

MONTANA ESTATES IN LAND STATUTES

Mont. Code Ann. §§70-15-201 Through 70-15-216

HISTORY AND COMMENTARY

Predecessor Statutes and Annotations

Collected and With Commentary By

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## ACKNOWLEDGMENTS

The author gratefully acknowledges the Cowley Endowment Foundation and the Cowley Grant committee for the support that made this work possible.

EDITOR'S NOTE TO THE READER

*Scire autem proprie est, rem ratione et per causam cognoscere.*

-- Motto on the title page of Charles Fearnese's Essay on Contingent Remainders (4th ed. 1791)

The Montana Field Code statutes governing interests in land modify greatly the real property lore taught in law school and expounded in the nationally-published treatises. This is so for two reasons. First, to a certain extent the statutes were designed to alter the common law. Yet because only a handful of states adopted these statutes, the law schools and in the national treatises tend to emphasize the nationally-predominant common law. Second, to the extent that the statutes once did reflect the common law, time has passed them by. Most of these provisions date to 1828 and none of them was drafted more recently than 1865. Property law in most states has evolved significantly since that time; the Montana statutes have not.

The Montana estates in land statutes are ripe for repeal, but I hesitate to recommend repeal lest the legislature feel obliged to replace them with something else. Careful study has led me to the conclusion that the mania for uniform laws and statutory borrowing from other jurisdictions (which is how the Field Code came to be adopted in the first place) has had most unfortunate results. Although private law codification is supposed to further the cause of justice and certainty, enactment of statutes at odds both with local conditions and with pre-existing statutes causes only injustice and uncertainty. I have made this point elsewhere with respect to the statutes governing land covenants in Montana;<sup>1</sup> as the material below demonstrates, similar problems plague other Field Code statutes and the Uniform Statutory Rule Against Perpetuities.

I should make clear what this compilation is *not*. It is not a discussion of the statutes in light of the case law arising since enactment. Rather, it is an examination of legislative intent -- an effort to translate for the modern lawyer and judge the meaning of provisions both archaic and arcane.

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Missoula, Montana  
July, 1991

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1. Natelson, *Running With the Land in Montana*, 51 Mont. L. Rev. 17 (1990) [hereinafter Natelson].

## EDITOR'S INTRODUCTION TO PRE-CODIFICATION HISTORY AND COMMENTARY

One of the great landmarks in the development of American law was the adoption, by the New York General Assembly, of the Revised Statutes of 1828. This partial codification of New York's private and public law represented the first successful American attempt to organize statutes on a rational basis while systematizing and simplifying the underlying common law. The portions of the Revised Statutes codifying the rules governing real property included some of the most important and sweeping of the private law reforms.

Several decades later, the property law innovations in the Revised Statutes became part of David Dudley Field's proposed New York Civil Code of 1865, authored by a state commission of which Field was chairman.<sup>2</sup> The New York legislature never adopted the Civil Code, but it formed the basis for similar codes adopted in the Dakota territory (1866) and California (1872). With slight changes, the California version of the Civil Code was enacted in Montana in 1895. All 16 provisions discussed here date from that time, and only one (Mont. Code Ann. §70-15-202) has undergone substantive amendment -- and that amendment was merely a clarification rather than a change in the law.

The following pages set forth the primary materials of legislative history for the Montana estate-in-land statutes. For each statute, the primary materials include (1) the statute as it stands today; (2) its predecessor in the Montana Civil Code of 1895; (3) the Montana codifiers' annotation, if any; (4) the predecessor statute in the California Civil Code of 1872; (5) the California annotation, if any; (6) the original Field Code provision; (7) any Field Code Annotation; (8) the version, if any, from the New York Revised Statutes of 1828; and (9) any pertinent commentary by the New York Revisors of Statutes. Following the primary materials for each section is an Editor's Explanation composed for the modern reader. This Explanation is an analysis of the statute and the annotations, and may include further primary material that sheds light on the meaning of the statute.

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2. This was one of two commissions chaired by Field. The earlier one composed a Code of Civil Procedure, adopted in 1848 and widely copied in other states, and a Code of Criminal Procedure, not adopted in New York until 1881, but also widely emulated. Articles on Field, his codification projects, and the difficulties involved in integrating his codes into a common law system include Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. Rev. 9 (1968); Natelson, *supra* note 1; and Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 Law & Hist. Rev. 311 (1988).

## INTRODUCTORY NOTES TO 1828 NEW YORK PROVISIONS

### Editor's Explanation

The drafters of the Revised Statutes of 1828 provided the New York General Assembly with extensive notes explaining and justifying changes proposed in existing statutes and common law. Most of these notes pertained to individual sections. In their Introductory Notes, however, the Revisers explain their overall scheme for property law reform. As suggested below, their goal was to rationalize and simplify a convoluted common law system and to allow the courts to enforce, wherever possible, the intent of parties devising or conveying real property.

### Text of 1828 Introductory Notes

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.

It will be seen by those, who are familiar with the difficult learning on this subject, that the change which the Revisers recommend, is effected, not so much by the introduction of new principles, as by the extension of rules, already admitted, but partial in their application, to all classes of expectant estates, created by the act of the party. The interests of society require that the power of the owner to fetter the alienation and suspend the ownership of an estate by future limitations, should be confined within certain limits; but where these limits are not exceeded, it would seem reasonable that the intentions of the party should always be carried into effect, whether declared by deed or devise, by a feoffment at common law, or a conveyance operating under the statute of uses.

Such, however, is far from being the present state of the law. There are at present three classes of estates in expectancy, created by the act of the party, as distinguished from reversions, which arise by operation of law, namely, remainders, springing and secondary uses and executory devices, and each of these classes is governed by distinct and peculiar rules, both in regard to the creation of estates belonging to them and the means by which they may be defeated or destroyed. These rules are in a great measure arbitrary and technical, and in the language of Blackstone, "It were endless to attempt to enter into the particular subtleties and refinements into which, in the course of centuries, they have been spun out and subdivided." The consequence is, that it rarely happens that the validity of a future limitation can be determined by reference to the actual intent of the party, or by any consideration of the nature and policy of the limitation itself, but it depends almost exclusively on the formal character of the instrument in which the limitation is contained, or the technical force of the language in which it is expressed.

So great indeed is the multitude of rules on this subject, and so nice and difficult of apprehension the distinctions on which they rest, that to draw a will or family settlement, containing future limitations, is justly esteemed in England, one of the most arduous and responsible duties, which the most learned in the profession can be called to perform. No man in that country can be a good conveyancer, who is not also a profound lawyer. Hence have arisen the evils of which the nation is now complaining, and which their wisest statesmen are seeking to redress; the complexity of their titles, the great hazard and expense of alienation, and the frequent and ruinous litigation in which estates are involved.

It is true, that in this state, these evils are not yet extensively felt, but we may be sure they will not fail to display themselves, as property advances in value, capital is accumulated, and the rich become anxious to secure their possessions to a distant posterity. The remedy seems to the Revisers obvious and effectual. It is to abolish all technical rules and distinctions, having no relation to the essential nature of property and the means of its beneficial enjoyment, but which derived from the feudal system, rest solely upon feudal reasons; to define with precision the limits within which the power of alienation may be suspended by the creation of contingent estates, and to reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise. These are the general views by which the Revisers have been governed, and the object and effect of particular provisions, as calculated to attain these views, will be best explained in notes to the respective sections.

## INDIVIDUAL SECTIONS

Present Law: **Mont. Code Ann. §70-15-201. Application of classifications.** The names and classification of interests in real property have only such application to interests in personal property as is in this code expressly provided.

1895 Codification: **Mont. Civ. Code §1123.** The names and classification of interests in real property have only such application to interests in personal property as is in this division of the code expressly provided.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §702.** The names and classification of interests in real property have only such application to interests in personal property as is in this Division of the Code expressly provided.

California Annotation: None

1865 Field Code: **N.Y. Civ. Code §194.** The names and classification of interests in real property have only such application to interests in personal property as is in this Division of the Code expressly provided.

Field Code Annotation: None

N.Y. Revised Statutes Provision: None

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-201

*Rights afforded by interests in land.* The hallmark of the rights afforded by interests in land is that those rights are enforceable specifically, and not merely by substitutional relief. In other words, interests in land afford their owners with in rem rights in specific property, not merely claims for money. In this respect, the rights afforded by interests in land may be distinguished from those granted by licenses to use land. One has a license when one has permission, express or implied, to use the property of another, but the permission falls short of that necessary to give rise to interests in specific property. A license may be gratuitous, as when a land owner, without receiving consideration, permits another to hunt on the property, or a license may be contractual, as in the case of those owner-sharecropper agreements that fail to qualify as tenancies. Whether gratuitous or contractual, a license is freely revocable -- that is, the licensee is not entitled to specific protection for his use<sup>3</sup> of the subject land. At most, he may be entitled to money damages if the license was contractual.

Over the years, the courts often have struggled with the issue of whether breach of a consensual agreement between fee owner and user gives rise to specific rights (i.e., an interest in land) or merely substitutional rights (i.e., a license or analogous agreement). The courts have recited a variety of tests for distinguishing interests in land from contractual licenses. In essence, they boil down to this question: is money adequate to cure the breach? If the relationship of the parties was such that the dispossessed person's loss is readily compensable in money, the relationship was a license only. If the injury not readily quantifiable in money, the user had an interest in land. Addressing the injury core question requires the court to consider the nature of the agreement the parties had with each other, the expectations aroused, the extent and kind of reliance on the agreement, the dispossessed person's use of the land, and the availability and adequacy of potential substitutes.

*Categories of interests.* Mont. Code Ann. §70-15-201 provides that the elaborate system of interests in land does not apply to personalty other than leaseholds. This general rule of law is due in part to the course of history and in part because dispossession of a chattel is less likely than dispossession from land to result in injury unquantifiable in money.

This section refers not only to *estates* in land, but to all kinds of *interests* in land. Before proceeding further, therefore, we should distinguish interests from estates.

*Interests in land* is the much wider term. The phrase is employed to denote certain recognized clusters of in rem property rights. To define correctly all the property rights held by any one person, one must identify several kinds of interests held by that person. These recognized clusters combine to denote the aggregate "bundle" much as letters of the alphabet combine to form words.

The interests in land -- the recognized clusters of rights -- fall into four categories. One category consists of those interests that define the intensity with which the interest-holder may use property. Thus, a person with a broad right to use property and exclude others is said to have a *possessory* (or corporeal) interest. A person with the right to use property for one or more limited purposes is said to hold an *affirmative easement* or *profit à prendre*.<sup>4</sup> A person with a veto power over another's use may enjoy the benefit of a *negative easement*, a *rent*, a (restrictive) *real covenant*, or a (restrictive) *equitable servitude*. A person who can compel a land possessor to undertake certain affirmative acts may do so by virtue of an (affirmative) real covenant or

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3. All references to the pronoun "he," "his," or "him" in this commentary are sexually generic, unless otherwise stated or implied.

4. By Field Code statute in Montana, a profit à prendre is a kind of easement. See Mont. Code Ann. §70-17-101(1) - (4), and (5).

(affirmative) equitable servitude.<sup>5</sup> All of these interests, except real covenants and equitable servitudes, are subject to further definition from the second, third, and fourth categories.<sup>6</sup>

The second category of interests defines when the interest-holder's right to use land begins. Thus, the holder of a possessory interest or of an easement may begin to use the land today -- in which case the interest is a *present interest* -- or at some future time, in which case it is a *future interest*. At common law, future interests are divided into reversions, possibilities of reverter, rights of [re-]entry, remainders, and executory interests.

The third category of interests defines how many people hold a right concurrently, and, if more than one, their rights inter se. Thus, a single owner may hold an easement in severalty, or co-owners may hold it as tenants in common, joint tenants, or (in most states), tenants by the entirety.

The fourth category of interests defines how long an owner's rights potentially may last. This group is divided in turn into two subcategories. One of those subcategories comprises the *estates in land*. The Montana hierarchy of estates in land is listed in Mont. Code Ann. §70-15-202, and both that version and the common law version are discussed in the Editor's Explanation to that section. The other subcategory defining potential duration depends on whether the interest is subject to a special limitation (determinable), subject to a condition subsequent, subject to an executory limitation, or free of conditions (absolute).

Thus, in defining property rights (other than a real covenant or equitable servitude), one must resort to all four categories. For legal purposes, it is not sufficient to state that one has an easement. Proper identification includes reference to all categories, including, but not limited to, the estate. Thus, one holds (1) in severalty a (2) present (3) easement (4) in fee simple absolute, or one is the (1) joint tenant of an (2) easement (3) in remainder (4) for years -- and so forth.

There have been several revisions of the Montana Code since 1895, and these often have been undertaken without complete understanding of how the interest in land system works. Therefore, certain underlying patterns are easier to see in the 1895 Montana Code than in today's structure. Yet the substantive law remains the same, for the modern law continues to include the Field Code sections (largely unaltered) devoted to co-ownership, easements, covenants, and conditions as well as to estates.<sup>7</sup> Of course, this legislative history is limited to estates and certain other subjects closely allied.

