

COMMON LAW METHODS OF HOLDING TITLE IN ARIZONA

By Bob Ciancola

In this article, we will survey the methods of holding and conveying title under the common law and whether these methods are recognized in Arizona. Common law title doctrines are a favorite of property law professors but many are seldom used today. While the doctrines discussed here may not show up on a real estate license exam, by reading this article you will be able to entertain your friends and impress your colleagues with your knowledge of some of the more arcane elements of property law.

Estates in land – in general.

Under the common law, estates in land are *freehold, non-freehold and qualified*. In addition, estates may be present estates or future estates. *Freehold* estates include estates in fee simple, in fee tail and for life. Non-freehold estates are tenancies for a term of years, periodic tenancy and tenancy at will. *Qualified* estates are those that are *defeasible* upon the happening of a future event. They usually contain the limiting language “so long as.” Thus, A conveys Blackacre to a church “so long as the property is used for church purposes.” This conveys a qualified estate in the church, subject to a contingent remainder in A (which will vest if the property is ever used for non-church purposes).

Fee simple. Of the freehold estates, fee simple is by far the most common. The simple conveyance from A to B, without any words of limitation, conveys a fee simple. 99% of the deeds of conveyance a real estate professional is likely to encounter in the real world convey an estate in fee simple.

Life estates. A conveyance by Z to “X for life” is a life estate under the common law and is recognized in Arizona (A.R.S. § 33-201). In a life estate, the grantee (X) will have the exclusive right to possession during his or her life while the grantor (Z) will own a remainder interest. The estate can be sold, leased or mortgaged and terminates upon the life tenant’s death. Thus, if X conveys to Y, Y will acquire an estate which will terminate on the death of X and revert to Z. A life tenant owes a duty to the remainderman to preserve and protect the estate. The life tenant bears the cost of ordinary repairs, taxes and insurance. The holder of the remainder interest is responsible for the cost of capital improvements.

Fee Tail. In medieval England, the chief means of accumulating wealth and power was the ownership of land. Landholders began looking for ways to be certain that future generations of their family would continue to own the land and to do this they had to be able to restrict the ability of their descendants to transfer the land outside of the family. In 1285 they prevailed upon Parliament to pass the *Statute de Donis Conditionalibus*. This law provided that a conveyance of Blackacre to “X and the heirs of his body” provided a series of life estates to be held by the succeeding eldest sons of the family. If X or any of his successors tried to convey Blackacre, the purchaser would acquire only a

life estate, which is all the owner could convey, while the heirs of X would own the remainder interest. If X died without heirs, the tail terminated and reverted to the original grantor. Later in England's history, Kings became unhappy with this state of affairs because it meant that a noble's land could never be taken away. If a noble committed treason, for example, his land could be forfeited but if held in fee tail, would revert back to his heirs upon his death. This disenchantment led to the "common recovery" doctrine, established in *Taltarum's Case* (1472). This case held that a tenant could cut the tail and obtain a court decree granting him title in fee simple. Fee tail itself was abolished in England in 1925. It is not recognized in Arizona per A.R.S. § 33-224.

Future Estates.

Many forms of future estates exist and most are recognized in Arizona. Future estates include *estates in expectancy* (those which commence at a future time); *alternative future estates* (to A, remainder to B, but if B fails to survive A then to C); and *contingent remainders* (in the above example, B and C have contingent remainders, the contingency being whether or not B survives A). All of these methods of holding are recognized in Arizona by statute. Common law developed several doctrines concerning future estates which have been abolished in Arizona. Some of these are dealt with below.

Rule in Shelley's Case. This rule held that a conveyance "to A, remainder to A's heirs" was considered a limitation of title, not a clause of purchase. Thus, A's heirs had no rights as purchasers of the property and could take only by descent or devise from A. The remainder interest was ignored and treated as a remainder in A which then merged with A's life estate to form a fee simple. The merger occurred only if the remainder was not contingent. For example, C conveys Blackacre "to A for life, then to A's heirs if A survives B." Under the Rule in Shelley's Case, A would have a life estate plus a contingent remainder while C would have a contingent remainder vesting if A failed to survive B. The Rule in Shelley's Case is abolished in Arizona under A.R.S. § 33-231. In Arizona, the result of the above example would be A has a life estate and A's heirs have a contingent remainder while C would have an alternative contingent remainder which would vest if A did not survive B *or* if A left no heirs.

Destructible Contingencies. This common law doctrine holds that a contingent future estate is destroyed if the contingency is not satisfied by the termination of the predecessor estate, resulting in reversion to the grantor. For example, A conveys Blackacre "to B for life, remainder to B's children who survive to age 21." Under the common law, if B died before any of his children reached 21, the children's interest would be destroyed and the property would revert to A. This doctrine is abolished by A.R.S. § 33-225. As a result, B's children would have a contingent remainder which would vest when (and if) they reached age 21.

Worthier Title. The doctrine of worthier title holds that one cannot, during one's lifetime, grant a remainder interest to one's own heirs. Thus, A conveys Blackacre "to B for life, remainder to A's heirs." Under the doctrine of worthier title, the remainder was void, resulting in a reversionary interest in A. Thus A's heirs could inherit Blackacre from A,

which was considered a better title. This doctrine is not recognized in Arizona per A.R.S. § 14-2710.

Well, at least the above is what I remember from my law school days.