

1941

Salt Lake City v. State of Utah : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

SALT LAKE CITY, a municipal
corporation,

Respondent,

vs.

STATE OF UTAH,

Appellant.

RESPONDENT'S BRIEF

APPEAL FROM THE THIRD DISTRICT COURT OF
SALT LAKE COUNTY, UTAH

HONORABLE BRYAN P. LEVERICH, *Judge*

E. R. CHRISTENSEN,
City Attorney,

GERALD IRVINE,

A. PRATT KESLER,

Assistant City Attorneys.

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In the Supreme Court of the State of Utah

SALT LAKE CITY, a municipal
corporation,

Respondent,

vs.

STATE OF UTAH,

Appellant.

Case No. 6376

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The Respondent, Salt Lake City, commenced an action April 8, 1940 to quiet title to a parcel of land described as follows:

All of lots 8, 9 and 10 in Block 2, Plat "K",
Salt Lake City Survey.

It was alleged in the City's Complaint that the Respondent was the owner of said land and that the Defendant, State of Utah, claimed an interest therein, which interest had no foundation in law and prayed that its title be quieted. (R. 1-2) The Defendant, State of Utah, filed

its general Demurrer (R. 4), which Demurrer was by the District Court on May 6, 1940 overruled. (R. 6) The Defendant filed its answer May 17, 1940 by which it denied Plaintiff's ownership of the land described in the complaint and alleged that said land was conveyed by deed for a valuable consideration to the State of Utah July 9, 1895, which deed was executed by the Plaintiff who then was the owner thereof and who conveyed a good title to the Defendant. That the Defendant had, since said date, been in possession of said land and at the time of the filing of the answer owned the same. (R. 8, 9 and 10) The Plaintiff, Salt Lake City, filed its Amended Reply September 26, 1940 wherein it alleged that Plaintiff, being the owner of said land described in the complaint, conveyed the same by deed to the Defendant July 9, 1895, which deed is attached to paragraph 2 of its Amended Reply as an Exhibit and as a part of said Reply, and after the words of conveyance and description of the property carried the following qualification: "So long as said premises shall be used for a mansion or residence by the Executive of said territory for the State of Utah.

But in case said property shall not be used by said territory or State for an executive mansion or residence then this deed shall become void and of no effect and said property, with all the improvements and appurtenances thereon or thereunto belonging, shall revert to and become the property of the said first party as fully and absolutely as if this deed had not been made." (R. 17)

It is further alleged by the Plaintiff's Amended Reply that said real property described in the complaint was conveyed to and received by the Defendant upon the above described limitation and qualification and that the Defendant, State of Utah, had not so used it, but on the contrary, and pursuant to Chapter 151, Laws of Utah, 1937, did accept a conveyance of land and residence located thereon for its Executive Mansion from one Jennie J. Kearns, which land and residence has since its conveyance to said Defendant April 28, 1937, been kept, used and maintained by the State of Utah as the residence and Executive Mansion of the Governor of Utah. That by reason thereof the land described in the Plaintiff's complaint reverted to and became the property of Salt Lake City. (R. 15, 16, 17, 18 and 19).

The case was tried November 28, 1940 before the Honorable Bryan P. Leverich in Salt Lake City. (R. 23) Thereafter and on February 13, 1941 the said Third District Court made the following order: "The within case having been heretofore submitted to the Court without argument, and by the Court taken under advisement, and the Court now, after considering the evidence and all the authorities cited, orders that Plaintiff be granted a decree quieting its title to the real estate described in Plaintiff's complaint as prayed." (R. 22)

On February 18, 1941 the same Court made its findings of fact by which it found that the Plaintiff, Salt Lake City, owned the real property and conveyed the same on July 9, 1895 to Defendant, State of Utah, as alleged in

Plaintiff's Amended Reply, upon the limitation and qualification set out in said deed and that the real property described in said deed reverted to and became the property of Salt Lake City, Plaintiff, as it was not used nor intended to be used by appellant as an Executive Mansion or residence. That the Defendant, State of Utah, failed to use said real property for the Governor's residence, acquired another parcel of land for that purpose and abandoned the use of said real property above described as a Governor's residence and terminated its fee therein (R. 24, 25 and 26) and the said Court concluded that the said real property reverted to the Plaintiff. (R. 26, 27) Judgment was entered February 18, 1941 quieting title to the real property described in Plaintiff's complaint in Salt Lake City. (R. 28) Notice of the decision of the Court was given to Defendant, State of Utah, February 20, 1941. The Defendant, State of Utah, served and filed its Notice of Appeal May 2, 1941. Three errors were assigned by Defendant on June 12, 1941 as follows:

1. Finding of Fact Number 6.
2. Conclusion of Law Number 1.
3. The Judgment.

No Bill of Exceptions was settled or filed. Appellant filed its Brief June 24, 1941 wherein it is contended that the Court erred in the 3 particulars set out in its Assignment of Errors. (Appellant's Brief, pages 6 and 7).

As above noted we have before us for consideration only the pleadings in determining whether or not the

Court erred in making its Finding of Fact No. 6, its Conclusion of Law No. 1 and its Judgment.