*Reasons for adhering to pre-recognized clusters of rights.* Today the recognized interests in land function (or are supposed to function) in much the same way as standard forms or the rules governing negotiability of instruments. In other words, the interests in land further respect for private consent and non-consent by increasing certainty and decreasing transaction costs. Specifically, the existence of these well-recognized right-clusters (1) reduce the need to re-draft elaborate clauses defining rights created and transferred, and (2) simplify interpretation of deeds, trust instruments, and wills. Simplifying interpretation is useful, for an easily-interpreted document is a better source of actual notice than an obscure document. Ease of interpretation offers the incidental benefit of promoting judicial economy in the event of a dispute.

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5. The English and Canadian rule that an equitable servitude can be only restrictive in nature has almost no force in this country.

6. Easements, rents, and profits a prendre are incorporeal interests, sometimes called nonpossessory interests. Equitable servitudes and real covenants are property-contract hybrids, and often are not classified as interests in land at all. Certainly real covenants have the weakest claim on interest-in-land status, for the usual remedy for their breach is purely substitutional (money).

7. See, e.g., Mont. Code Ann. §70-1-301, et seq.; §70-1-401 et seq.; §70-17-101, et seq.; §70-17-201 et. seq.

Present Law: **Mont. Code Ann. §70-15-202. Enumeration of estates.** Estates in real property, in respect to the duration of their enjoyment, are either:

- (1) estates of inheritance or perpetual estates;
- (2) estates for life;
- (3) estates for years;
- (4) estates from year to year, quarter to quarter, month to month, week to week, day to day, and for other indefinite and unascertained durations of enjoyment whatsoever, except estates or tenancies at will; or
- (5) estates at will.

1895 Codification: **Mont. Civ. Code §1210.** Estates in real property, in respect to the duration of their enjoyment, are either:

- 1.Estates of inheritance or perpetual estates.
- 2.Estates for life.
- 3.Estates for years; or,
- 4.Estates at will.

Montana Annotation: "Estates at sufferance" are included in the phrase "estates at will."

If the owner permits another to occupy land without any lease or agreement to pay rent, and such other merely takes care of it for the owner, he is a tenant at will: *Jones v. Shay*, 50 Cal. 508. A mere servant or agent in possession of his principal's land is not a tenant at will: *Mitchell v. Davis*, 20 Id. 45. A tenancy at will cannot exist without some express grant or contract: *Blum v. Robertson*, 24 Id. 127. In *Moore v. Morrow*, 28 Id. 551, it is said that a tenancy by sufferance is not by the consent but by the laches of the owner; as, for example, in the common law, where a tenant held over after the expiration of his lease: *Uridas v. Morrell*, 25 Id. 31; and so *McCarthy v. Yale*, 39 Id. 585.

LIFE ESTATE, contract, when creates: 81 Cal. 205.

1872 California Codification: **Cal. Civ. Code §761.** Estates in real property, in respect to the duration of their enjoyment, are either:

- 1.Estates of inheritance or perpetual estates;
- 2.Estates for life;
- 3.Estates for years; or,
- 4.Estates at will.

California Annotation: NOTE.--"Estates by sufferance" are included in the phrase "Estates at will."

1865 Field Code: **N.Y. Civ. Code §218.** Estates in real property, in respect to the duration of their enjoyment, are either:

- 1.Estates of inheritance, or perpetual estates;
- 2.Estates for life;
- 3.Estates for years; or,
- 4.Estates at will.

Field Code Annotation: 1 R.S. 722, §1. The term "estates by sufferance" has been omitted, as it is proposed to designate all such as estates at will. The words "in respect to the duration of their enjoyment," are new.

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 722, §1.** Estates in lands are divided into estates of inheritance estates for life, estates for years, and estates at will and by sufferance.

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-202

*Estates in general.* As discussed in greater detail in the Editor's Explanation to the previous section, at common law the term *estates in land* is not a synonym for *interests in land*. Rather, the estate system is part of the interest universe, and serves the function of defining the potential duration of the rights enjoyed by an interest-holder. Under the common law estate system, if one may hold an easement (or other interest) indefinitely, one holds *in fee simple*;<sup>8</sup> if one may hold for the length of single family blood line, one holds *in tail*; if for a person's life, *for life*; if until an ascertainable termination date, *for years*; if during the landlord's pleasure, *at will*; and if for recurring estates for years, *in periodic tenancy*. Sometimes added to the hierarchy is the so-called estate *at sufferance*, discussed later in this Editor's Explanation. The provision set forth above, §70-15-202, lists the estate hierarchy as it obtains in Montana. That hierarchy generally parallels the one existing at common law.

Mont. Code Ann. §70-15-203 provides that the first estate identified in §70-15-202, the estate of inheritance or perpetual estate, is to be identified with the traditional fee simple. The fee tail has been abolished. §70-15-204. Estates for life are continued. §70-15-202(2). Thus, the last case in the Montana annotation is *Manning v. Franklin*, 81 Cal. 205 (1889), in which the California Supreme Court denied a landlord's request for the recovery of property that, for a consideration, he had demised for the tenant's natural life. The court disagreed with the plaintiff's characterization of the agreement as a tenancy at will, and held that had the defendant wished specific enforcement, he would have received it.

This section also recognizes the common law estates for years and at will. §70-15-202(3), and (5). The periodic tenancy is really just a version of the term of years, and was recognized as such by the codifiers. See, e.g., *Pugsley v. Aiken*, 11 N.Y. 494 (1854) and *Bigelow v. Finch*, 17 Barb. 394 (N.Y. Sup. Ct. 1853), both cited in the annotations to §70-15-206. Perhaps because of the common practice of referring to the periodic tenancy as a separate estate, in 1931 the legislature added §70-15-202(4).

*Amalgamation of tenancies at will and at sufferance.* The Montana, California, and Field Code annotations all express the intent to amalgamate tenancies at will and at sufferance. In order to understand the implications of this amalgamation, it is necessary to identify the distinguishing characteristics of each.

The tenancy at will is created by agreement of landlord and tenant, and continues during the pleasure of the landlord. Although the tenant at will would seem to have few in rem rights, as a practical matter, he enjoys more than does a mere licensee. For example, there often is a minimum notice period for eviction of a tenant at will, and a tenant at will generally has standing to bring an action to evict a third party disseisor. That the Montana codifiers understood this to be true is evident from their citation to *Jones v. Shay*, 50 Cal. 508 (1875), which held that a plaintiff had standing to bring an action for eviction due to his status as a tenant at will.

The private law, of which the law of real property is a part, is devoted largely to protecting potential plaintiffs against unbargained-for loss imposed consensually by potential defendants. In private law, a potential plaintiff may acquire rights against a potential defendant in any of at least three ways. First, the plaintiff may acquire rights against the defendant by virtue of express agreement, for failure to enforce such an agreement might impose unbargained-for loss on the plaintiff. For similar reasons, the plaintiff may acquire rights by virtue of agreement implied in fact. Finally, the plaintiff may acquire rights against the defendant even if the latter did not enter into an agreement with the plaintiff. This is so if the defendant has conducted himself (intentionally, wantonly, or negligently) so as induce the plaintiff to rely on a reasonable belief that the

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8. The common practice of calling only a possessory interest a *fee* or *fee simple* is erroneous. Possessory interests, easements, profits, and rents – either present or future – all may be held in fee simple.

defendant has agreed to plaintiff's course of conduct. The courts vindicate the plaintiff's reliance interest in order to protect the plaintiff against unbargained-for loss for which the defendant was responsible. The courts employ many different doctrines for protecting plaintiffs in these three basic fact patterns. For example, the doctrine of express contract is employed in the first pattern. The doctrines of contract implied in fact, acquiescence, and abandonment are employed in the second pattern. The doctrine of quasi-contract is employed in the third. Some doctrines straddle two or more fact patterns. Thus, waiver may be employed to denote either express or implied consent. Adverse possession and laches cases may involve either implied consent or inducement-plus-reliance. The typical estoppel case fits into the pattern inducement-plus-reliance but some estoppel cases are really consent cases. The doctrine of fraud is employed in all three fact patterns.

Except for the occasional involuntary transfer, the six common law estates in land all arise in circumstances of actual agreement -- the first or second pattern. For this reason, it is said that the tenancy of will is based on the agreement of the parties. Because of the statute of frauds, it sometimes is said that this agreement must be express, and the latter is repeated in the Montana annotation where *Blum v. Robertson*, 24 Cal. 128 (1864) (erroneously cited as beginning at page 127) is cited in support. However, the requirement that the consent be express is merely a dictum in *Blum*, and if the statute of frauds otherwise is satisfied, there would seem to be no reason why the agreement creating a tenancy at will cannot be implied from conduct.

Sometimes a tenant whose initial entry onto land was rightful overstays his lease. Prior to eviction, the courts grant such a person more rights than would be enjoyed by a trespasser. Because the holdover enjoys some minimal in rem possessory protection,<sup>9</sup> the holdover's interest is analogous to an interest in land -- hence the term tenancy (or estate) at sufferance. The commentators maintain that the estate at sufferance is not really an estate, for it does not arise from consent. 1 American Law of Property 236 (A.J. Casner ed. 1952). Blackstone, in a passage quoted by the annotator's case *Moore v. Morrow* 28 Cal. 552, 568 (1865) (first page erroneously cited at 551), states that the estate at sufferance arises due to the landlord's laches. 2 Bl. Comm. \*150. Yet we have seen that the doctrine of laches is employed not merely in inducement-with-reliance cases, but also in implied consent cases. In other words, the landlord's neglect may be due either to a readiness to keep the tenant guessing or to genuine willingness to let the tenant stay on until someone else can be found. Thus, the doctrines of tenancy at will and tenancy at sufferance overlap in the implied consent area -- the realm lying between express consent and inducement-with-reliance. The case of *Uridias v. Morrell*, 25 Cal. 31 (1864), cited in the Montana annotation, is an example of an "at sufferance/at will" case from the area in which the doctrines overlap.

The difficulty of segregating tenancy at will from tenancy at sufferance may have been the motivation for aggregating them under the rubric of tenancy at will. Certainly there is precedent for this: under the general heading of contract law, for example, lawyers lump the doctrines of express contracts, contracts implied in fact, and contracts implied in law (quasi-contract), even though the factual basis for the underlying obligation is different in each category. In any event, it appears that in the statute the term tenancy at will comprises both of the common law estates in land subject to termination at any time by a landlord.

*Distinction of tenancies from licenses.* The Editor's Explanation to the previous section observed that the fundamental distinction between an interest in land and a license, even a contractual license, is that the wrongfully dispossessed owner of an interest in land can obtain specific relief -- *in rem* protection of identifiable real estate, and not merely money damages. Further, that Explanation stated that the distinction arises because specific relief is available when, on all the facts and circumstances, the injury to the dispossessed person is such that it cannot be quantified readily in money.

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9. See, e.g., the procedure required of the landlord in *McCarthy v. Yale*, 39 Cal. 585 (1870) (cited by the Montana codifiers).

The cases cited in the annotations to this section suggest that this line of distinction has been preserved in Montana. Thus, when one is in possession of land merely as the servant or agent of another, he has no special right worthy of *in rem* protection. *Mitchell v. Davis*, 20 Cal. 46 (1862)(first page erroneously cited as 45)(agent had insufficient "connection" with the premises to maintain forcible entry action). But where the occupant was permitted by his brother-in-law to maintain his home on the land, the occupant was a tenant at will with standing to bring such an action. *Jones v. Shay*, 50 Cal. 508 (1875).

Present Law: **Mont. Code Ann. §70-15-203. Fee simple.** Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

1895 Codification: **Mont. Civ. Code §1211.** Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple, or an absolute fee.

Montana Annotation: TRANSFERRING FEE, WORDS OF INHERITANCE NOT ESSENTIAL. -- See sec. 1476, post.

DEVISING FEE, "HEIRS" NOT ESSENTIAL. -- Sec. 1775.

1872 California Codification: **Cal. Civ. Code §762.** Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defensible or conditional, is called a fee simple absolute, or an absolute fee.

California Annotation: NOTE. -- 2 Shars, Blackst. Comm. p. 106; Plowd., p. 557; 1 Preston Est., p. 425; 1 Wash. Real Prop., p. 51. The word "simple" does not add any significance. It is used merely to mark more fully the distinction between an unqualified fee and a fee tail, or any class of conditional estates.

1865 Field Code: **N.Y. Civ. Code §219.** Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defeasible or conditional, is called a fee simple absolute, or an absolute fee.

Field Code Annotation: 1 R.S., 722, §2.

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 722 §2.** Every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee simple, or fee; and every such estate, when not defeasible or conditional, shall be termed a fee simple absolute, or an absolute fee.

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-203

The fee simple originally was a tenurial estate (*fee = fief*), but in the years after the adoption of the statute *Quia emptores* in 1290, the tenurial aspects of the fee simple became of decreasing significance. At the time of the outbreak of the American Revolution, however, there still were extensive lands held in fee simple of the Crown or of certain favored poltroons. Upon obtaining independence, New York abolished the tenurial fee.

