

Estates and Future Interests*

A TAXONOMY OF PRESENT AND FUTURE INTERESTS

We have already discussed a few situations in which property is transferred from one party to another. What used to belong to O now, after the transaction, belongs to A. We now consider land transactions in which O desires to grant property to A but, perhaps, not forever. Maybe O wants A to have the property for awhile before turning it over to B. Perhaps O wants A to have the property, maybe even forever, but if certain events occur the property should go to B.

The law permits O to grant property with conditions and time limits. As we will see, and later consider more deeply, it restricts such arrangements to a small number of types. Our immediate task is to determine from the language of a grant which type of arrangement we have. Think of it as learning to identify animals in a park. There may be only a few different animals, and our task is to distinguish one from the other based on identifying characteristics. So too here. Grantors can and do use a wide variety of language and may specify all sorts of temporal relationships, but the law requires us to reduce this language, to map it onto, the small set of permissible relationships.

A warning: some property courses delve deeply into various accounts of the medieval history of these arrangements. This is not such a course. Nor will we be concerned with being able to unravel the most complex of temporal divisions or the most obscure doctrines. Our goal is only to gain familiarity with the basics of the



Homage Ceremony

Source: [JAMES HENRY BREASTED & JAMES HARVEY ROBINSON, 1 OUTLINES OF EUROPEAN HISTORY 399 \(1914\).](#)

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common law system of estates in land, being able to identify the elements of traditional grants and to understand typical disputes that arise from such grants.

First things first: The grants that we will consider look more or less like the following

O to A [condition] then to B.

What this grant by O does is to give the property to A for a while and then, maybe, to B. A has the present interest. B holds what is called the future interest. Makes sense: at the time of the grant, A has the property now, and B will take the property, if at all, later. So this grant creates a present interest and a future interest. This is what I meant above by “types of relationship.” What present interest and what future interests are created by the grant? That’s the initial question we will be trying to answer when we read a grant.

Distinguishing fee simple interests from everything else

We now ask several questions, each with two answers. Answering this series of questions will tell us precisely what present and future interests we have. Let’s take these questions one by one, and we’ll return to them to summarize.

Question 1: Is the present interest possibly infinite or definitely finite in duration?

That is, might A retain the property, under the grant, forever, or is A guaranteed not to retain the property forever under the grant? Now, of course A won’t really live on the property for all time, but the question here is whether the grant will definitely cut off A’s ownership, and thus that of anyone who has taken from A by will or grant, involuntarily.

If the present interest is possibly infinite in duration, we call it a fee simple. If the present interest is definitely finite, it is either a life estate or leasehold. This distinction is typically, though not always, easy to discern in a grant. A life estate will almost always state that A’s interest is only “for life,” and a leasehold will almost always set out a fixed time limit. By contrast, a fee simple will not be so limited. Traditionally, a fee simple would be created by language such as

O to A and his heirs [with perhaps some conditions here].

The “and his heirs” part is meant to indicate that A’s interest should not expire and revert to O or go to some other party on A’s death. These days, however, using such language or explicitly stating that the grant is “in fee simple” is unnecessary. Courts will presume a fee simple in the absence of clear language otherwise.

Distinguishing types of fee simple interests and their corresponding future interests

We will ask two questions to distinguish the three types of defeasible fees.

Question 1: Is the present interest definitely infinite or is it possibly finite?

If there is no condition in the grant that could cause A to lose the property to someone else, then A has a fee simple absolute. There is obviously no future interest following a fee simple absolute, since nothing in the grant could lead to someone else becoming the owner. A fee simple absolute is created by simple language

O to A.

You could get fancy and write something like: O to A and his heirs; or O to A in fee simple absolute. But this isn’t necessary. The law has a strong presumption in favor of interpreting language to grant the biggest present interest possible, and there isn’t anything bigger than the fee simple absolute. If we find a fee simple absolute we’re done.

If, on the other hand, the grant contains a condition that could cause A to lose the property to someone else, then we say that A has a defeasible fee (which I like to think of as a fee that can be “de-feed”). The “someone else” who could get the property has a future interest. Because A has a fee, though, this other person’s future interest may never become possessory. At the time of the grant, we just don’t know what’s going to happen. There are three kinds of defeasible fees, each with a corresponding future interest. They are: (1) the fee simple subject to an executory interest (the “someone else” has, surprise, an executory interest), (2) the fee simple determinable (the “someone else” has a possibility of reverter), and (3) the fee simple subject to a condition subsequent (the “someone else” has a right of entry). Those are all the types of defeasible fees and their corresponding future interests. Now let’s figure out how to tell them apart.