The Finding of Fact No. 6 assigned as error by Appellant is based upon the evidence received by the Court at the trial of the case and since there is not before us any of the evidence it seems that we must, as a matter of law, assume that the Finding of Fact is amply supported by the evidence received at the trial.

The Conclusion of Law No. 1 assigned as error by Appellant is based upon the Findings of Fact. No contention is made that the Findings of Fact do not support this conclusion. If the Conclusion is one which may be lawfully made from the Findings of Fact then the assignment by Plaintiff that the Conclusion is erroneous should fail. No contention is made by the Appellant that the pleadings of the Plaintiff, that is, the Complaint and the Amended Reply, failed to state a cause of action, nor is any such contention tenable. The Judgment is supported by the pleadings. Since we have before us only the pleadings for consideration, it seems to us that, if the pleadings state a cause of action, the assignment made by Appellant that Court erred in making its judgment should fail.

ARGUMENT.

No motion for a new trial was made. The Defendant has brought as its record on appeal only the judgment roll (Section 104-30-14, R. S. U. 1933). No bill of excep-

tions is included in the record (Section 104-39-4, R. S. U. 1933). Where the evidence has not been brought up and presented to this Court by a Bill of Exceptions it must be presumed that such evidence is sufficient to sustain the judgment, 5 C. J. S. Appeal and Error 1574 B, page 448, and the cases cited in Note 55 on pages 453-4.

The first assignment of error (Appellant's Brief, page 6) relates to Finding of Fact No. 6, Record, page 26, and is assigned by Appellant "for the reason that the finding is based on the fact that the State had accepted the Jennie J. Kearns' property to be used as a Governor's Mansion". The finding recites that the State of Utah abandoned the use of said real property conveyed to it by Salt Lake City for an executive mansion or residence. This finding is based upon the evidence adduced at the trial and it is presumed as a matter of law that the evidence was sufficient to support the finding.

The Court further recites in said finding that by the acceptance of the said real property conveyed to Appellant by Jennie J. Kearns and the use by the State of Utah of said property as its executive mansion and residence for its Governor, Appellant did terminate its fee in the deed of conveyance. This portion of the finding is, as alleged by Appellant, based on the fact found by the Court that the State had accepted the Jennie J. Kearns' property to be used as a Governor's mansion, but it is also based, as is set out in the finding, upon the further fact of the use by the State of Utah of said Jen-

nie J. Kearns' property as its executive mansion or residence for the Governor. The character of that use is not shown but is presumed to support the finding.

It can readily be ascertained then that the finding is based upon 3 points: 1. The abandonment by the State of Utah of the real property conveyed to it by the City for an executive mansion or residence. 2. The acceptance of a parcel of land from Jennie J. Kearns as an executive mansion or residence. 3. The use by the State of Utah of said Jennie J. Kearns' property as its executive mansion or residence. These ultimate facts found by the Court are derived from the testimony and are supported by paragraphs 5, 6 and 7 of the Respondent's Amended Reply. (R. 16)

The Court, in Finding of Fact No. 3 (R. 26) found as follows: "That the said defendant did on said day accept said deed and the real property therein upon the express limitation and qualification set out in said deed, that is, in the event that the property described therein was not used by the defendant for an executive mansion or residence the said realty would revert to and become the property of the plaintiff herein."

The Court further found in its Finding of Fact No. 4 (R. 26) as follows: "That the defendant State of Utah has not since the execution and delivery of said deed or at any time used the real property described therein for an executive mansion or residence and the same has been and now is vacant and unoccupied land."

By a reading of the Court's Finding No. 2 (R. 24) and as appears from Finding No. 3 above quoted the deed from Salt Lake City to the State of Utah was executed and delivered July 9, 1895 and was accepted by the State of Utah on the same day. The findings were made and entered February 18, 1941, or nearly forty-six years after the execution and delivery of the deed to the State of Utah. In accordance with Finding No. 4 above quoted the State of Utah has not, during the entire period of nearly 46 years, used the property described in the deed of conveyance for any purpose or for a Governor's residence.

As appears from Finding No. 3 above quoted the Appellant, State of Utah, accepted the property described in said deed upon the express limitation and qualification that the property should be used for a mansion or residence by the executive of the territory or the State of Utah. The failure to use said property for a period of 46 years as an executive mansion in and of itself, without some explanation, should determine the fee and terminate the right of the State of Utah in said land. It might be argued, however, that the State of Utah did not have sufficient funds to erect an executive mansion and was intending to do that some time in the future.

Finding of Fact No. 5 (R. 26) reads as follows: "That the said defendant State of Utah pursuant to Chapter 151 of the Laws of Utah, 1937, an act of the Legislature of the State of Utah known as Senate Bill No. 236, approved and effective February 24, 1937, did

accept a parcel of land conveyed by deed from Jennie J. Kearns to the said defendant State of Utah, which conveyance was dated April 28, 1937, and recorded in the office of the County Recorder of Salt Lake County in Book 198 of Deeds, pages 470-1, upon which land there existed a residence for the express purpose of using the same as the residence of the Governor of the State of Utah, and since said time said residence and real property have been and are now used by the defendant State of Utah as the executive mansion or residence of the Governor of said State." By this finding the State of Utah has definitely determined to use other property, to-wit, the Jennie J. Kearns property for its executive mansion. It has only one executive, therefore, the argument that it may still intend to use this property for a Governor's residence has no force. In addition to that, Chapter 151, Laws of Utah 1937, provided as follows, to-wit: "The Secretary of State is hereby authorized to accept as a gift on behalf of the State from Mrs. Jennie J. Kearns the property and improvements thereon, located at 603 East South Temple, Salt Lake City, Utah, to be used as a residence of the Governor of the State of Utah."