The original version of this section made clear that despite the abolition of tenure, estates of inheritance were to be called fees simple. Cf. §70-15-202(1). The other estate of (limited) inheritance -- the fee tail -- had, of course been abolished.

At common law, to create a fee simple *inter vivos* it is necessary to add to the name of the grantee the words of limitation "and his [or her] heirs." Failure to do so created only a life estate, not a fee simple, whatever the intent of the grantor. All American states except South Carolina, have now abolished this requirement, in a few cases by altering common law, but mostly by statute. The applicable section of the 1895 code is noted in the Montana Annotation. This provision is now Mont. Code Ann. §70-20-104.

Section §70-15-203 as it reads today contains an ambiguity not found in its California and New York predecessors -- the result of some thoughtless or hasty editing. The modern section *seems* to say that the term fee simple is limited to what would be at common law a fee simple absolute, and that word fee means what would be at common law a fee simple determinable, a fee simple subject to a condition subsequent, or a fee simple subject to an executory limitation. (The inexact synonyms "defeasible" and "conditional" fee are falling out of favor.) The *real* meaning of the section is that there is no alteration in the common law system, other than abolition of the fee tail -- the only kind of fee that is not "simple". This result can be divined, first, by examining the predecessor statutes; and, second, by noting that the literal reading of the modern statute is logically inconsistent with §701-15-204, where it is assumed that a future interest can follow a fee simple. Thus, not all fees simple are "absolute" under these provisions any more than all fees simple are absolute at common law.

Your editor has not been able to learn what induced the Montana codifiers to make the erroneous change, but probably the confusing California annotation had something to do with it.

Present Law: **Mont. Code Ann. §70-15-204. Estates tail abolished -- considered fee simple.** Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple and, if no valid remainder is limited thereon, is a fee simple absolute.

1895 Codification: **Mont. Civ. Code §1212.** Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple, and if no valid remainder is limited thereon, is a fee simple absolute.

Montana Annotation: None

Cal. Civ. Code (1892): **Cal. Civ. Code §763.** Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple; and if no valid remainder is limited thereon, is a fee simple absolute.

California Annotation: NOTE. -- An inheritable estate which will descend to certain classes of heirs is called an "estate in fee tail," or an "estate tail." The words "heirs of the body of," etc., were the proper words creating such an estate. -- 1 Washb. Real Prop., pp. 51, 66; see also Bouv. L. Dict., "Estate in fee tail."

1865 Field Code: **N.Y. Civ. Code §220.** Estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, is a fee simple; and if no valid remainder is limited thereon, is a fee simple absolute.

Field Code Annotation: 1 R.S. 722, §3.

N.Y. Revised Statutes Provision: 1 **N.Y. Rev. Stat. (1828) 722, §3.** All estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, shall hereafter be adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute.

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-204

Estates tail were created by the statute *De Donis Conditionalibus* ("On Conditional Gifts") in 1285 and adopted as part of the common law of most American states.<sup>10</sup> One conveys an estate tail by executing a deed to the grantee, followed by the words of limitation, "and the heirs of his body" or "and his bodily heirs." The effect is to create an interest in land for the duration of the grantee's bloodline, unless earlier terminated by a stated divesting condition.<sup>11</sup> Upon a general failure of issue, possession of the land would revert to the grantor or his successors, or pass to a specified remainderman or his successors.

English judges were often hostile to the fee tail because it was employed to retain property in the custody of certain wealthy families, and English judges tended to favor free alienability. Thus, they countenanced judicial devices, especially the fine and common recovery designed to "dock" the tail and enable the tenant in tail to convey in fee simple, either alone or in conjunction with other living persons. These devices also passed into American common law.

American lawmakers were even more hostile to the fee tail than were their English counterparts, and were impatient with devices such as the fine and recovery. Except in a handful of states, therefore, the fee tail has been abolished by statute, as it has been here.

At common law if O, sole owner of a present possessory interest in fee simple absolute, conveys "to A and the heirs of his body," then A obtains a present possessory interest in tail and O retains a reversion in fee simple absolute. Under the statute, A obtains a present possessory interest in fee simple absolute, and O retains nothing.

At common law, if O, sole owner of a present possessory interest in fee simple absolute, conveys "to A and the heirs of his body, remainder to B and her heirs," then A obtains a present possessory interest in tail and B obtains a remainder in fee simple absolute. O retains nothing. Under the statute, A obtains a fee simple subject to an executory limitation and B receives an executory interest in fee simple absolute. Again, O retains nothing. In the statute the executory interest is called a remainder, because §70-15-211 (considered *infra*) states that it may be so called. As noted in the commentary to §70-15-211, however, B's interest is best thought of as an executory interest rather than as a common law remainder.

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10. A few states, notably Iowa, have refused to accept *de donis* as part of their common law. In such states, the predecessor of the fee tail, the fee simple conditional, continues to survive.

11. For example, the heirs may be limited to male or female heirs, or to the issue of a certain person: "To A and the to female heirs of A's body begotten on W."

Present Law: **Mont. Code Ann. §70-15-205. Remainder limited upon fee tail valid -- vesting.** Where a remainder in fee is limited upon any estate which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee and vests in possession on the death of the first taker without issue living at the time of his death.

1895 Codification: **Mont. Civ. Code §1213.** Where a remainder in fee is limited upon any estate, which would be the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker, without issue, living at the time of his death.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §764.** Where a remainder in fee is limited upon any estate, which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker, without issue living at the time of his death.

California Annotation: None

1865 Field Code: **N.Y. Civ. Code §221.** Where a remainder in fee is limited upon any estate, which would be the law mentioned in the last section be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession, on the death of the first taker, without issue living at the time of his death.

Field Code Annotation: 1 R.S. 722, §4.

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 722, §4.** Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of this state, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of such death.

N.Y. Rev. Stat. Commentary: At common law, where an estate is conveyed or devised to A, and if he die without issue or without heirs of his body, or without heirs, where the limitation over is to an heir, then to B in fee, A takes an estate tail, on which the limitation to B is valid as a remainder, and if the entail be not barred, the fee will vest in B, or his heirs, in case of the failure of the issue of A, at any distance of time. By the operation of our statute respecting entails, the estate of A is converted into a fee simple absolute, and thus the remainder to B and his heirs, is entirely defeated -- such is obviously the necessary effect of giving to the first taker a fee simple absolute, and would also be the result of the well known rule, that a fee cannot be limited upon a fee, even by way of use or executory devise, unless upon a contingency that must happen within a life or lives in being, and twenty-one years thereafter. It is conceived, however, that the object of the legislature in abolishing entails, may be effected, without sacrificing, (as certainly they are now sacrificed,) the rights of the persons entitled in remainder. The object of the legislature was to destroy perpetuities, in other words, to prevent the fee from being rendered inalienable, beyond a certain period; and this object is completely attained, if without defeating the remainder, we confine it to vest within the period allowed by law in other cases; in doing this we violate no rule of public policy, and we comply, we may be assured, with the intention of the person creating the estate.

In most cases, it is expressed, that the limitation over shall take effect on the event of the first taker's "dying without issue, or without leaving issue;" and in these cases, it is believed that the meaning which the law affixes to the terms, viz., a failure of issue, at any period however remote, even after the death of the first taker, is very opposite to that of the party by whom they are employed.

It has often been remarked, by judges in England and in this country, that it is not probable that testators are aware of the technical construction given by the courts, to the words "dying without issue," and that they undoubtedly intend by them, a dying without issue, *living at the death* of the person named; which is supposed to be the obvious and natural meaning of the expressions.

It is true that chancellor Kent, in *Anderson v. Jackson*, (16 Johns, 400,) suggests, that "this motion has been borrowed by one judge from another, without much reflection, or examination as to its truth," and he gives it as his opinion, that the legal interpretation of the phrase, accords with the popular understanding of its signification. The Revisers, however, are strongly inclined to the general opinion above stated.

To them, it seems hardly credible that a person not conversant with the technical rules of law, would ever dream of the construction which those rules have affixed to the phrase. If this is so, then it follows, that the law of this state, as it now stands, gives to the first devise, in cases of this sort, an absolute estate, contrary to the intention of the grantor or testator.

It may be asked, even where the limitation over is plainly expectant, on an estate tail, as where an estate is given to A, and the issue of his body, and on the determination of such estate, then to B and his heirs, why should it be thought necessary to defeat entirely the remainder over? What reason can be given why the intentions of the party creating the estate, should not be carried into effect, so far as they may be executed, without violating the rules of law? Those intentions evidently were,

1. That the first taker should not have the power to dispose of the estate, so as to destroy the remainder; and,

2. That in the event of his dying without descendants then living, competent to take, the remainder should vest; for this is plainly comprehended in the general intention, that the remainder should vest, upon the failure of issue, at any period, however remote. Now these intentions are clearly legal, and by giving them effect, we certainly execute *pro tanto*, the wishes of the party creating the estate, and secure it to those who were the direct objects of his bounty. We do that, which we are certain the party himself would have declared, to terms, should be done, had he been acquainted with the rules of law forbidding a larger exercise of his discretion.

The tendency of the sections that we have proposed, to prevent litigation may be fairly stated, as an additional argument in favor of their adoption. Nearly every case that has arisen in our own courts, in relation to executory devises, and other contingent limitations, has turned on the question, whether the first taker took an estate tail, or in other words, whether the remainder were dependent on an indefinite failure of issue. (1 John. R 440;; 10 do. 12; ib. 19; 11 do. 337; 16 do. 382; 18 do. 368; 20 do. 483.)

In all of these cases, the struggle of the judges to support the limitation over, by confining the failure of issue to the death of the first taker, is very manifest.

It may be that this object is sometimes accomplished with some disregard of former authorities, and of maxims supposed to be established; but this is only a proof how strongly it was felt, that those maxims and authorities were repugnant to common sense, and foreign to the state of society and habits of thought, that now prevail. If this be so, would it not be better that the obnoxious rules should be swept away at once, by direct legislative enactment, than permit them to be slowly undermined and subverted by the subtleties of judicial

interpretations, at the expense, perhaps to the rules, of a succession of suitors, and at the hazard of plunging the whole law on the subject, *into endless uncertainty*.

Editor's Explanation: Mont. Code Ann. §70-15-205

As noted in the Editor's Explanation to the previous section, at common law if O, holding a present possessory interest in fee simple absolute, conveyed to A and the heirs of his body and then to B and her heirs, A would take a present possessory interest in tail and B a remainder in fee simple absolute. The previous section converts A's fee tail into a fee simple subject to an executory limitation and converts B's remainder into an executory interest (called, by reason of §70-15-211, a remainder). Mont. Code Ann. §70-15-205 defines the scope of that "remainder."

Read alone, §70-15-205 is ambiguous because of the language "on the death of the first taker without issue living at the time of his death." This language could be read to mean that the "remainder" will continue to exist until A's bloodline dies out (i.e., until there is a general failure of issue), at which time it will vest into possession. This construction has the effect of continuing the fee tail under a different name, at least when a remainderman is named. The second way to interpret the statute is to read "first taker" to mean only the immediate grantee. Under this construction, if the immediate grantee were to die leaving issue, he would pass a fee simple on to his heirs or devisees. The "remainder" would be destroyed. If the immediate grantee were to die without issue, the remainderman would obtain a present interest in fee simple absolute.

Although the statute is ambiguous, the New York commentary makes it clear that the second construction is what was intended. Certainly that construction seems more in keeping with the anti-entail policy behind §§70-15-204 and 70-15-205.

The working of the statute may be exemplified by the following two illustrations:

*Illustration #1:* T, holding a present possessory interest in fee simple absolute to Blackacre, devises his interest "to A and the heirs of his body, remainder to B and her heirs." A dies without issue. B takes a present possessory interest in fee simple absolute.

*Illustration #2:* T, holding a present possessory interest in fee simple absolute to Blackacre, devises his interest "to A and the heirs of his body, remainder to B and her heirs." A dies leaving a daughter, D. The devisees under A's will (probably including D) take whatever interest A left them. If there is no will, A's heirs (probably including D) take a present possessory interest in fee simple absolute.

One unanswered question is posed by the following example:

*Illustration #3:* T, the father of W, devises Blackacre "to A and the heirs *female* of his body begotten on W, remainder to my niece Jill and her heirs." T's purpose is to benefit not only A, but W, and to provide a head start for orphaned female family members. A and W have no children, W dies, and then A dies leaving only a son S, born to A's second wife, X. Intent effectuation would suggest that Jill's remainder ought to vest. But under the literal language of the statute, S probably will end up with a present possessory interest in fee simple absolute.

Present Law: **Mont. Code Ann. §70-15-206. Freehold estates -- chattels real -- chattel interests.** Estates of inheritance and for life are called estates of freehold; estates for years and estates embraced by the provisions of 70-15-202(4) are chattels real; and estates at will are chattel interests but are not liable as such to sale on execution.