Question 2: Is the future interest in the grantor, O, or someone else?

If it's in someone else, we're pretty much done. Such a grant would look like O to A, but if something happens, then to B.

Here A has a defeasible fee so long as it's uncertain whether this something will ever happen. But if that thing does happen, then the grant specified that B should get the property. In other words, the future interest is in B. B is not the grantor.

In this case, we say that A has a fee simple subject to an executory interest and that B has an executory interest. In particular, we may say that B has a shifting executory interest, because the happening of the condition will shift ownership from one person who is not the grantor to another person who is not the grantor.

If the future interest is in the grantor, then we have a further question to ask in order to name the interests. Note that unless the grant mentions a third party, we assume the future interest is in the grantor. We'll look at some sample language below.

Question 3: Where the future interest is in the grantor, will the happening of the condition vest ownership in the grantor automatically or only if the grantor asserts his or her right to retake the property?

If it's automatic, we have a fee simple determinable in A and a possibility of reverter in O. Courts differ on whether this alternative is presumed. But a guaranteed way to specify that reversion to the grantor should be automatic is to use what is often called "durational language." For example,

O to A so long as the property is only used for residential purposes.

O to A until alcohol is consumed on the premises.

"So long as," "while," "until," and the like are key words that all courts will interpret as an intent to specify an automatic reversion to O and thus an intent to create a fee simple determinable / possibility of reverter.

If the reversion is not automatic, we call the present interest a fee simple subject to a condition subsequent and the future interest a right of entry. Some courts will insist on something approaching an explicit reference to a "right of entry" or "right to enter and retake." Some look for a non-durational formulation of the condition - "but if" or "upon condition that." And still others will presume that reversion is not automatic

unless it's absolutely clear the grantor intended otherwise. The following will surely create a FSSC / Right of Entry:

O to A, but if alcohol is ever served on the property, then I shall have a right of entry.

Note that this distinction does not arise with executory interests. For whatever reason, if the future interest is in someone other than O, the property transfers automatically on the happening of the condition.

Summary

It may take a while to explain and to read through this initially, but distinguishing fee interests is not very difficult. We ask four questions:

Potentially infinite? Yes = fee simple (FS). No = something else.

If potentially infinite, is it possibly finite? Yes = defeasible fee. No = FS absolute (done).

If defeasible fee simple, future interest in someone other than the grantor? Yes = FS subject to executory interest / executory interest (done). No = go to question 4.

If in the grantor, forfeiture automatic? Yes = FSD / POR (done). No = FSSCS / ROE (done).

If you are a chart person, you may want to refer to (or make) a flow chart from this. The only trick, once you have this down, is figuring out from the language of the grant what the answers to these questions are. That's done through a variety of presumptions and interpretive techniques, some of which we will see in the cases that follow.

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That's it for fee interests. You now know enough so that, with a little practice and after resolving any ambiguities in the language a grantor chose, you will be able to name the fee interest contained in a grant. Now, to return to our metaphor at the beginning of this section, you can name at least some of the animals you run across in the park. However, unlike the inherent joy some take in identifying the denizens of the natural world, no sensible person would delight in distinguishing one type of land grant from another unless tangible consequences flowed from the distinction. Indeed, the law does treat these types differently. Indeed the law does treat these interests somewhat differently.

For example, what happens if a condition in a defeasible fee is violated but the present interest holder stays on? Suppose the grant was to A so long as alcohol is never sold on the property, but, wouldn't you know it, A sold alcohol on the property. The grant described is a fee simple determinable with possibility of reverter in the grantor. We know that the grantor becomes the owner of the property immediately upon the violation of the condition. If A continues to occupy the property after the violation, he or she is a trespasser. And if one trespasses in the right way, for long enough, one can take property by adverse possession. So if A sells alcohol and then continues on as the apparent owner of the property for the statutory period, A will indeed become the owner again, by adverse possession, and, this time, free of the condition.

Contrast this with what happens if the grant were to A but if alcohol is ever sold on the property then the grantor has a right of entry. Now if A sells alcohol on the property, the grantor does not immediately become the owner of the property. Rather, the grantor has the right to retake the property. But until the grantor reclaims the property, A continues to be the rightful owner and is not a trespasser. Therefore, the adverse possession period does not start immediately on the violation of the condition. Paradoxically, this could be worse for A, since a lengthy period of violation won't necessarily serve to free A of the condition: grantor may return and retake at any time.

This distinction isn't as stark as it appears. In fact, the equitable doctrine of laches or a statute may prevent the grantor from showing up to retake too long after a violation of the condition. As is often the case with these somewhat ancient forms, what looks formally like it might make a difference may not make much of a practical one.