By the provisions of Section 1, Chapter 158, Laws of Utah 1937, the sum of Fifty Thousand and no/100 (\$50,000.00) Dollars was appropriated by the State Legislature for the "Governor's residence, household subsistence and contingent expense". By the provision of Section 1, Chapter 137, Laws of Utah 1939, the sum of

Thirty-one Thousand and no/100 (\$31,000.00) Dollars was appropriated by the Utah Legislature "for the Governor's residence as created and designated by Chapter 151, Laws of Utah 1937, and the necessary expenses incident to the Governor's residence and the household subsistence and contingent expense relating thereto". From the reading of these statutes alone, without recourse to the evidence as to the use made of the property by the Appellant it appears that the State of Utah had effectively determined not to use the property described in the Respondent's deed. The Appellant used the Jennie J. Kearns' property from April 28, 1937, until the date of these findings, February 18, 1941, as the residence for its Governor and appropriated the sum of Eighty-one Thousand (\$81,000.00) Dollars for the maintenance of the property.

If there was ever any doubt that the lapse of 46 years indicated an intention not to use the property described in the deed from Salt Lake City to the State of Utah this doubt is certainly destroyed and resolved in favor of Finding No. 6 made by the Court when the State of Utah by Legislative Act accepted the Kearns property and used it for its Governor's residence. The Court found by its finding No. 6 (R. 26) as follows: "That the said defendant State of Utah abandoned the use of said real property conveyed to it by Salt Lake City for an executive mansion or residence as aforesaid and by the acceptance of the said real property conveyed to it by Jennie J. Kearns as aforesaid and the use by the State

of Utah as its executive mansion or residence for its Governor did terminate its fee in the deed conveying the real property from Salt Lake City plaintiff to the State of Utah as aforesaid.”

The deed by which the Appellant derived its qualified fee carried the following qualification: “by these presents does grant unto the Territory of Utah so long as said premises shall be used for a mansion or residence by the executive of said territory or State of Utah. But in case said property shall not be used by said territory or the State for an executive mansion or residence then this deed shall become void and of no effect and said property, with all the improvements and appurtenances thereon or thereto belonging shall revert to and become the property of said first party, as fully and absolutely as if this deed had not been made”.

It is interesting to note that the consideration set out in said deed is the sum of One Dollar, and it is further interesting to note that the Legislature of Utah or of the Territory of Utah has not by any formal act which appears in any of the reported proceedings, Session Laws or Compiled Laws accepted the gift of the land described in said deed by Salt Lake City, nor has the State of Utah by its Legislature so far as its reported Session Laws or Compiled Laws indicate acknowledged that it intended to use the property described in said deed for any purpose. In fact, there is no legislative expression of any character affecting this real property. A state

acts through its legislative body and acting in this manner has the same right with respect to real property as an individual. 59 C. J., States 276, at page 164.

The premises were in accordance with the finding never used by the State for a residence for its Governor or for any other purpose.

It would seem that the failure to formally accept the tendered gift of Salt Lake City for the purpose it was offered and the further failure to use the land for the purpose limited by the deed should alone cause a reversion ipso facto to the Grantor. Attention is called to the fact that failure to use the property for the purposes limited in the deed results in reversion to the Grantor.

The appellant, State of Utah, contends that it received by conveyance a determinable fee sometimes known as a qualified or base fee. (Appellant's brief, page 7) We do not disagree with this contention. Appellant's view is apparently that a determinable fee is an estate limited with a qualification annexed to it by which it is provided that the fee must determine whenever the qualification is at an end. Appellant observes at page 8 of its brief: "Such deed provides for termination of the estate of Grantee by operation of law not by act of the parties. * * *"

It is our view that any estate received by appellant was qualified and limited in the following: "So long as the premises shall be used for a mansion or residence by the executive of the Territory or the State of Utah."

The further precaution: "But in case said property shall not be used by said Territory or State for an Executive mansion or residence, then this deed shall become void and of no effect and said property with all the improvements and appurtenances thereon or thereunto belonging shall revert, etc." is simply a clause to clarify the intention of the Grantor that the fee granted to appellant was limited solely to the use of the land for an executive mansion or residence and upon failure to so use such premises the property should revert to the Grantor. This but states the common law rule as to a fee determinable. When the appellant's position is examined, it is all the more apparent that the land should revert to the Grantor. What use of the land does appellant contend it has made? The answer is, obviously, none.