1895 Codification: **Mont. Civ. Code §1214.** Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

Montana Annotation: ESTATES FOR YEARS, CHATTELS REAL. -- Pugsley v. Aiken, 11 N.Y. 498; Averill v. Taylor, 8 Id. 52; Bigelow v. Finch, 17 *Barb.* 396.

ESTATES AT WILL, chattel interests, but not liable to sale on execution: Dickinson v. Smith, 25 *Barb.* 108; Bigelow v. Finch, 11 Id. 498.

1872 California Codification: **Cal. Civ. Code §765.** Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

California Annotation: NOTE. -- Crabb Real Prop., Sec. 945; 1 Wash. Real Prop., p. 51; 1 Stephen Comm., p. 218. Estates for years, chattels real. -- Pugsley vs. Aiken, 11 N.Y., p. 498; Averill vs. Taylor, 8 N.Y., p. 52; Bigelow vs. Finch, 17 *Barb.*, p. 396. Estates at will, chattel interest not liable to sale on execution. -- Dickinson vs. Smith, 25 *Barb.*, p. 108; Bigelow vs. Finch, 11 *Barb.*, p. 498.

1865 Field Code: **N.Y. Civ. Code §222.** Estates of inheritance and for life, are called estates of freehold; estates for years are chattels real;<sup>1</sup> and estates at will are chattel interests, but are not liable as such to sale on execution.<sup>2</sup>

Field Code Annotation: 1 R.S., 722, §5.

1. Pugsley v. Aiken, 11 N.Y., 498; Averill v. Taylor, 8 N.Y., 52; Bigelow v. Finch, 17 *Barb.*, 396.
2. Dickinson v. Smith, 25 *Barb.*, 108; Bigelow v. Finch, 11 *Barb.*, 498.

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 722, §5.** Estates of inheritance and for life, shall continue to be denominated estates of freehold; estates for years, shall be chattels real; and estates at will or by sufferance shall be chattel interests, but shall not be liable as such to sale on executions.

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-206

Fees simple, fees tail, and life estates, all of which arose out of the feudal system, long have been denominated estates of *freehold*. This term served to distinguish them from less honorable estates, such as copyhold,<sup>12</sup> arising from other sources. Until approximately 1500, terms of years were not interests in land at all, but mere contracts -- they afforded their owners no in rem rights. (In this respect, the common law paralleled Roman law.)

The development of the action of ejectment gave to tenants for years a legal mechanism for protecting their interests in specific real estate. The effect was to convert the term of years into an estate in land. However, terms continued to be distinguished from estates of freehold. Freehold estates were recognized as real property for all purposes. Those freeholds that could survive their owners -- the fee simple and fee tail -- passed to the heirs (and after adoption of the Statute of Wills, the heirs or devisees) of their owners. Lesser estates, predominantly terms of years, were chattels, and like other personal property, passed on death to the administrator of the estate or executor of the will, for eventual transfer to the deceased owner's distributees or legatees. *Pugsley v. Aiken*, 11 N.Y. 494 (1854) (cited by codifiers).

Yet the lesser estates were not chattels like other chattels. Unlike movable personalty, they were interests in specific land. It therefore became the practice to distinguish them as *chattels real* -- as opposed to *chattels personal*.

Mont. Code Ann. §70-15-206 makes little change in pre-existing law other than recognizing the abolition of the entail. Fees simple and life estates remain freeholds; lesser estates remain chattels real. According to one of the cited cases, *Averill v. Taylor*, 8 N.Y. 44 (1853), the distinction between freeholds and nonfreeholds was preserved only to protect the titles and other interests of those affected by the rules of descent, distribution, and wills. Freeholds continue to pass to heirs and devisees; leaseholds to distributees and legatees.

For other purposes, however, terms of years are to be treated as realty, as the cited cases make clear. Terms may be sold on execution as real estate, *Averill*; *Bigelow v. Finch*, 17 Barb. 394 (N.Y. Sup. Ct. 1853); *Dickinson v. Smith*, 25 Barb. 102 (N.Y. Sup. Ct. 1857); purchased in advance for a lump sum, *Averill*, and may serve as a basis for redemption from the landlord's mortgagee. *Id.* If the term is executed upon, the former termor, while in possession, becomes the tenant at will of the purchaser at the execution sale. *Dickinson*.

On the other hand, the mere tenant at will or tenant at sufferance (the two are amalgamated by §70-15-202) has no interest that be levied upon. *Bigelow*. After execution, the occupant of the land becomes the tenant at will of the property purchaser. *Dickinson*.

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12. For practical purposes, copyhold tenure is not part of American law.

Present Law: **Mont. Code Ann. §70-15-207. Estate for life of third person -- freehold.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold.

1895 Codification: **Mont. Civ. Code §1215.** An estate, during the life of a third person, whether limited to heirs or otherwise, is a freehold.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §766.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.

California Annotation: NOTE. -- Corresponds to estate *per autre vie*. -- 1 Wash. Real Prop., p. 88; 2 Shars. Blackst. Comm., p. 120; Mosher vs. Yost, 33 *Barb.*, p. 277.

1865 Field Code: **N.Y. Civ. Code §223.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.

Field Code Annotation: 1 R.S., 722, §6. Mosher v. Yost, 33 *Barb.*, 277.

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 722, §6.** An estate during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.

N.Y. Rev. Stat. Commentary: [In ch. 6 of the Second Part, as adopted by the legislature, estates during the life of a third person, are declared, in all cases, to be assets in the hands of the executors. Hence the necessity of the preceding section. (Part 2, ch. 6, Title 3, art. 1, §6.)]

Editor's Explanation: Mont. Code Ann. §70-15-207

Mosher v. Yost, 33 Barb. 277 (N.Y. Sup. Ct. 1861) (cited by the California and New York codifiers) contains a fairly good summary of the pre-existing rules pertaining to estates for the life of another -- that is, estates *pur autre vie*. In *Mosher*, Banyon conveyed to a married couple a lease for their lives, which by mesne assignments came into the hands of Mautany. Mautany allegedly gave the estate by parol gift to his son, who remained in possession. Mautany died, and a suit to recover possession was commenced by the grantees from Mautany's administrators.

At common law, the court noted, estates *pur autre vie* were freeholds, but not inheritable ones. Thus, if the measuring life was still in being when the tenant died, the tenant could not pass on the estate to his heirs; yet because the measuring life had not terminated, the estate could not revert to the grantor. Eventually the courts ruled that if the grantor had conveyed the estate to the life tenant "and his heirs," the life tenant's heir could enter as a "special occupant. In the absence of such words of limitation, the court awarded title to the first to win the scramble to the land -- the "general occupant."

A statute enacted during the reign of Charles II sought to remedy the problem of estates *pur autre vie* for which there were no words of inheritance. The statute permitted the tenant of such an estate to devise his interest as realty; in default of a devise, it would pass to the administrators or executors of the life tenant to distribute as personalty. In the hands of their grantee, it would again become a freehold.

The New York and California predecessors of Mont. Code Ann. §70-15-207 limited such changes to one: the estate *pur autre vie* was a freehold during the life of the immediate grantee; after that it was a chattel real, and passed to the administrators or executors of the deceased's personalty. Then, according to the *Mosher* court, the estate could be conveyed as realty. The Montana codifiers sought to avoid such chameleon-like conduct on the part of estates, and the Montana solution is most satisfactory: an estate *pur autre vie* is a freehold, and remains such for all purposes.

Incidentally, the winner in *Mosher v. Yost* was the Mautany's son, then in adverse possession of the land. An old common law rule has it that one cannot convey freehold title if the land is in the adverse possession of another. Because the life estate was to be treated as a freehold in the hands of the administrators, their deed (on which the plaintiffs claimed) failed: It was a void conveyance of land for which the grantors had no seisin.

Present Law: **Mont. Code Ann. §70-15-208. Term of years -- suspension of absolute ownership.** The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

1895 Codification: **Mont. Civ. Code §1219.** The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §770.** The provisions of Title II of Part I of this Division, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

California Annotation: None

1865 Field Code: **N.Y. Civ. Code §227.** The provisions of Title II of Part I of this Division, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

Field Code Annotation: 1 R.S., 724, §23

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828), 724, §23.** All the provisions contained in this Article, relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

N.Y. Rev. Stat. Commentary: None.

Editor's Explanation: Mont. Code Ann. §70-15-208

This section, when compared with other Field Code sections, exemplifies the kinds of drafting problems that caused the code to be rejected in New York. Mont. Code Ann. §70-1-303, originally §1101 of the 1895 Civil Code, states that "ownership of property is absolute when a single person has the absolute dominion over it and may use it or dispose of it according to his pleasure. . . ." §70-1-101 states, "In this code, the thing of which there may be ownership is called property." From the foregoing, it would seem that absolute ownership of land should be limited to a present possessory interest in fee simple absolute in severalty. Yet this provision, §70-15-208, speaks of "absolute ownership of a term of years."

What the section apparently means is that one may not suspend ownership with a leasehold under conditions in which one could not suspend ownership with a freehold. For example, if O, holding a present possessory interest in fee simple absolute, conveys Blackacre to A and his heirs so long as the oak tree stands and then to B and her heirs, the grant to A would be valid but the grant to B would violate the common law rule against perpetuities. In absence of the statute, O could convey a remainder to R, retain a 1000 year leasehold, grant possession under the leasehold to A so long as the oak tree stands with possession then to pass to B -- and B's grant would be valid. This section prevents such evasion of the perpetuities rule.

Moreover, as the Revised Statutes Commentary suggests, if not for this section granting a long leasehold to a grantee and the heirs of his body would be a way to evade the abolition of the fee tail.

Present Law: **Mont. Code Ann. §70-15-209.** **Future estate -- right of possession at future day.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate or on the termination by lapse of time or otherwise of a precedent estate created at the same time.

1895 Codification: **Mont. Civ. Code §1216.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

Montana Annotation: FUTURE ESTATES. -- See note to sec. 1182, ante, and sec. 1183. "The definition in this section comprehends every species of expectant estates created by the act of the party, remainders strictly so called, future uses, and executory devises. The words, with or without the intervention of precedent estate, embrace what are technically known as estates *in futuro*. The words 'lapse of time or otherwise' provide for contingent limitations operating to abridge or defeat the prior estate: *Nicoll v. N.Y. & Erie R.R.*, 12 N.Y. 121, 139. Expectant estates, says Chancellor Walworth, 'include every present right and interest, either vested or contingent, which may by possibility vest at a future day:' *Lawrence v. Bayard*, 7 Paige Ch. 76."

The above section does away with the common law rule, that a free-hold could not be created to commence *in futuro*: *Hawes v. Stebbins*, 49 Cal. 374; see also sec. 1222, *infra*. Freeholds commencing *in futuro*: See also *Chandler v. Chandler*, 55 Cal. 267.

1872 California Codification: **Cal. Civ. Code §767.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

California Annotation: NOTE. -- See note to Sec. 741, ante. The definition in this section comprehends every species of expectant estates created by the act of the party; remainders strictly so called, future uses and executory devises. The words, with or without the intervention of precedent estate, embrace what are technically known as estates *in futuro*. The words "lapse of time or otherwise," provide for contingent limitations operating to abridge or defeat the prior estate. -- *Nicoll vs. N.Y. and Erie R.R.*, 12 N.Y. Rep., pp. 121, 139. Expectant estates, says Chancellor Walworth, "include every present right and interest, either vested or contingent, which may by possibility vest at a future day." -- *Lawrence vs. Bayard*, 7 Paige, p. 76.

1865 Field Code: **N.Y. Civ. Code §224.** A future estate may be limited<sup>1</sup> by the act of the party to commence in possession at a future day, either without the intervention of a precedent<sup>2</sup> estate, or on the termination, by lapse of time, or otherwise,<sup>3</sup> of a precedent estate, created at the same time.

Field Code Annotation: 1 R.S., 723, §10.

1. *Nicoll v. N.Y. & Erie R.R.*, 12 N.Y., 121, 139. "The definition in this section is so framed as to comprehend every species of expectant estates created by the act of the party, remainders strictly so called, future uses and executory devises." (*Rev. Notes*, 5 *Edmonds' Stat., App.*, 305).

2. "Introduced to embrace estates *in futuro*, as they are technically called." *Ib.*

3. "The words 'by lapse of time or otherwise' are necessary to provide for contingent limitations operating to abridge or defeat the prior estate." *Ib.*

N.Y. Revised Statutes Provision: 1 N.Y. Rev. Stat. (1828) 723, §10. A future estate, is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.

N.Y. Rev. Stat. Commentary: In conformity to the plan of the Revisers, and with a view of subsequent provisions, the definition in this section is so framed, as to comprehend every species of expectant estates created by the act of the party. Remainders, strictly so called, future uses and executory devises. The words "by lapse of time or otherwise," are necessary to provide for contingent limitations, operating to defeat or abridge the prior estate, and the other variations from the ordinary definition of a remainder, are introduced to embrace estates *in futuro*, as they are technically termed.

At common law, owing to the necessity of an immediate livery of seizin, a freehold estate could not be created to commence in possession at a future day, unless as a remainder. (2 Black. Com. 166.)