Life estates and remainder interests

We now take up grants that create present interests that will definitely terminate. Some specify durations of fixed periods. These would be leaseholds, which in many places are not considered interests in land at all but only a type of contractual arrangement regarding possession. We will consider leaseholds later. For now we focus on a particular kind of definitely finite present interest: the life estate. These look like:

O to A for life, [then possibly to someone else].

Unfortunately for all of us, it is certain that the condition of A's ownership, that he or she be alive, will one day no longer be satisfied. Thus, we know this cannot be a kind of fee simple interest. Indeed, we call all such interests life estates. Because

everyone will one day die, all life estates have corresponding future interests. It is these future interests we must distinguish. To do so, we ask another series of questions.

Question 1: Is the future interest, the one following the life estate, in the grantor or someone else?

If it's in the grantor, then we call the future interest a reversion. The simplest example:

O to A for life.

A is the present interest holder. He or she has a life estate. When A dies, what happens? If nothing else is said, the property reverts to O. O, the grantor, has a reversion.

If, on the other hand, the future interest is in someone else, we call the interest a remainder. A remainder is the name of the interest in a third party that immediately follows a life estate. There can be no gap. An example:

O to A for life, then to B.

Here, A has a life estate. B has a remainder interest, and O has nothing. By the way, one who has a remainder interest is sometimes called a remainderman, a word that strikes me as even more ridiculous than "tortfeasor."

Question 2: Is there any uncertainty in who, exactly, has the remainder interest or in whether conditions on the remainder interest will be met?

If an identifiable person or group of people is certain to take the property on expiration of the life estate, then their future interest is called an absolutely vested remainder or, synonymously, indefeasibly vested remainder. The example of a remainder interest above is the quintessential absolutely vested remainder. B is an identified person, and there are no conditions on B's taking the property.

Contrast this with the following:

O to A, then to A's oldest living child.

O to A, then to B if B graduates from college.

O to A, then to O's grandchildren.

In each of these grants, A has the present interest, a life estate. Each also specifies that a third party, meaning someone other than the grantor, should take when

A dies. Thus, each creates a kind of remainder interest. But in each we either do not know who will take when A dies or do not know whether the specified remaindermen will take when A dies. We don't have an absolutely vested remainder in any of these grants. So what do we have?

There are three other types of remainder, and the last part of our job in this section will be to distinguish these three types. (1) The contingent remainder; (2) the vested remainder subject to divestment; (3) the vested remainder subject to open.

Question 3: If the remainder interest is in an uncertain person or class of people, is at least one member of that class identified and certain to take?

If so, then we have a vested remainder subject to open. That identified person is guaranteed to take at least a share of the property. Others may later join the class of remaindermen, and so we cannot say that we know with certainty exactly what the identified person will take until this class closes. An example may help:

O to A for life, then to B's children. Suppose that B has at least one child, C, at the time of the grant.

Let's start with the easy part. A has a life estate, the present interest created by this grant. Who has the future interest? Certainly C will be entitled to take the property when A dies. But others might as well. If B is dead at the time of the grant, then we know with certainty who all of B's children are.¹ And so this grant uses the phrase B's children to refer to an identified group of individuals - not a class that could expand in the future. And so the children would have an absolutely vested remainder.

If B is alive at the time of the grant, then he or she might well have more children after the grant.² And so C's share of the property will diminish as more children are born. We know C will get something, but we don't exactly know what. C has a vested remainder subject to open, sometimes called a vested remainder subject to partial defeasance, a phrase reflecting the fact that C's share of the property will diminish if new individuals join the class.

At some point, though, this has to stop. C needs to know what portion of the property C has. In general, we try to determine when the grantor intended the class to close, meaning when no new individuals, even if they satisfy the condition, should be able to share in the grant. Often grantors may not specify this time, and so there are two common ways that classes close.

Naturally: There may come a point at which it's no longer physically possible for there to be new class members. For example, if the remainder is in B's children, the class closes, at the latest, when B dies.

The Rule of Convenience: We close the class, unless grantor's intent is to the contrary, when a member of the class is entitled to demand possession. This typically happens when the life tenant dies. And so, using our example, where the remainder is in B's children, when the the life tenant dies, C and any other living children of B will be entitled to take possession, and the class will close. If B has children at some later time, those children will not be entitled to a share of the property.

All of the above went to defining the vested remainder subject to open, the remainder interest we would find if we answer this question: Yes. If, on the other hand, we answer negatively, that there is no one at the time of the grant who is certain to take the property upon the death of the life tenant, then the grant to this unascertained person or group of people is called a contingent remainder. We just don't know who, if anyone, will take the property upon the death of the life tenant. An example:

O to A for life, then to A's children. Assume A has no children at the time of the grant.