What opportunity has the appellant had to use the land for an executive mansion or residence? For a period of forty-six years. The most striking language in this case, it seems to us, is that when the appellant did provide its Governor with a residence it did not use this property but it used the Jennie J. Kearns' property. The appellant's answer seems to be (appellant's brief, page 13) that the property referred to in the deed of Salt Lake City must be used "for some other purpose than a Governor's mansion" before a reverter will occur. Appellant does not find this language in the deed. The contention is drawn from its quotation taken from a few words in one paragraph of the deed (appellant's brief, page 14) "but in case said property shall not be used

* * *.’’ Surely the entire sentence is entitled to consideration in the construction and determination of the meaning of the deed. As will be seen when the sentence is read in its entirety or adding a part deleted from the quotation “for an executive mansion or a residence” that the contention is obviously an error. Its meaning is simply that the premises shall be used for an executive mansion. Therefore appellant’s contention that the premises must be used by appellant before a reverter occurs and that the use must be for a purpose other than that described in the deed is not the proper construction of the language of the deed.

A reverter shall occur by operation of law as indicated by appellant when the property is not used as a mansion or residence of the appellant’s executive.

The qualifications set out in the deed certainly do not carry the meaning that appellant may keep the fee in the real property forever without making use of the property or until it attempts to use the premises for a purpose other than a Governor’s residence. Such construction would permit the State to play “dog in the manger”. It would deprive the Grantee of the use of the land because Grantee may only use it for the purpose limited by the deed. It would also deprive the Grantor of the use of the land because the fee rests in Grantee until a reverter occurs. The effect of that construction would be to render the land useless to anybody. There is no ambiguity in the limitation of the Grantor nor in the quality of the fee conveyed.

The terms of the deed are direct, simple and understandable. They become difficult only by reason of faulty argument.

Appellant likewise is in error in its contention with respect to the finding that appellant "had abandoned the use of the property conveyed to it by respondent and that the fee of the appellant terminated upon acceptance of the Kearns property was not supported by competent evidence which could justify such a finding. * * *"
(See Appellant's brief, page 10). Two points are overlooked here: one, the court found that appellant had abandoned the use of said real property conveyed to it by Salt Lake City for an executive mansion or residence (appellant's brief, page 6, Record page 26, Finding No. 6), and two, there is no evidence before the court for its consideration and determination of whether or not the finding is supported by "competent evidence." The presumption is that the evidence is sufficient to sustain the finding. The cases of appellant relating to the abandonment of property by a fee owner are not in point. We are here dealing with a limited fee which is subject to a possible reverter. The abandonment referred to in the finding is an abandonment of the use of the property for the purpose to which it was limited in the deed. The evidence is presumed to support such finding.

The appellant seems to be confused in its attempt to distinguish between an estate upon condition and an estate upon conditional limitation. The case of *Yarborough v. Yarborough*, (Tenn. 1925) 269 S. W. 36, has

been cited on page 9 of its brief to illustrate such distinction. There are in fact by the writers considered as determinable fees four types.

In the case of *Tebow v. Dougherty*, (Mo. 1907), 103 S. W. 985, the court observes at page 988:

“There are four classes of such fees, viz., fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law.”

The various types of fees have been considered in cases which we will attempt to illustrate.

FREE UPON CONDITION.

The fee upon condition is described very well in Vol. 1, Restatement of the Law of Property, page 59, thus:

“The term ‘condition subsequent’ denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised.

COMMENT:

a. Applicability to both present and future interests. A condition subsequent may be used to qualify either a present or a future interest.

b. Power of Termination. Whenever an estate subject to a condition subsequent is created, some person has the power to terminate this es-

tate upon the occurrence of the stipulated event. Thus such an estate does not end automatically and by expiration as does an estate subject to a special limitation. On the contrary, it is cut short, or divested, if, but only if, the person having the power chooses to exercise it. This option to terminate an estate upon breach of a condition subsequent is referred to in this Restatement as a 'power of termination.'

Special Note: The interest herein described as a 'power of termination' frequently is referred to as a 'right of entry.' This latter term is not used in this Restatement for two reasons. In the first place, the interest of the person in whose favor the condition exists, is not a 'right' as that word is defined in par. 1. It is a 'power' as that word is defined in par. 3. In the second place, under modern law, an entry is normally not necessary in order to terminate the interest subject to the condition. Even if the instrument creating the condition expressly reserves to the conveyor a 'power to enter and to terminate' the estate created, no entry is essential. The interest subject to such a power is terminated by any appropriate manifestation, upon the part of the person in whose favor the condition exists, of his intent thereby to terminate the interest in question."

There is also what is known as a conditional fee which gave rise to estates tail. 10 R. C. L. Estates, 13 P. 656. Such fees are distinguished from fees upon condition as follows:

In the case of *Yates v. Yates*, (Neb. 1920) 178 N. W. 262, at page 265, it will be observed that at common law estates limited to the heirs of the body of grantee were

known as conditional fees by reason that should the grantee die without the particular heirs, the land would revert to the grantor. (See 10 R. C. L. Estates 9, p. 654).

FEE UPON LIMITATION.

In the case of *Mills v. Davison*, (N. J. 1896) 35 Atl. 1072, the word "limitation" in its most technical sense when used in the habendum clause of a deed is an appropriate term under which to declare the nature and extent of the estate granted and the uses for which the grant is made.