In modern times, however, this rule is in effect abolished, since an estate *in futuro* may be created by devise or by any conveyance operating under the statute of uses. The reasons upon which the original rule was founded, being no longer applicable, it is proposed to abolish it altogether. As future estates cannot, under the following sections of this Article, create a suspension of ownership, for a longer period than remainders, no rules of public policy are violated by their permission. In truth, they are in effect, though not by verbal definition, remainders, commencing in possession on the determination of the *intermediate* estate not granted or devised. A provision similar to the above, will be found in the statutes of Virginia, vol. 1, p. 369, §28.

Editor's Explanation: Mont. Code Ann. §70-15-209

*Overview of future interests.* At common law, future interests (often called in the annotations "expectant estates") are created when the grantor conveys to a grantee a right of possession or potential right of possession that precedes another person's right or potential right to possession. If, immediately after conveyance of the earlier right, the grantor retains a later right, then the grantor's interest is a reversion, right of entry, or possibility of reverter. If the later right of possession is conveyed to another grantee by the same instrument that created the earlier interest, then the latter grantee's future interest is a remainder or an executory interest. This section, in conjunction with Mont. Code Ann. §70-15-212(1) & (4), is designed to ensure the general validity of both remainders and executory interests. On this point, see also the California annotation to §70-15-211, reproduced below.

*Distinction between remainders and executory interests.* The line between remainders and executory interests is a creature of history. A remainder is an interest that would be enforced at law prior to the Statute of Uses of 1536. Before that time, future interests not qualifying as remainders could be enforced only in equity. In California, where it was uncertain whether the Statute of Uses was part of the local common law, this distinction was retained until the 1872 codification. See the cited cases of *Hawes v. Stebbins*, 49 Cal. 369 (1874) (refusal to enforce at law) and *Chandler v. Chandler*, 55 Cal. 267 (1880) (enforcement in equity).

With some traditional qualifications,<sup>13</sup> one may assert that a future interest owned by a transferee qualifies as a remainder if the interest complies with both of two criteria: (1) The interest does not follow, immediately or mediately, a fee simple created by the same instrument; and (2) it does not follow, immediately or mediately, a condition subsequent limiting an earlier grant in the same instrument.<sup>14</sup> Obversely put, a remainder cannot follow either a fee simple or a condition subsequent.

*Illustration #1:* O, holding a present possessory interest in fee simple absolute to Blackacre, conveys Blackacre to A and his heirs so long as the oak tree stands, and then to B and her heirs. Assuming B's interest survives the rule against perpetuities, it is an executory interest, for it follows A's fee simple.

*Illustration #2:* O, holding a present possessory interest in fee simple absolute to Blackacre, conveys Blackacre to A for life; but if A marries a McCoy, to B for life with a remainder over to B's son and his heirs. B has an executory interest for life and B's son has an executory interest in fee simple absolute. Neither B nor his son have remainders, for their interests follow a condition subsequent -- although if B's life interest becomes possessory, B's son's interest may be converted into a remainder.

*Illustration #3:* O, holding a present possessory interest in fee simple absolute to Blackacre, conveys Blackacre to A for A's life so long as the oak tree stands, and then to B and her heirs. B has a

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13. Qualifications such as the following:

(1)As late as the 19th century, a grantor could not create a remainder by conveying the fee and reserving a life estate. The grantee of the fee held an executory interest. In California, this executory interest was valid only in equity. See the cited cases of *Hawes v. Stebbins*, 49 Cal. 369 (1874) (refusal to enforce at law) and *Chandler v. Chandler*, 55 Cal. 267 (1880) (enforcement in equity).

(2)A contingent remainder could not follow a term of years. A grant in the form of a remainder following a term of years was enforceable, if at all, only as an executory interest. See the Editor's Commentary to Mont. Code Ann. §70-15-212.

14. Sometimes this is summarized by stating that a remainder must follow the "natural expiration of a particular estate." A particular estate is one less than a fee simple. Conditions subsequent divest estates -- they do not allow estates to expire naturally.

remainder. Her interest does not follow a fee simple, and although A's life interest is subject to a special limitation ("so long as"), there is no condition subsequent.

Scholars believe that the old English law courts refused to enforce executory interests because to do so would undermine the publicity functions of the ceremony of livery of seisin. Normally, of course, livery was necessary to convey legal title. It was acceptable for ownership to shift without livery on a person's death (as after a life estate) or on expiration of a bloodline (as after a fee tail), for these were events that would cause the community to expect such a change of ownership. But recognition of executory interests would enable parties to convey ownership secretly, which, in absence of a recording system would encourage fraud. A system whereby ownership would shift at an otherwise unremarkable time was denigrated as one in which ownership would arise only *in futuro* -- a circular remark, since whether the courts recognized the interest as a valid (presently-existing) future interest itself determined whether it existed *in praesenti* or only *in futuro*.

With the enactment of the Statute of Uses, executory interests became enforceable at law as well as in equity. Thus, in states where the Statute of Uses was part of the common law, this section did not alter the existing rules. Such is the observation in *Sherman v. Sherman*, 3 Barb. 385 (N.Y. Sup. Ct. 1848), cited in the annotations under Mont. Code Ann. §70-15-212.

*Abolition of the destructibility doctrine.* The California annotation refers the reader to the annotation to Cal. Civ. Code §741. The modern Montana analogue to this section reads as follows:

Mont. Code Ann. §70-1-423. **Future interest not defeated by destruction of other interest.** No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest or by destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by 70-1-424 or where a forfeiture is imposed by statute as a penalty for the violation thereof.

The section referenced, 70-1-424 states:

Mont. Code Ann. §70-1-424. **Future contingent interest -- termination of precedent interest.** No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect, but should such contingency afterwards happen, the future interest takes effect in the same matter and to the same extent as if the precedent interest had continued to the same period.

The purpose of these sections is to abolish the doctrine of destructibility of contingent remainders, as the California annotation to Cal. Civ. Code §741 made clear:

NOTE. -- A contingent remainder, requiring by common law a particular estate to support it, could never be held in abeyance. If the particular estate terminated, in whatsoever manner, before the remainder could vest, the remainder was gone forever. A freehold could not commence *in futuro*. It followed that if the particular estate terminated before the happening of the contingency, the remainder was destroyed. Thus the particular estate might be destroyed by fire, feoffment, or by a merger, and the remainder fell with it. The policy of legislation generally, however, has been to place contingent remainders beyond the reach of accident to the precedent estate. -- 1 N.Y.R.S., p. 725, Secs. 32, 35. So in Virginia (see Lomax's Digest, Vol. 1, p. 457.) Thus the N.Y. statute renders expectant estates no longer dependent on the continuance of the precedent estate, and the Revised Code of Mississippi declares the same rule and allows an estate of inheritance or freehold to commence *in futuro*. -- Code of 1824, p. 459. See 4 Kent's Com., pp. 253-256. Much nice learning has been thrown around the subject of contingent remainders, and many nice distinctions and refinements have accumulated, but in

many of the States, and by this Code, future interests include all estates in expectancy, vested, and contingent, and all future interests are descendible, devisable, and alienable in the same manner as estates in possession, so that a thorough examination of the common law rules concerning remainders, and the delicate questions springing therefrom, must be esteemed as of more interest in showing the learning and scholarly attainments of the early law writers rather than as of any practical utility.]

This section came from N.Y. Civil Code §213, and in turn was copied from Rev. Stat., 725, §32:

No expectant estate can be defeated or barred by any alienation, or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger or otherwise.

The commentary to that section was as follows:

The object of this section is to extend to every species of future limitation, the rule that is now well established, in relation to the executory devise, namely, that it cannot be barred or prevented from taking effect by any mode whatever. If it is consistent with public policy that the owners of lands should be permitted to restrain their alienation, by the creation of future contingent estates, it seems reasonable that they should be protected in the exercise of the power thus given, and that the law should not suffer their intentions to be frustrated by any fraud or device whatever. Where a future limitation is called an executory devise, it receives full protection from the law, yet no reason is perceived why the intentions of a party creating a future estate, ought not to be held equally sacred whatever may be the technical name of the estate so created. The truth is that the whole doctrine of the law in respect to the means by which contingent remainders may be destroyed, is strictly feudal. As the ingenuity of lawyers has long since invented an effectual mode of evading it, it answers no other purpose, at the present day, but to render titles more complicated, and to increase the expense and difficulties of alienation. It is a maxim of the common law, that the contingent remainder must vest either during the continuance of the preceding estate, or upon the very instant of its determination. Consequently, every determination of the preceding estate, before the happening of the contingency, destroys the remainder. Thus, if a tenant for life, with a contingent remainder to his children in fee, before the birth of any children, make a feoffment, levy a fine, suffer a recovery, surrender to the person ultimately entitled to the inheritance, procure a release, or unite the inheritance to his own estate, the remainder is destroyed, and the rights of the issue, the principal objects of the person creating the estate, completely sacrificed. To prevent these inconveniences and guard against the frauds of the tenant for life, trustees to preserve contingent remainders have been introduced, in whom the estate vests, in case of the alienation or forfeiture of the first taker, and who retain it until the contingency happens, on which the rights of the persons in remainder depend. The necessity and success of the remedy are a confession of the mischiefs of the doctrine which it avoids, but unfortunately, it is a source, in itself, of new evils, by rendering the title more complex, enabling the trustees by fraud to divest the estate, and compelling the frequent resort to the court of chancery for direction and relief.

The legitimate purpose of this invention, the protection of the interests of the persons entitled in remainder, will be effectually answered by placing all contingent estates on the same footing as executory devises, and the end is thus attained in the most simple and direct manner, without the necessity of present expense, or the hazard of future litigation.

Another most important advantage, to which we have not yet adverted, will result from reducing all expectant estates substantially to the same class. We shall prevent all future

litigation on the purely technical question, to which class or denomination any particular limitation is to be referred. It is a well known rule, that no expectant estate, even if created by will, or a conveyance to uses, is to be construed as an executory devise or secondary use, if it be so limited, as to be capable of taking effect as a remainder, and some of the most difficult and abstruse cases, to be found in the reports, have turned exclusively on the application of this rule. If the distinctions which create the difficulty and necessity of applying this rule, are of no practical value, if they have no existence in the intention of the parties, and are not required by any considerations of public good, it will scarcely, we imagine, be thought necessary to preserve them merely for the sake of the litigation to which they give rise.

The destructibility doctrine held that a condition precedent to vesting was not yet satisfied when the interests prior to a contingent remainder expired, the remainder was destroyed.

*Illustration #4:* O, holding a present possessory interest in fee simple absolute to Blackacre, conveys Blackacre to A for A's life and then to B and her heirs if B reaches 21. A dies when B is 18. Because the condition precedent to the vesting of B's remainder has not been satisfied, B's remainder is destroyed and Blackacre reverts to O.

The original justification for the destructibility doctrine was that B could not take possession on A's death, for the condition precedent to B's possession had not been satisfied, and allowing her to divest O when she was 21 would enable her to enforce an (invalid) executory interest. With the adoption of the Statute of Uses, the rationale for the destructibility doctrine ended, and the doctrine should have expired. The fact that it survived, and entered the common law of some American states, is said to be the result of judicial eagerness to preserve the alienability of land.

In any event, Mont. Code Ann. §§70-1-423 and 70-1-424 reverse the result in Illustration #4. The "or otherwise" language of §70-15-209 accommodates this change when the precedent estate terminates by reason of forfeiture or condition subsequent. The latter is the import of the cited case, *Nicoll v. The New-York and Erie Railroad Co.*, 12 N.Y. 121 (1854) (condition subsequent fits within quoted language).

*Correction of Quotation from Lawrence v. Bayard.* Both the Montana and California annotations omitted words from the quotation from *Lawrence v. Bayard*, 7 Paige Ch. 70, 76 (N.Y. 1838), creating a logical contradiction. The full sentence is, "And by an examination of the several provisions of the revised statutes it will be seen that by the term 'expectant estates' the legislature intended to include every present right or interest, either vested or contingent, which may be possibility vest *in possession* at a future day." [emphasis added]

Present Law: **Mont. Code Ann. §70-15-210. Reversion.** A reversion is the residue of an estate left by operation of law in the grantor or his successors or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

1895 Codification: **Mont. Civ. Code §1217.** A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Montana Annotation: RIGHT TO AN ESTATE IN REVERSION becomes absolute on the happening of the event which terminates the intermediate estate: Hawes v. Lathrop, 38 Cal. 493.

1872 California Codification: **Cal. Civ. Code §768.** A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

California Annotation: None

1865 Field Code: **N.Y. Civ. Code §225.** A reversion is the residue of an estate left, by operation of law, in the grantor, or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Field Code Annotation: 1 R.S. 723, §12. The words "by operation of law" are new, and "successors" substituted for "heirs."

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 723, §12.** A reversion is 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.

N.Y. Rev. Stat. Commentary: 2 Black. Comm. Chris. ed. p. 175.

