presumption that the condition is merely nominal. The grantee, to defeat the condition, must apparently show that the grantor had no present or prospective substantial interest in the performance of the condition.\textsuperscript{85} The statute would not literally apply to conditions originally of actual benefit to the grantor, which become in course of

\textsuperscript{81} G. S. Minn. 1913, Secs. 6664, 6665.
\textsuperscript{82} See ante, p. 333; Sioux City, etc., R. Co. v. Singer, note 71.
\textsuperscript{83} See Morse v. Blood, (1897) 68 Minn. 442, 71 N. W. 682.
\textsuperscript{84} G. S. Minn. 1913, Sec. 6695.
\textsuperscript{85} “It may be apparent, from the very nature of the condition, that it was not intended to confer or reserve any real benefit to the grantor or to any other person. Such, for instance, would be a condition annexed to the granting of a fee, that the grantee should yearly deliver an ear of corn to the grantor, or render any specified, but unsubstantial, service. To such a case the statute would apply. Again, a condition may be such that proof beyond the deed itself would be necessary to disclose the fact whether the expressed condition was or was not substantially beneficial. We will suppose that the owner of a lot conveys it with the express condition that
time merely nominal.\textsuperscript{86} Besides it is a question of fact whether the condition is substantial or nominal, and a breach by the owner or purchaser always incurs the danger of litigation. An absolute restriction as to the time for which rights of re-entry shall be good would obviate this danger. In Massachusetts it is provided that restrictive conditions and covenants become inoperative thirty years after their creation.\textsuperscript{87} Timely legislation of this kind would prevent evils which, once existing, might be difficult to remedy, under the constitution, by subsequent legislation.

**Reversions**

The statutes define a reversion as "the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."\textsuperscript{88} This definition conforms to the definition of a reversion by the common law.\textsuperscript{90}

A reversion differs from a possibility of reverter in that the former is an estate while the latter is only a possibility of an estate. The former can only exist after a present estate, which, as an estate, is less than a fee; while the latter arises after a fee by force of a special limitation upon it.\textsuperscript{90}
A reversion continues in a grantor unless he limits vested estates equal in quantum to his own. If A, tenant in fee simple, devises to B for life, and on the death of B to his children who survive him, and if B leaves no children surviving, to C and his heirs, the limitations to the children and to C are alternative contingent remainders at common law. The fee will vest in one or the other at B’s death, but not before. The limitations are but possibilities while B lives, and the fee continues as a reversion in A’s heirs pending the contingency.91

It is a rule of the common law that a grantor cannot limit an estate, which apart from the limitation would continue in him or his heirs as a reversion, so that he or his heirs should have it as a remainder. A man cannot convey to himself, or make his heirs, as such, take by purchase what they would otherwise take by descent.92 The Court of Appeals in New York has lately held that the rule is still law.93 It is also presumably law in Minnesota, the statutory provisions being the same.

Since reversions arise only when one conveys an estate less than he has, the power to create them is limited by the power to create present estates. Estates in fee-tail are abolished and a limitation which by the common law would have created a fee-tail leaving a reversion in the grantor now creates a fee simple,94 on which no reversion can arise. Leases of agricultural lands for more than twenty-one years are void.95 There are no other restrictions on the creation of reversions than existed by the common law. They are vested estates and are alienable, and consequently are not affected either by the common law rule, or by

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91 Gray, Perpetuities, 3rd ed., Sec. 11, Note. The existence of the reversion made possible the destruction of the contingent remainders by the common law, for by the doctrine of merger if B surrendered his life estate to A’s heirs, or the heirs released the reversion to B, the life estate which supported the contingent remainder was “drowned” in the fee and the contingent remainders dependent upon it failed. Egerton v. Massey, (1857) 3 C. B. N. S. 338, 27 L. J. C. P. 10, 21 Jur. 1325, 6 Wkd. Rep. 130; Lewin v. Bell, (Ill. 1918) 120 N. E. 633; see 3 MINNESOTA LAW REVIEW 135.

92 “A man cannot, either by conveyance at the common law, by limitation of uses or devise, make his right heir a purchaser.” Pibus v. Mitford, (1674) 1 Vent. 372, 86 Eng. Reprint 239.

93 Doctor v. Hughes, (N. Y. 1919) 120 N. E. 221. A conveyed land to trustees on trust for A for life, and on the death of A to convey to A’s heirs. Judgment creditors of A’s heirs presumptive attempted to levy on the interest to the heirs while A lived. It was admitted that the levy was good if the interest to the heirs was well created, but it was held that the limitation to them was void, and the reversion was in A.

94 G. S. Minn. 1913, Sec. 6654.

95 Constitution of Minnesota, Art. I, Sec. 15.
the statutory rule, against perpetuities. Except in agricultural lands, terms for years may be created of any duration leaving a reversion in the lessor. There is no limit of time by the common law or by the statutes within which a reversion must vest in possession.  

(To be continued.)

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96 For a criticism of this phase of the law see Gray, Perpetuities, 3rd ed., Secs. 970-974.