As to the distinction between conditional fees and limited fees, the court in the case of *Smith v. Smith*, (Wis. 1868) 99 Amer. Dec., 153, observed as follows:

"There is much subtile learning on the books in regard to the distinction between conditions and limitations in deeds so much that it is sometimes difficult to determine whether the words used are words of condition, making the estate voidable, or words of limitation, making the estate to cease. In Professor Green leaf's edition of Cruise on Real Property, title 13, chapter 2, section 64, the author says: 'Lord Coke mentions a distinction between a condition that defeats an estate, but requires a re-entry, and a limitation which determines the estate ipso facto, without entry. Of the first sort, it has been shown that a stranger cannot take advantage; but of limitations it is otherwise; as, if a man makes a lease quousque, that is, until J. S. returns from Rome; the lessor grants over the reversion to a stranger;

J. S. returns from Rome; the grantee of the reversion may take advantage of the return of J. S., and enter, because the estate was determined by an express limitation.' In the editor's note 1 to this section, the different estates are distinguished in the following clear manner:—

'A condition is something inserted for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will, and revest the estate in himself or his heirs. As the law does not presume forfeiture, it requires some express act of the grantor, as evidence of his intent to reclaim the estate, viz., an entry.

'A limitation is conclusive of the time of continuance and of the extent of the estate granted, and beyond which it is declared at its creation not to be intended to continue. Conditions render the estate voidable by entry. Limitations render it void without entry. If upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a third person, this is a limitation over, and not a condition. For if a condition, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter. A limitation is imperative, and is determined by the rules of law. A condition not only depends on the option of the grantor, but is also controlled by equity if the grantor attempts to make an inequitable use of it. The performance of a condition is excused by the act of God, or of the law, or of the party for whose benefit it was made. A limitation determines the estate absolutely, whatever be its nature.'

See also 11 *American Jurist*, page 42, for an instructive article on this branch of the law."

A CONDITIONAL LIMITATION.

A conditional limitation is of a mixed nature and in the case of *Smith v. Smith*¹, supra, was defined by Chancellor Kent as follows, p. 155:

“A conditional limitation is of a mixed nature, and partakes of a condition and a limitation; as, if an estate be limited to A for life, provided that when C return from Rome it shall thenceforth remain to the use of B in fee, it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited; and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place, the estate passes to the stranger without entry, contrary to the maxim of law, that a stranger cannot take advantage of a condition broken.”⁴ Kent’s Com. 128.

The distinction between a conditional fee and a conditional limitation is found in the case of *City National Bank v. City of Bridgeport*, (Conn. 1929) 147 Atl. 181, at page 185:

“One distinguishing characteristic as between these two forms of estates is that ‘a condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger.’ 21 Corpus Juris, p. 930. ‘In the case of a condition the estate or thing is given absolutely without limitation, but the title is subject to be divested by the happening or not happening of an uncertain event. Where, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the

event, the estate is said to be given or granted subject to a limitation.' 2 Bouvier's Inst. 275; 2 Bl. Com. 155."

A FEE CONDITIONAL AT COMMON LAW.

A conditional fee at common law is well defined in the case of *Willis v. Mutual Loan & Trust Co.*, (N. C. 1922) 111 S. E. 163, at page 165:

"A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, * * * as the heirs of a man's body. * * * Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee simple, on condition that he had issue." 2 Bl. Com. 110. "Which condition was implied in the words as well as in the intent; for in that the gift is to one and to his heirs of his body, and no further, therein it is implied that, if he have no heirs of his body, the donor shall have the land again." *Willion v. Berkley*, Plowd. 235.

See also 10 R. C. L. Estates 9, page 654.

A DETERMINABLE FEE IN THIS CASE HAS REVERTED TO GRANTOR.

The appellant in this case aptly observes that the fee granted by the deed of Salt Lake City to appellant was a limited fee. As is pointed out in appellant's brief, page 8, in its quotation of the law of property from Sec-

tion 23, a limited fee has been defined to automatically expire upon the occurrence of a stated event. As is used in this re-statement, the word limitation normally denotes the complete language of a conveyance delimiting the duration and character of a created interest. This is observed in 25 Words & Phrases at page 300, where the author further observes: "The word is also used in this re-statement distributedly to denote a part of the limitation."

The appellant contends that the property should be used by the State of Utah before the reverter occurs. That would seem to imply that there is a condition attached to the deed in question. A fair construction of the deed does not disclose such a condition. A distinction between a condition and a limitation has heretofore been pointed out in the case of *Board of Chosen Freeholders v. Buck*, (N. J. 1912) 82 Atl. 418, at page 420, where the court observes:

"A distinction is, however, made between a condition in deed and a limitation, which Littleton denominates, also, a condition in law. For, 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 fall, this is denominated a limitation, as when land is granted to a man, so long as he is parson of Dale, or while he continue unmarried, or until out of the rents and profits he shall have made £500., and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be a parson, marries a wife, or has received

£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." See also, 4 Kent's Commentaries, *126. "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 words 'provided' or 'on condition', though appropriate to the creation of a condition, may also be appropriately used to introduce a covenant or trust (*Mackenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; *Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594); but the words 'so long as' followed by the words 'and no longer' can have but one significance, in the absence of some element clearly disclosing that they were not designed to defeat the estate granted at the expiration of the period of time named.