Editor's Explanation: Mont. Code Ann. §70-15-210

At common law, a future interest left in the hands of the grantor is either a reversion, a possibility of reverter, or a right of entry. The grantor retains a possibility of reverter when he conveys an *estate* equal to the one he has, but restricts it with a special limitation -- as when the holder of a fee simple absolute conveys a fee simple "so long as the oak tree stands." A grantor retains a right of entry when he conveys an estate equal to the one he has, but restricts it with a condition subsequent and reserves the right to retake the land if the condition is violated. Thus, if A is a lessee who conveys the remainder of his term to B, subject to B paying the rent to L, then A has retained a right of entry. A reversion is the interest left in the grantor if the grantor conveys a lesser estate than he started with, irrespective of any special limitations or conditions subsequent placed on the estate granted. Thus, if O has a fee simple and grants a fee tail, life estate, or term of years, O retains a reversion. Similarly, if X holds a term for 15 years and conveys out 10 years to Y, X retains a reversion.

This section, which is an adaptation of Blackstone's definition of a reversion (2 Bl. Comm. \*175), is an effort to restate, rather than reform, common law. The definition, however, is overinclusive. To be sure, if the grantor begins with a fee simple and then conveys a "particular estate" (i.e., an estate less than fee simple), the grantor retains a reversion. But the definition does not take into account the situation when the grantor begins with a particular estate -- a life estate or term of years -- and then conveys the entire interest, subject only to a special limitation or condition subsequent. At common law, the grantor would have retained a possibility of reverter or right of entry, respectively; under the literal wording of the statute, he retains a reversion.

At common law, a reversion, even if subject to divestment, is always a vested interest. This is most important for purposes of the rule against perpetuities. The Editor's Explanation to Mont. Code Ann. §70-15-213 observes that this rule of common law is thrown into doubt by §§70-1-322 through 70-15-324, and by recent adoption of the Uniform Statutory Rule Against Perpetuities.

There is also the question of whether possibilities of reverter and rights of entry even exist in Montana. Mont. Code Ann. §70-1-318, another Field Code-Revised Statutes provision, states

No future interest in property is recognized by the law except such as is defined in this code.

Because the code fails to list rights of entry and possibilities of reverter as valid future interests, at first blush it seems to exclude them. On further analysis, though, it would appear that these entitlements are recognized in this state. There are two reasons for this conclusion:

1. In the 19th century, the courts of New York classified possibilities of reverter and rights of entry as choses in action rather than future interests. Thus, *Nicoll v. The New-York and Erie Railroad Co.*, 12 N.Y. 121 (1854), cited in the annotations to the previous section, sustained a right of entry as a valid interest, but not as an "expectant estate."

2. Rights of [re-]entry are recognized obliquely in §70-1-505 and in the Montana annotation to §70-1-213 (discussing the grantor's right to take advantage of a breach of condition). Possibilities of reverter are acknowledged both in *Nicoll* and in subsequent Montana case law.<sup>15</sup> In view of the holding in *Nicoll*, however, and of §§70-1-319 and 70-1-504, rights of entry and possibilities of reverter probably are not alienable.

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15. *Esgebrecht, Inc. v. Waters*, 217 Mont. 291, 704 P.2d 442 (1985). It is unclear whether §§70-1-319 and 70-1-504 were intended to embrace possibilities of reverter. The California commentary to Cal. Civ. Code §741, reproduced under the next section, suggests that §70-1-504 is not so applicable.

At common law, possibilities of reverter and rights of entry are contingent interests, except for purposes of the rule against perpetuities, under which they are treated as vested. The interaction of Field Code statutes with the Uniform Statutory Rule Against Perpetuities render uncertain the viability of these common law doctrines. See the Editor's Explanation to Mont. Code Ann. §70-15-213.

The sole case cited in the annotations is *Hawes v. Lathrop*, 38 Cal. 493 (1869), mentioned in the Montana annotation. There, the plaintiff had conveyed to defendants, as trustees, a deed, which stated that the property was to be used as a school. The instrument also stated that if the design to establish and maintain a school should prove unsuccessful, the trustees should so declare by resolution, whereupon the title would revert to plaintiff. A fire destroyed the school, the trustees so declared, and the property reverted to plaintiff.

The presence of this case in the codifiers' notes is puzzling. To all appearances, the grantor's future interest was not a reversion -- he apparently having conveyed a fee -- but a right of entry or perhaps a possibility of reverter. Moreover, the question of the plaintiff's ownership was not in doubt and was not litigated. The question before the court was the disposition of proceeds from the trustees' fire insurance policy on the school building. (The court awarded the proceeds to the plaintiff.) In sum, the *Hawes* case does not assist in the construction §70-15-210, and could just as well have been omitted.

Present Law: **Mont. Code Ann. §70-15-211. Remainder.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder and may be created and transferred by that name.

1895 Codification: **Mont. Civ. Code §1218.** When a future estate, other than reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §769.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

California Annotation: NOTE. -- See notes to Sections 741 and 742, ante. [See Editor's Explanation to Mont. Code Ann. §70-15-209 for the text of the note to §741. The text of the note to §741 is as follows:

NOTE. -- See note to preceding section. For varied learning upon the subject of contingent remainders see the admirable work of "Ferne on Contingent Remainders."]

1865 Field Code: **N.Y. Civ. Code §226.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

Field Code Annotation: 1 R.S. 723, §11. Modified by inserting the words "other than a reversion."

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 723, §11.** When a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-211

Executory interests -- transferees' future interests not qualifying as remainders -- are enforceable in Montana by virtue of Mont. Code Ann. §70-15-209. The commentary appended to N.Y. Rev. Stat. (1828) 725, §32 (reprinted in the Editor's Explanation to §70-15-209) states that an overall purpose of the New York reform was to "reduc[e] all expectant estates substantially to the same class." In that respect, this section, 70-15-211 seems to contemplate that all future interests conveyed to transferees are to be called remainders, and all are to be governed by the same rules.

But matters are not so simple. Indeed, this §70-15-211 has considerable capacity for mischief. The fundamental meaning of the statute is in doubt. Why is the statute written in permissive rather than mandatory form? Does it mean that executory interests *may* (but need not) be called remainders and *may* (but need not) be transferred by that name? The aforementioned policy would argue against such an interpretation. But why, then, does §70-15-213 state that a "remainder" following a condition subsequent "is to be deemed a conditional [i.e., executory] limitation"?<sup>16</sup>

The history of Montana perpetuities law has something to say on the question. The Revised Statutes codified for New York a perpetuities doctrine called the "two lives" rule. It treated remainders and executory interests similarly. But for many years, Montana followed the common law rule, which distinguishes between remainders and executory interests. More recently, the legislature has adopted the Uniform Statutory Rule Against Perpetuities (§§70-1-801 through 70-1-807). It also refers for some purposes to the common law rule against perpetuities.

So it would seem that the line between remainders and executory interests, however unimportant, survives for some purposes in this state. The permissive language of Mont. Code Ann. §70-15-211 must be read literally.

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16. *Conditional limitation* was a synonym for executory limitation much used in the 19th and early 20th century, but now out of favor.

Present Law: **Mont. Code Ann. §70-15-212. Future and contingent estates -- how created.** Subject to the rules of parts 1, 3, and 4 of chapter 1, parts 1 and 2 of this chapter, and part 1 of chapter 17:

- (1) a freehold estate, as well as a chattel real, may be created to commence at a future day;
- (2) an estate for life may be created in a term of years and a remainder limited thereon;
- (3) a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and
- (4) a fee may be limited on a fee upon a contingency which, if it should occur, must happen within the period prescribed in this code.

1895 Codification: **Mont. Civ. Code §1222.** Subject to the rules of this title, and of part I. of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee upon a contingency, which, if it should occur, must happen within the period prescribed in this title.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §773.** Subject to the rules of this Title, and of Part I of this Division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Title.

California Annotation: NOTE. -- Maurice vs. Graham, 8 Paige, pp. 483, 486; Sherman vs. Sherman, 3 Barb., p. 385.

1865 Field Code: **N.Y. Civ. Code §230.** Subject to the rules of this Title, and of Part I of this Division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Title.

Field Code Annotation: 1 R.S., 724, §24. Maurice v. Graham, 8 Paige, 483, 486; Sherman v. Sherman, 3 Barb., 385.

N.Y. Revised Statutes Provision: **1 N.Y. Rev. Stat. (1828) 724, §24.** Subject to the rules established in the preceding sections of this Article, a freehold estate as well as a chattel real, may be created, to commence at a future day; an estate for life may be created, in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of

years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article.

N.Y. Rev. Stat. Commentary: This section is indispensably necessary to produce that uniformity in the law, which it is the object of the Revisers to attain. By the strict rules of the common law, and for reasons purely technical, no remainder can be limited on a life estate, in a term of years. Thus if a man possessed of a term, say of 100 years, grant it to A. for life, and if he shall die during the term, then the residue of the term to B., A. has an absolute interest, and the remainder to B. is utterly void. The maxims of the common law also prohibit the creation of a contingent remainder of freehold, on a term of years, and the limitation of a fee upon a fee, on a contingency defeating the prior estate. Thus if an estate be granted to A. and his heirs, but if he dies without issue living at his death, then to B. as a remainder, the limitation is void, as repugnant to the fee already given. No such repugnancy, however, is supposed to exist, if the same limitation is contained in a will, in precisely the same words; for although as a remainder it is void, as an executory devise, it is unexceptionable and valid.

None indeed of the restrictions that we have mentioned, except the second, which extends also to limitations of uses, are applicable to secondary uses and executory devises; so that in these cases, it is literally true that the validity, as we have before remarked, of a limitation, depends exclusively on the formal character of the instrument, in which it is contained. 2 Blackstone's Com. (Christian's edition.) p. 170, 173, 174. Fearn on Remainder [*sic*], p. 423.

Editor's Explanation: Mont. Code Ann. §70-15-212

This general curative section has four parts. It seems best to consider each part separately:

(1) *a freehold estate, as well as a chattel real, may be created to commence at a future day. . .*

This subsection is essentially a restatement of §70-15-209. Its function is to validate executory interests, whether they be held in fee simple, for life, or for years. The reader is referred to the Editor's Explanation under §70-15-209.

(2) *an estate for life may be created in a term of years and a remainder limited thereon. . .*

If O, holding a present possessory interest in fee simple absolute to Blackacre, conveys to A for life, and a remainder to B and her heirs, both A and B have freeholds. On death their interests pass to the recipients of their real property.

Now assume, that O, holding a present possessory interest in fee simple absolute to Blackacre, conveys a term of 500 years to X and retains a reversion. X conveys his term to Y. Then O conveys the reversion to X. Finally Y conveys the term to O. This leaves X with a reversion in fee simple absolute and O with a present possessory interest for [500] years. In practical consequences, O's interest is not much worse than a fee. O now conveys to A for life, remainder to B. As the commentary to the Revised Statutes notes, B's remainder was void before adoption of this section.<sup>17</sup> After adoption, the real-world results are pretty much the same as those outlined in the last paragraph, but A and B have chattels real rather than freeholds. Mont. Code Ann. §70-15-206. On death their interests pass to the recipients of their *personal* property.

Note that by virtue of Mont. Code Ann. §70-15-208, one cannot avoid the effects of the rule against perpetuities through the device of carving freehold-like interests out of long terms of years.

(3) *a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years. . .*

For many years the common law has permitted the creation of a vested remainder on a term of years. This is because, while a termor did not carry seisin, at the time of the conveyance the feoffer could make livery of seisin to the vested remainderman.

*Illustration #1:* O, holding a present possessory interest in fee simple absolute to Whiteacre, conveys ten year term to A, remainder over to B and her heirs. A has a present possessory interest for years; B has a vested remainder in fee simple absolute. O has nothing.

However, the common law did not permit contingent remainders to follow a term of years. This is because the termor could not carry seisin, and the prospective remainderman -- not being certain to possess -- could not take seisin, and the grantor could not delivery a clod of earth to himself. Thus:

*Illustration #2:* O, holding a present possessory interest in fee simple absolute to Whiteacre, conveys ten year term to A, "remainder" over to B and her heirs if B so long survives. A has a present possessory interest for years. If B's interest is invalid, O has a reversion in fee simple absolute.

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17. The grounds for objection apparently were that an estate of greater dignity (life estate) could not be contained by an estate of lesser dignity (term of years).

If B's interest is enforced as an executory interest, then B has an executory interest in fee simple absolute and O has a reversion in fee simple subject to an executory limitation.

Today there is no reason that a grant in the form of a contingent remainder following a term of years should not be enforced as such. This section so provides. In Montana, therefore, the state of the title in Illustration #2 would be: A has a present possessory interest for years; B has a contingent remainder in fee simple absolute; O has a reversion in fee simple absolute.<sup>18</sup>

*(4) a fee may be limited on a fee upon a contingency which, if it should occur, must happen within the period prescribed in this code.*

A future interest in a transferee may fail as a remainder (and therefore qualify as an executory interest) either because it follows a simultaneously-created fee simple or because it follows a condition subsequent (divesting condition). See the Editor's Explanation to Mont. Code Ann. §70-15-209. This section validates executory interests of the former sort; §70-15-213 validates those of the latter.