The provisions of the deed here in question so clearly and adequately create a limitation that no field for construction appears to exist. The habendum of the deed, which is wholly consistent with all its other parts, and therefore determines what estate is granted, is, 'To have and to hold,
 * * * so long as the same shall be used for

the purposes herein before mentioned and no longer.' The period named marks the limitation of the estate as to time; at the end of that period, the determinable estate ceases, and the fee vests in the grantor, or his heirs, by reverter. The words 'so long as the same shall be used for the purposes herein before mentioned' are sufficient for the creation of a limitation; the added words 'and no longer' remove all possibility of doubt touching the quality of the estate granted. It is clearly impossible to regard this language as not having been intended to defeat the estate granted, or as in the nature of a covenant or trust."

As a citation of authority for appellant's point, as above noted, the case of *Yarborough v. Yarborough*, supra, has been cited at page 9 of his brief, but it will be observed by carefully reading that case, the whole estate was passed to grantee and an estate was created to arise in a third person. A bare fee determinable as we find in the instant case was not created and the limitation was over in favor of a third person, to-wit, the owners of the original tract, and not to the grantor as is the fact in the instant case. The court in the cited case held that the limitation over in a third person destroyed the idea that it was the intention of the grantor to create a simple fee determinable and observed at page 38, "when a determinable fee ends, the estate reverts to the grantor and his heirs."

The court very aptly points out in the above cited case the difference between an estate in fee on condition and on a conditional limitation thus, that the fee on condition leaves in the grantor a vested right, while a fee

on conditional limitation passes the whole interest to the grantor at once and creates an estate to arise and vest in a third person upon a contingency at a future and uncertain time. It would occur to us that the authority is not applicable to the facts in this case.

The appellant further cites on page 10 of its brief, 51 A. L. R. 1466 and 1473. These citations illustrate the distinction between estates upon condition and estates upon conditional limitation. They do not consider limited fees.

The citation on the same page, to-wit, 77 A. L. R. 345 (Note 2), is concerned with the inheritability of possibilities of reverter arising on the creation of fees of less estate than fee simple absolute including conditional fees, determinable fees and fees conditional and in particular (note 2) referred to relates to the distinction between possibilities of fee determinable, fees on condition and conditional fees. Here the author refers to a limited fee as a qualified or determinable fee and defines it as a fee terminating ipso facto upon the happening of a specified contingency. The determinable fee or qualified fee is distinguished from the fee on condition which the author describes as a fee subject to a re-entry on the happening of a specified condition. The determinable fee is further distinguished from a conditional fee. That is a fee limited to the grantee and the heirs of his body, which fee is probably better described in the case of *Matlock v. Locke*, (Ind. 1905) 37 N. E. 171. It would

occur to us, therefore, that neither of these citations are in point.

As above observed, the fee in the instant case is a limited fee so long as the premises are used as a residence or mansion for the executive of Utah. It is the fee described as the fee upon limitation. Most writers refer to the limited fee when discussing the determinable or qualified or base fee. All of the various types of fee are sometimes considered under the head determinable fee and therefore the reader must be very careful when the subject is followed to discern just what character of a fee is referred to.

A determinable fee is generally defined as follows, 19 Amer. Jur., Estates 28, page 486:

“The definition most often quoted by the courts, which is valuable because, although sweeping, it includes within its purview the fundamental incidents of the estate defined, states that a ‘determinable’, ‘qualified,’ or ‘base’ fee is an estate limited to a person and his heirs, with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end. Because the estate may last forever, it is a fee; and because it may end on the happening of an event, it is called a ‘determinable or qualified fee.’ Chancellor Kent uses the words ‘qualified,’ ‘base,’ and ‘determinable’ fee promiscuously as defining an estate which may continue forever, but is liable to be determined without the aid of a conveyance by some act or event circumscribing its continuance or extent. He adds: ‘Though the object on which it rests for perpetuity may be transitory or perishable, yet

such estates are deemed fees, because, it is said, they have a possibility of enduring forever. It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee, and not merely a freehold.' In his historic work on Estates, Preston remarked: 'Though the estate will determine when the event marked as the boundary to the time of continuance shall happen, in the meantime the whole estate is in the grantee or owner, subject only to a possibility of reverter in the grantor. The grantee has an estate which may continue forever, though there is a contingency which, when it happens, will determine the estate. This contingency cannot, with propriety, be called a 'condition;' it is part of the limitation, and the estate may be termed a 'fee.' Plowden uses the phrase 'fee simple determinable.' "

In 8 R. C. L. Deeds, Section 157, at page 1100, a distinction is made between estates on condition and estates upon limitation, and also estates upon conditional limitation, thus:

"The essential difference between an estate on condition and an estate in fee determining on the happening of some future uncertain but possible event, with a limitation over conditioned on the happening of the event, is that in the latter case on the happening of the event the estate either reverts to the grantor or is carried by force of the deed to the person to whom it was granted, while in the former the grantor must have either expressly or by necessary implication reserved to himself or his heirs a right of entry on breach of the condition, re-entry being necessary to revest the estate. A condition is inserted for the benefit of the grantor, giving him the power, on de-

fault of performance, to destroy the estate if he will. By failure to enter he may defeat the condition, and, under certain circumstances, equity might forbid his entry. A limitation is conclusive of the time of continuance and of the extent of the estate granted, beyond which it is declared at its creation not to be intended to continue, and not only is no act necessary on the part of the grantor to terminate the estate, but the limitation is imperative and under the rules of law determines the estate absolutely, whatever be its nature. A conditional limitation is of a mixed nature, and partakes of a condition and a limitation; as, if an estate be limited to one for life, provided on the happening of some other event it shall thenceforth remain to the use of another in fee, it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited, and is so far a limitation and to be distinguished from a condition that on the contingency taking place the estate passes to the stranger without entry, contrary to the maxim that a stranger cannot take advantage of a condition broken."

The event which marked the end of the fee granted by Salt Lake City to the State of Utah in the deed under consideration was the time when the premises were no longer to be used as an executive mansion. The court found that the event had occurred, Record pages 24, 25, 26, that the premises were no longer to be used as an executive mansion, as is observed by Re-statement of the Law of Property, Vol. 1, page 195, Sec. 56:

"On the occurrence of the event on which an estate in fee simple defeasible is effectively limited to end in accordance with the terms of either

a special limitation or an executory limitation, such estate immediately ceases. It is not necessary that the holder of the next succeeding interest take any action to terminate the estate."

In the case of *U. S. Pipeline Company v. Delaware*, (N. J. 1898) cited in 42 L. R. A. 572, where the conveyance made was so long as suitable wagon road was maintained, the court observed at page 578:

"The qualifying words in the habendum clause, 'to have and to hold', etc., 'unto the said the Morris & Essex Railroad Company, and their successors and assigns, forever, for all purposes mentioned in said act of incorporation and the several supplements thereto passed and to be passed,' are simply a qualification of the fee that inured to the company by the operative words of grant. 'Of fee simple,' says Lord Coke, 'it is commonly holden that there be three kinds, viz., fee simple absolute, fee simple conditional, and fee simple qualified, or a base fee. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz., simple or absolute, conditional, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee.' 1 Inst. Ib. 'Where an estate limited to a person and his heirs has a qualification annexed to it, by which it is provided that it must determine whenever that qualification is at an end, it is then called a qualified or base fee. As in the case of a grant to A and his heirs, tenants of the manor of Dale, whenever the heirs of A cease to be tenants of the manor of Dale, their estate determines.' 1 Cruise, Dig. 63 (*79) 1 Inst. 27a. 'If land is given to a man and to his heirs as long as he shall pay 20s. annually to A or as long as the church of St. Paul shall stand, his estate is a fee

simple determinable, in which case he has the whole estate in him; and such perpetuity of an estate which may continue forever, though at the same time there is a contingency which when it happens will determine the estate (which contingency cannot properly be called a condition, but a limitation), may be termed a fee simple determinable.' (Walsingham's Case) 2 Plowd. 557. 'Though the estate will determine when the event marked as the boundary to the time of continuance shall happen, in the meantime the whole estate is in the grantee or owner, subject only to a possibility of reverter in the grantor. The grantee has an estate which may continue forever, though there is a contingency which, when it happens, will determine the estate. This contingency cannot, with propriety, be called a condition; it is part of the limitation; and the estate may be termed a fee. Plowden uses the phrase 'fee simple determinable.' 1 Preston, Estates, 431, 441, 442, 484. Chancellor Kent uses the words 'qualified,' 'base,' or 'determinable' fee promiscuously as defining an estate which may continue forever, but is liable to be determined without the aid of a conveyance by some act or event circumscribing its continuance or extent. And he adds: 'Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever * * *. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold.' 4 Kent, Com. p. 9. 'The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the qualification upon which it is limited is at an end, as if he were a tenant in fee simple!' 1 Cruise Dig. 65 (*79) Plowd. 557; 4 Kent, Com. p. 11; Seymour's Case, 10 Coke 97a; 1 Preston, Estates, 484. So long as the qualified fee remained, the grantor or his heirs

had no right of entering upon the lands. If the estate granted was terminated by breach of the condition, then the whole estate was gone, and there could be no partial forfeiture. He who enters for breach of condition regularly shall have the land of his first estate. Co. Litt. 202a; Comyns' Dig. p. 533 (06); per Chief Justice Green, McKelway v. Seymour, 29 N. J. L. 329."

In the case of *Mills v. Davison*, (N. J. 1896) 35 Atl. 1072, at page 1073, where the deed read:

"To have and to hold unto the said party of the second part and their successors forever, with this express condition and limitation: that neither the said party of the second part, nor their successors, shall at any time sell, mortgage, or in any way convey the said land and premises, or any part thereof, and that no building shall be kept, maintained, or erected thereon, except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the protestant Episcopal Church in the United States of America, and also except the proper outbuildings appurtenant thereto."

the court observed at page 1075:

"The language of the habendum plainly indicates a conveyance for use exclusively for public worship and teaching in conformity with the rites and ceremonies of the Protestant Episcopal Church."

In the case of *Aumiller v. Dash*, (Wash. 1909) 99 Pac. 583, a fee described "so long as said party * * * shall use said strip of land for a private way * * *

and no longer'' was held to be a determinable or qualified fee.

In the case of *McGahan v. McGahan*, (Ind. 1926) 151 N. E. 627, where the deed read: "And for a further consideration that at the death of Ella J. McGahan that the above described land shall revert back to Simeon McGahan," the court held at page 629:

"A fair interpretation of the clause, and its effect upon the granting clause, is that it created what in common law was called a 'base fee'—a fee which was to determine upon the happening of a certain event."