Concisely stated, this provision means that a court will enforce an executory interest in fee following an executory interest in fee as long as the rule against perpetuities is not violated. Both cases cited in the annotations dealt with this type of situation. In *Sherman v. Sherman*, 3 Barb. 385 (N.Y. Sup. Ct. 1848), a testator, in a will probated after adoption of the Revised Statutes, devised land to his son in fee, "Provided, that if said [son] shall die without child or children, then it is my said will that the real estate hereby devised shall be divided equally among my grandchildren. . . ." The son died childless, and the gift to the grandchildren was enforced as a valid shifting executory interest.<sup>19</sup> In dicta the court stated that the result would have been the same under pre-existing law, for as noted in the Commentary on the Revised Statutes, executory devises were enforced.

*Maurice v. Graham*, 8 Paige Ch. 483 (N.Y. 1840) involved the following bequest:

I give and bequeath to Juda Jackson, my freed colored girl, and equally to her brother Edward Butler, and to their heirs and assigns forever, provided they both live to the age of twenty-one years, or to the survivor if only one should live to attain that age, all that lot [describing premises] . . . If Juda and Edward both die leaving no child or children, in that case I leave and give the whole of this lot to my freed black woman Lucy Bates, her heirs and assigns forever. . . .

The facts, somewhat simplified, were that both Juda Jackson and Edward Butler lived to age 21. Mr. Butler conveyed his interest to Miss Jackson (now Mrs. Graham) and thus dropped out of the picture. She died without issue, and her heirs sought to convey to her husband. The issue before the court was whether the husband took a fee simple absolute, or whether his interest was subject to an executory limitation in favor of Lucy Bates.

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18. One who grants a contingent remainder always retains a reversion, and the presence of the contingent remainder does not reduce, in form anyway, the potential duration of the reversion. In this example, it is easily to see that O's interest may become possessory – if A does not survive. But O would retain a reversion even if there were an alternative gift to B. O's interest still could become possessory: A's leasehold might terminate prematurely for some reason (i.e., forfeiture for drug running), with the ten-year survival contingency neither satisfied nor defeated.

19. The son's interest is best described as a present possessory interest in fee simple subject to an executory limitation.

The court held that Ms. Bates held a valid executory interest under the New York Revised Statutes. The state of the title, therefore was as follows: The husband held a present possessory interest in fee simple subject to an executory limitation.<sup>20</sup> Ms. Bates held an executory interest in fee simple absolute.

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20. The court described his interest as a determinable fee [fee simple determinable]. Because the condition reads like a condition subsequent rather than a special limitation, a more accurate description would have been a fee simple subject to an executory limitation. This distinction would have had legal consequences only if the executory limitation had violated the rule against perpetuities. In that event, a fee simple subject to an executory limitation would ripen into a fee simple absolute; a fee simple determinable would remain a fee simple determinable, and the heirs of the testator would have retained a possibility of reverter.

Present Law: **Mont. Code Ann. §70-15-213. Remainder upon a contingency.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate, and every such remainder is to be deemed a conditional limitation.

1895 Codification: **Mont. Civ. Code §1227.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

Montana Annotation: **CONDITIONAL LIMITATION.** -- The great distinction between a condition and a conditional limitation is, that to render a condition effective to terminate the estate to which it is attached, it must be taken advantage of by some act of the grantor or his heirs, while on the expiration of an estate by the limitation, it at once ceases, and the next estate is expectancy at once vests: See 1 Sharswood & Budd's Leading Cases on Real Prop. 188, 143.

See sec. 1229, *infra*.

1872 California Codification: **Cal. Civ. Code §778.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

California Annotation: **NOTE.** -- Tyson vs. Blake, 22 N.Y., p. 563.

1865 Field Code: **N.Y. Civ. Code §236.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

Field Code Annotation: 1 R.S., 725, §27; Tyson v. Blake, 22 N.Y., 563.

N.Y. Revised Statutes Provision: 1 **N.Y. Rev. Stat. (1828) 725, §27.** A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law.

N.Y. Rev. Stat. Commentary [identified with §28, the section number before enactment] A remainder, properly so called, can not be limited on a contingency, which, should it happen, will defeat the prior estate, before the period of its natural termination; in fewer words, it cannot be limited on a condition subsequent. This rule it seems, is a consequence of the common law *maxim*, that none but the grantor or his heirs can take advantage of the breach of a condition, so that it is only by their entry that the conditional estate can be defeated. That entry, if made, defeats the livery made on the creation of the original estate, and therefore of course defeats all subsequent estates dependent on the same livery -- the remainder and the precedent estate fall together. Thus if an estate be granted by deed to A., who is then a widow, for life, upon condition that if she afterwards marry it shall belong to B., the limitation to B. is nugatory, for although A. marries, her estate still continues, unless the heir of the grantor chose to avoid it by his re-entry, and then the remainder to B. is also annulled. But if the

estate was not expressed to be for life, if the grant had been to her during her widowhood, and in case of her marriage to B., this would have been a valid remainder, and the marriage of the widow would have entitled B. to the immediate possession of the lands; for in such case it seems the estate to the widow is not an estate upon condition, but a limitation, or a condition not in deed, but in law. Thus it is that the rights of the remaindermen are made to depend on a distinction as purely verbal, as it is possible to conceive, for whichever form of expression is used, the estate of the widow is obviously meant to be precisely the same. It is meant in both cases, that she shall enjoy the lands so long as she remains a widow, and no longer, and that when she marries they shall belong to B.

This rule, however, that a remainder limited on a condition subsequent, is void, is not applicable to devises; for in a devise, although strict words of condition are used, yet if there is a remainder over, they are always construed as creating not a condition but a conditional limitation, so that when the condition is broken or performed, as the case may be, the remainder commences in possession, and the person entitled under it has an immediate right to the estate. The reason of this distinction we are told is, that a different construction would defeat the intent of the testator, and prevent the remainder from taking effect, since if it were a condition it would descend to the heir at law, whose entry would destroy the whole estate. This reasoning it must be admitted is sound and conclusive, and because it is so, we are desirous to apply it to deeds as well as to wills.

It deserves to be remarked that one of the few inaccuracies to be found in Blackstone, occurs on the subject of this note. He states it as a general rule, that where a remainder is limited on a conditional estate, the condition, for the sake of preserving the remainder, is always construed as a limitation; but the only cases he cites in support of this position, arose upon wills. In respect to conveyances at common law, the contrary doctrine is clearly established. *Fearne on Rem.* p. 363, 391 to 3, 409 to 10, and cases there cited. 2 *Black. Com.* 155, 6.

Editor's Explanation: Mont. Code Ann. §70-15-213

*General overview of contingent and vested interests.* At common law, remainders are divided into contingent and vested remainders. Contingent remainders are those that *either* (a) depend for vesting on a condition precedent *or* (b) are lodged in unascertainable persons, such as unborn children or the heirs of a living person. Any other remainder is vested, including those subject to being divested by the occurrence or non-occurrence of conditions subsequent.

At common law, other future interests may be contingent or vested. However, the rules are simpler: reversions are always vested; executory interests always are treated as contingent (even if certain to become possessory), and rights of entry and possibilities of reverter are contingent, except for purposes of the rule against perpetuities, when they are considered vested.

The Field Code statutes as enacted in Montana continue the distinction between contingent and vested interests, but raise the possibility that all future interests should be judged by the same standards. The relevant statutes are as follows:

Mont. Code Ann. §70-1-322. **Kinds of future interests.** A future interest is either:

- (1) vested; or
- (2) contingent.

Mont. Code Ann. §70-1-323. **Future interest -- when vested.** A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest.

Mont. Code Ann. §70-1-324. **Future interest -- when contingent.** A future interest is contingent whilst the person in whom or the event upon which it is limited to take effect remains uncertain.

The foregoing definitions fit fairly well into the original Field Code scheme, with its single perpetuities limit, the so-called "two lives" doctrine. But Montana long since has abandoned the two-lives doctrine, initially for the common law rule; more recently for the Uniform Statutory Rule (Mont. Code Ann. §70-1-801 through §70-1-807), which invalidates certain "nonvested" interests without defining what "nonvested" means.

Thus, we are now faced with various unanswerable questions: Does Montana recognize contingent reversions and vested executory interests? Can possibilities of reverter and rights of entry be vested? (if these are future interests under the Code at all -- see Editor's Explanation to §70-15-210). Is contingency or nonvestedness the same for all purposes, or can an interest be nonvested for perpetuities purposes and vested for other purposes? All these questions throw doubt on the wisdom of continuing to cling to statutes whose time is long past, and then compounding the error by adopting uniform legislation without regard to the statutes already on the books.

Incidentally, problems with Uniform Statutory Rule are not limited to its clash with the Field Code. The uniform act presents other, more universal difficulties, including federal tax problems, daunting complexity, and the uncertainty arising from its wait-and-see feature. See, e.g., Bloom & Dukeminier, *Perpetuities Reformers Beware: The USRAP Tax Trap*, 25 *Real Prop. Prob. & Tr. J.* 203 (1990); Bloom, *Perpetuities Refinement: There is An Alternative*, 62 *Wash. L. Rev.* 23 (1987); Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 *UCLA L. Rev.* 1023 (1987).

*Effect of this section.* This provision is *not* designed to validate all contingent remainders. Its purpose, rather, is to validate future interests that would, at common law, be disqualified as remainders because they

follow conditions subsequent. This section thus carries out the policy of Mont. Code Ann. §70-15-209 and complements §70-15-212(4).

The only case cited in the annotations, *Tyson v. Blake*, 22 N.Y. 558 (1860), illustrates the operation of this section. A testator had three grandsons and one granddaughter. His will stated that certain property (personalty, actually) was to be divided equally among them, "[b]ut in case my granddaughter . . . should die, without lawful issue, then her share to be equally divided among my three grandsons aforesaid . . . ." The interest of the grandsons in the daughter's share could not be a remainder, for it followed a condition subsequent. (See the Editor's Explanation under §70-15-209.) The granddaughter having died without issue, the court enforced the provision as a valid executory interest.

*Other implications of this section.* The Montana annotation to Mont. Code Ann. §70-15-213 offers additional insight into the law of the state. As noted in the Editor's Explanation to §70-15-211, the reference to a "conditional limitation" -- the 19th century synonym for executory limitation -- suggests that executory interests are part of our law, even though they may be referred to and conveyed as "remainders." Further, the annotation suggests that the common law pertaining to executory interests and rights of entry survives to the extent that (1) if a condition subsequent is followed by a right of entry, the grantor must act affirmatively to enforce that right of entry when the condition is breached, but (2) if a condition subsequent is followed by an executory interest, breach causes title to shift (or spring) automatically to the holder of the executory interest.

Present Law: **Mont. Code Ann. §70-15-214. Remainder not upon a contingency -- when to take effect.** When a remainder of an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker or the expiration by lapse of time of such term of years.

1895 Codification: **Mont. Civ. Code §1229.** When a remainder of an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration by lapse of time, of such term of years.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §780.** When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

California Annotation: None

1865 Field Code: **N.Y. Civ. Code §238.** When a remainder, on an estate for life or for years, is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

Field Code Annotation: 1 R.S., 725, §29

N.Y. Revised Statutes Provision: 1 **N.Y. Rev. Stat. (1828) 725, §30.** When a remainder on an estate for life, or for years, shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect, only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

N.Y. Rev. Stat. Commentary: [See note to § 33]

Editor's Explanation: Mont. Code Ann. §70-15-214

The absence of substantive annotations in the Montana, California, and Field Code versions of this section induces us to follow the suggestion of the Revised Statutes drafters that we examine the annotation to 1 Rev. Stat., 725, §33 (§32, as enacted). That provision and the annotation are quoted at length in the Editor's Explanation to Mont. Code Ann. §70-15-209.

The gist of those excerpts is that the doctrine of destructibility of contingent remainders is abolished. Therefore, if a life estate or term of years should expire before the remainder's condition precedent has occurred, the present enjoyment of the land reverts to the grantor to await the outcome of the contingency. If the condition precedent is satisfied, present enjoyment shifts to the remainderman; if it fails, the grantor's title becomes absolute.

This section, §70-15-214, deals, of course with vested rather than contingent remainders. At common law, the destruction of the precedent estate causes a vested remainder to "accelerate into possession:"

*Illustration:* T, holding a present possessory interest in fee simple absolute to Whiteacre, wills the land to A for life, remainder to B and her heirs. A forfeits his life estate for drug-running. Even though A is still alive, B now takes possession; she holds a present possessory interest in fee simple absolute.

The apparent reason for the reference to the New York commentary under the destructibility section is that commentary's assurance that a purpose of the reforms is "reducing all expectant estates substantially to the same class" -- in other words, adopting similar rules for functionally similar interests. If land may revert to the grantor to await the outcome of the condition governing a contingent remainder, applying a similar rule would require that land revert to await the time when the interest of a vested remainderman otherwise would become possessory. In other words, this section abolished the acceleration of vested remainders. In the foregoing example, on A's forfeiture the land would revert to T's heirs or devisees, who would have a present possessory interest for the life of A. B would have to wait until A died.