In the case of *White v. Kentling*, (Mo. 1939) 134 S. W. (2d) 39, where the deed read at page 41, "that when such real estate was no longer used by the Bank of Highlandville for a bank, that the same reverted to the grantors or their assigns," the court held at page 44: "A reversion ipso facto is expressly provided for," and at page 45: "The rights of the bank or its assignees, however, will automatically cease and determine if the land is not used for the purpose of a bank. * * *"

In the case of *Puffer v. Clark*, (Mich. 1918) 168 N. W. 471, the conveyance required the premises to be used as a home for ministers of a church (page 472) or revert to grantor and the court held at page 480:

"They conveyed, however, a conditional or qualified fee, absolute until the condition is broken, and if broken the heirs of the grantor take by right of reverter."

In the case of *University of Vermont and State Agr. College v. Ward*, (Vt. 1932) 158 Atl. 773, a lease as long as the grass grows and the water runs was urged to be a fee and while the court denied the contention by reason of a statute under which the lease was given, it held at page 776:

“A determinable fee is a fee-simple estate to a person and his heirs with a qualification annexed to it by which it is provided that it must determine whenever the qualification is at an end. Common instances given in the books are a limitation to one and his heirs so long as a certain tree stands, or so long as A and his heirs shall pay B a certain sum per annum, or so long as the property conveyed is used for a certain specified purpose. Such an estate may remain forever, or it may terminate on the happening of the contingency upon which the estate is limited.”

In the case of *Gillespie v. Broas*, (N. Y. 1856) 23 Barbour's Supreme Court Reports 370, the court observed at page 376:

“The duration of the estate in the premises, is, in terms, specified to be as long as they ‘shall be used and occupied for a county site for the court house, jail and clerk's office of said county of Schuyler;’ and a limitation of the estate to that period is expressly imposed, by adding, that ‘when said lot or premises shall cease to be used for the purposes aforesaid, then the same, with its appurtenances thereunto belonging, is to revert and belong to the party of the first part, his heirs, executors, administrators or assigns, the same as if this conveyance had not been executed.’ The effect of this specification and limitation is to

make the estate a qualified or determinable fee— an estate which may continue forever, but which is defeasible or conditional on an event provided for. If the county should cease to use the lot or premises in the manner mentioned, the estate created by the deed would thereby be determined; and the title to the premises, including all buildings thereon, be revested in the grantor or his heirs. (4 Kent's Com. 9, 129).''

Limited fees are considered in 10 R. C. L. Estates, par. 8, page 652, thusly:

“Limited fees are estates of inheritance which are restricted by or dependent upon the conditions or qualifications. They are divided into two classes: first, qualified or determinable fees, or such as are frequently referred to as base fees; second, fees conditional, which after the statute *de bonis* become fees tail. A qualified or determinable fee is an estate limited to a person and his heirs, with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end. Because the estate may last forever it is a fee, and because it may end on the happening of the event it is called a determinable or qualified fee. Thus, where an estate is conveyed in fee for a specified purpose ‘and no other,’ the fee is a qualified fee, determinable upon the cessation of the use of the property for that purpose; and the same character of estate is conveyed where the grant is in fee with a remainder over upon the proviso that the grantee die without heirs, or where, in default of heirs, the land reverts to the donor. The rule is that the mere expression of a purpose will not of and by itself debase a fee; and though the qualification must be found in the instrument itself, no special or technical words are required. The words ‘so long as,’ or ‘during the time that,’

the property is used for a certain purpose, usually create an estate subject to determination upon conclusion of that use, rather than a fee with condition subsequent. So clearly a deed providing that the land shall revert to the donor whenever it ceases to be used or occupied for a specified purpose creates a 'determinable or qualified fee.' A deed to a wife 'for during and so long as she shall live, or remain a widow,' creates a life estate, determinable upon her remarriage. Notwithstanding the condition subsequently written in the deed if the estate is liable to become absolute, and continue perpetually in the first taker, his or her heirs and assigns, the deed creates in the donee a fee simple conditional, or a fee of a determinable or conditional character, and not an estate or condition subsequent. The proprietor of a determinable fee so long as the estate in fee remains, until the contingency upon which the estate is limited occurs, has all the rights and privileges over it that he would have if tenant in fee simple. After such a grant no right of seisin or possession remains in the grantor; all the estate is in the grantee notwithstanding the qualification. Nothing remains in the grantor but a possibility or right of reverter, which does not constitute an actual estate, and consequently it is not the subject of devise, inheritance or grant. Such a possibility of reverter is, however, capable at all times of being released to the person holding the estate or his grantee, and if so released vests an absolute and indefeasible title thereto; and if the event occurs upon which the fee is limited, the property reverts to the grantor without any claim or act on his part."

There can be no argument that the State of Utah does not use the land in question for the purpose limited. It has held the land forty-six years unused, by Legisla-

tive Act determined to use other property and since has actually used other property for its executive mansion. Furthermore, the court has found that the appellant's fee has determined. That evidence cannot here be assailed. We respectfully submit that the judgment of the District Court should be sustained.

Respectfully,

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