This result is questionable. First, it clutters land titles unnecessarily. T's successors retain a reversion despite T's intent that they not do so. Rather, T intended to devise all of his interest, and his intended beneficiaries were A and B, not his other successors. Since benefit to A is no longer possible, there seems little reason not to pass enjoyment of the land to B.

Present Law: **Mont. Code Ann. §70-15-215. Remainder to heirs of tenant for life -- effect of.** When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to take by virtue of the remainder so limited to them and not as mere successors of the owner for life.

1895 Codification: Mont. Civ. Code §1228. When a remainder is limited to the heir or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

Montana Annotation: RULE IN SHELLEY'S CASE ABOLISHED. -- For examples arising under the rule in Shelley's Case, see *Norris v. Henley*, 27 Cal. 39; *Estate of Utz*, 43 Id. 201. The above provision of the code is in harmony with the prevailing spirit of legislation in this country. The policy of the rule is not consistent with our institutions, and therefore the rule itself is now generally abolished. See a consideration of the prevalence of the rule in Shelley's Case in this country in the note to *Polk v. Faris*, 30 Am. Dec. 400, 415.

1872 California Codification: **Cal. Civ. Code §779.** When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

California Annotation: None

1865 Field Code: **N.Y. Civ. Code §237.** When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

Field Code Annotation: 1 R.S. 725, §28, modified so as to avoid the use of the technical phrase "take as purchasers."

N.Y. Revised Statutes Provision: 1 **N.Y. Rev. Stat. (1828) 725, §28.** Where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate, in the same premises, shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them.

N.Y. Revised Statutes Commentary [identified with §29, the section number before enactment]: This section is introduced to abolish a technical rule, commonly described by lawyers as the rule "in Shelly's [*sic*: should be "Shelley's" - ed.] case." The terms of this rule are, "That when the ancestor by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited mediately or immediately to his heirs, or the heirs of his body, that the words heirs, &c, are always words of limitations of the estate, and not words of purchase;" (*Shelley's case*, 1 Rep. 9.) In plain terms, the ancestor takes the whole estate, and the heirs if they

take at all, can take only by descent, contrary it is admitted to the natural meaning of the words and the clear intent of the grantor. That we may judge of the propriety of retaining this rule, it is proper to attend to the reasons given for its introduction. We are told that if the heirs were to take as purchasers, these consequences would follow:

1. That the lord would be deprived of the wardship and marriage of the heir:
2. That the remainder of being contingent, the fee would be in abeyance during the life of the ancestor:
3. That as a necessary consequence of the abeyance of the fee, its alienation during the continuance of the life estate would be suspended.

The first of these reasons is plainly not applicable in this state, where the feudal incidents of wardship and marriage do not exist, and as we have already shown, never have existed; and of the second and third reasons, it may be remarked, that if valid, they prove that contingent remainders, secondary uses, and executory devises ought never to have been allowed, and should at once be abolished; for the necessary effect of every species of contingent limitation, whether to the "heirs" of the first taker, or to strangers, is to place the fee in abeyance and suspend its alienation until the contingency happens.

As affording a striking illustration of the mischiefs of the rule in Shelly's case, we refer to the celebrated case of *Perrin v. Blake*, which turned entirely on its meaning and application. The question, in every stage of the controversy, was admitted to be, whether the undisputed intentions of the testator, or this technical rule of construction, were to prevail. The suit (upon the issue of which depended the validity of a large jointure to a widow) commenced in the island of Jamaica, where the estate was situated, in the year 1746. It was thence transferred to the courts in England, and after passing through them all, reached the house of Lords, on a writ of error, and finally, in the year 1777, "the cause, we are told, being then ready for a hearing,) was ended by a compromise between the parties, leaving the law in the same uncertainty as if it had never arisen. On this state of facts, Mr. Hargrave remarks with much simplicity: "It seems particular, that under any circumstances, a lady should not be able to know whether her jointure was good or not, for upwards of thirty years; and that at last the business should have no decision, but terminate in a compromise." The legislature, it is presumed, will be anxious to make such provisions as to prevent the occurrence of such *particularities* hereafter.

Whatever reasons may have existed for the original adoption of the rule in Shelly's case, a few observations will show, that it ought now to be regarded as purely arbitrary and technical. Nor can any other motive for preserving it be stated, except that it may remain as one of the subjects on which the ingenuity of the bar is to be exercised at the expense of suitors. The rule does not apply unless the word "heirs" is used, although the terms actually employed are identical in meaning. Thus if the grant be to the father for life, remainder to the issue of his body, the remainder is good, and the father has a life estate only; but substitute "heirs" for issue, you give him a fee. Again: the estate of the ancestor must be a freehold, for if the limitation to the heirs be on a term of years, it is valid. Thus if the estate be given to the father for one hundred years, if he should so long live, and upon his death to his heirs, the heirs take as purchasers, and it is out of the power of the father to effect their rights. Yet it is obvious that the interest of the father is in fact an estate for life, and that the term of years is only introduced to evade the operation of the rule. In short, the application of the rule, with the aid of a tolerably skillful conveyancer, may always be evaded; and its only practical operation is to defeat the intentions of those who are without sufficient advice and ignorant of the force of technical language.

The principles by which the Revisers have been governed, in proposing the alterations contained in this chapter, and indeed throughout the revision, may be very 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. (Cruise's Dig. Tit. Rule in Shelly's case; Fearne on Rem. 110 to 270; Hargrave's Tracts, 489; 4 But. 2579).

Editor's Explanation: Mont. Code Ann. §70-15-215

The rule in Shelley's Case, 1 Co. Rep. 93b, 76 Eng. Rep. 206 (C.B. 1581), is a rule of law rather than a rule of construction, for it requires a certain result without regard to the intent of the parties. It was held to be a rule of law in the Exchequer's reversal of Lord Mansfield in the celebrated case of Perrin v. Blake, 1 W. Bl. 672, 96 Eng. Rep. 392 (K.B. 1770), discussed in the New York Revised Statutes annotation. Interpretative rules of law are inconsistent with the principle of "intent" (bargain or agreement) validation regnant in modern private law, and most American jurisdictions have abandoned all or most such rules, including Shelley's Case. In the majority of states, as here, abolition is by statute, rendering the courts free to apply the "intent" behind the language in the instrument.

The rule in Shelley's Case holds that if one instrument creates a life estate in land in A and purports to create a remainder in persons described as the heirs (or heirs of the body) of A, and if the life estate and purported remainder are both legal or both equitable, then the words purporting to create the remainder are treated as words of limitation -- that is, that the remainder becomes the property of the life tenant in fee simple (if the word "heirs" was used) or in fee tail (if the phrase "heirs of the body") was used).<sup>21</sup>

*Illustration #1:* O, while holding a present possessory interest in fee simple absolute, purports to convey property to A for life, then to B for life, then to the heirs of A. Under the rule in Shelley's Case, A becomes the fee simple owner of the remainder as well as the owner of the first life estate. B's remainder for life is unaffected.

*Illustration #2:* O, while holding a present possessory interest in fee simple absolute, purports to convey property to A for life, then to the heirs of A. Under the rule in Shelley's Case, A becomes the fee simple owner of the remainder as well as the owner of the first life estate. Because there is no intermediate owner between the life estate and the remainder, both of which are held by A, the two interests merge. A holds a present possessory interest in fee simple absolute.

The rule in Shelley's Case does not apply to executory interests,<sup>22</sup> so the conveyancer can evade the rule by creating executory interests in the heirs of A. Hence, abolition of the rule comports well with the statutory policy of equalizing the treatment of remainders and executory interests wherever possible. (See the commentary of the New York Revisors of Statutes reprinted in the Editor's Explanation to Mont. Code Ann. §70-15-209).

The three cases set forth in the annotation are unremarkable. *Norris v. Henley*, 27 Cal. 439 (1865) (erroneous cited as 27 Cal. 39) held that at bequest to three life tenants, "each and all of them to have and to hold in their lifetime, and then to go to their heirs and assigns" was within the rule. Thus, the life tenants held their respective remainders in fee simple, which remainders they merged with their life estates. *Estate of Utz*, 43 Cal. 200 (1872) (erroneously cited as 43 Cal. 201) held that a bequest "to my youngest daughter, Margaret Utz, and to her children" was not within the rule -- children not being the same as heirs -- and that Margaret and her children held as tenants in common. *Polk v. Faris*, 9 Yerger 209, 30 Am. Dec. 400 (Tenn. 1836) is chiefly a learned discussion of the history of the rule. The court applied the rule to the conveyance in question.

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21. 1 American Law of Property 482 (A.J. Casner ed. 1952). Theoretically, the rule also would apply if the present possessory interest were a fee tail and the remainder a fee simple, but there are no American cases on point. *Id.* at 483.

22. 1 American Law of Property 485 (A.J. Casner ed. 1952).

Present Law: **Mont. Code Ann. §70-15-216.** **When vesting of future estate not prevented by power of appointment.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

1895 Codification: **Mont. Civ. Code §1230.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

Montana Annotation: None

1872 California Codification: **Cal. Civ. Code §781.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

California Annotation: NOTE. -- Root vs. Stuyvesant, 18 *Wend.*, p. 268; 2 *Smith's Fearne*, p. 193.

1865 Field Code: **N.Y. Civ. Code §239.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

Field Code Annotation: Root v. Stuyvesant, 18 *Wend.*, 268, per NELSON, Ch. J.; 2 *Smith's Fearne*, 193. This section is new.

N.Y. Revised Statutes Provision: None

N.Y. Rev. Stat. Commentary: None

Editor's Explanation: Mont. Code Ann. §70-15-216

The purpose of this section is to reverse the decision in *Root v. Stuyvesant*, 18 Wend. 257 (N.Y. 1837). In simplified form, the facts of *Root* were that testator left to each of his children life estates coupled with powers of appointment to lease the property. Further, each child had the right to appoint the remainder among his or her own children, grandchildren, nephews, and nieces. In default of exercise of the latter power, the remainder would pass to each child's children or grandchildren *per stirpes*.

The power to appoint leaseholds violated the New York perpetuities doctrine of the time, resulting in its invalidation. As a result of the voiding of that power, the court invalidated the interests following it cutting off the testator's grandchildren and enabling the testator's children to take as heirs, in fee, rather than as life tenants.

Seven out of 32 members of the Court of Errors dissented from this holding, among them Chief Justice Nelson. The reference to page 268 in the annotation is to part of that jurist's opinion.

Another illustration may assist the reader to understand this provision:

*Illustration:* T, holding a present possessory interest in fee simple absolute in Blackacre, devises it to A for life, then to A's oldest child for life, then to such person as A's oldest child may *by will* appoint in fee simple; and if A's oldest child fail to appoint anyone, then to any other children of A in fee simple. At the time of T's death, A is alive and without children.

There are two ways of analyzing this bequest. Under either analysis, A takes a present possessory interest for life. Also, under either analysis, while A has no children the interests "held" by A's oldest child, the potential appointees, and the other (unborn) children of A all are contingent remainders, for they are lodged in unascertainable persons. If A later has an (oldest) child, the remainder for life vests in that child.

Now assume that A dies, leaving three children. In chronological order, their names are B, C, and D. B's vested remainder for life will, of course, become a present possessory interest for B's life. As for the other interests, the first way of analyzing them is to say that the interests of the prospective appointees and of C and D are all contingent remainders. But this analysis places the interests of C and D in great jeopardy. A court may invalidate the power of appointment under the common law rule against perpetuities, for it is not certain to be exercised within the perpetuities period.<sup>23</sup> Under the rule of *Root*, this would cause the subsequent gifts to C and D to be invalidated. Moreover, even if B's power of appointment is good, B may not exercise it. In that event, though, C and D's contingent remainders still do not vest until the death of B. Thus they also are remote for perpetuities purposes.

The statute saves the bequests of C and D by causing them to vest for perpetuities purposes at the death of A. This is because the class of "any other children of A" closes at the death of A.<sup>24</sup> Since A is a good measuring life (a life in being at the time of the bequest), the rule against perpetuities is not violated. Of course, if B's power of appointment is valid the interests of C and D are subject to divestment, but the rule does not strike down vested interests merely because they are subject to divestment.<sup>25</sup> Thus, if the power of appointment is

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23. In the Illustration, only A was a life in being, and therefore a potential measuring life, at the death of T. The power will be exercised, if at all, at the death of B, which may occur more than 21 years after the death of A.

24. For perpetuities purposes, the interests of the recipients of a class gift do not vest until the class closes. This is true despite the fact that we otherwise refer to class members as having "vested remainders subject to partial divestment" or "vested remainders subject to open."

25. Other than divestment because a class is still open.

valid, then on the death of A his oldest child B has a present possessory interest for life, C and D have vested remainders subject to executory limitations (i.e., subject to divestment), and the potential appointees "have" executory interests in fee simple absolute. If the power of appointment is invalid, B has a present possessory interest for life and C and D have vested remainders in fee simple absolute.

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