In this example, A has a life estate, and the class of A's children has a contingent remainder. This is because while we know how to determine whether someone is in that class, there is no one in that class now, and there may never be.

Question 4: If the remainder interest contains a condition on the remainderman's taking the property, did the grantor intend that the remainderman had to satisfy the condition before having a vested interest or that the remainderman's vested interest could be taken away if the condition is satisfied?

This is, conceptually, the toughest distinction of the lot. And frankly it often makes little sense. Luckily there's an easy way to distinguish a vested remainder subject to divestment from a contingent remainder. So let's rephrase the question to make it easier to answer, though perhaps less substantive:

Question 4: Is the condition part of the clause granting the remainder, or is the condition separated from the remainder grant by a comma and words like "but if"?

Ok, so this "comma rule" won't prevail if there is contrary grantor intent, but it resolves almost all of the cases. Examples are the only way to understand this:

O to A for life, then to B if B graduates from law school.

Here, we have a contingent remainder, because “if B graduates from law school” is part of the “then to B” clause, and is not separated by a comma. We don’t know if B will ever graduate from law school, even though we do know who B is. Contrast this with:

O to A for life, then to B, but if B does not graduate from law school, then back to O.

Same effect, but different name. Because the condition is separated by a comma from the “then to B” clause, most courts would interpret this remainder interest in B to be a vested remainder subject to divestment.

Formally this distinction turns on whether the condition is precedent to the remainderman’s ownership, i.e. the condition must be satisfied before we can say that the remainderman has anything at all. Or whether the remainderman has been granted something that subsequently may be taken away, perhaps even after the remainderman has taken possession, if the condition is violated. But practically, it can be difficult to determine which of these grantor meant, and in many cases it doesn’t matter.

Importantly, though, the rule against perpetuities, which is a rule that can invalidate grants that remain uncertain too far into the future, applies to contingent remainders but not to vested remainders subject to divestment. So the classification of these very similar types of remainders can have dramatic consequences.

Summary

Distinguishing remainder interests is a little more involved than distinguishing fees and their future interests. But a little practice makes it easy. If we have a life estate, we’re going to ask what kind of future interest is created. We ask the following questions to decide:

Future interest in grantor? Yes = reversion (done). No = remainder.

Uncertain condition and/or unascertained remaindermen? Yes = go to next question. No = absolutely vested remainder (done).

If unascertained remaindermen, is there at least one who is certain to take? Yes = vested remainder subject to open (done). No = contingent remainder and reversion in O (done).

If condition, separated by comma? Yes = vested remainder subject to divestment (done). No = contingent remainder and reversion in O (done).

There it is - not as hard as all the above explanation may have seemed.

A few more notes on remainders

First, let's clean up one loose end by classifying all of the interests in the following grant:

O to A for life, then to the first child of A to graduate from law school. Assume A has no children at the time of the grant.

Aside from setting up an unhealthy intra-family dynamic, this is a grant of a life estate to A. Immediately on A's death the child, if any, of A that has satisfied the condition will take the property. Thus, there is a remainder interest here. But we don't know who this child might be and whether any child will exist or satisfy the condition. This is a contingent remainder.

What happens if A dies, but no child of A has graduated from law school? The answer is that the property reverts to O. In fact, any contingent remainder also creates a reversion in O. So to classify fully the interests created, we'd say that A has a life estate, that there is a contingent remainder in one who might satisfy the condition, and that O has a reversion.

Second, remainders, like all future interests can be limited in time themselves. It's best not to think about this until you have the hang of the classifications above. But once you do, this possibility isn't really more complex. The upshot is that grants like this one are fine:

O to A for life, then to B for life, then to C.

All of the examples we have discussed so far have involved future interests that will become fee simple interests - and in fact fee simple absolute interests - once they become possessory. In this grant, A has a life estate, the present interest, B has an absolutely vested remainder for life, and C has an absolutely vested remainder (in fee simple). Similarly, life estates can be terminated early like fees. So we could have a life estate determinable, for example.

Third, contingent remainders can be granted in the alternative. Here's an example:

O to A for life, then to B if B survives C, otherwise to C.

B and C have alternative contingent remainders. It's easy to see that each has a contingent remainder, since each must satisfy a condition in order to take. It certainly

seems as though there is no way that one or the other will not succeed A in ownership. Still, though, we would say O has a reversion, because there is no vested remainder specified in the grant.

This example brings up a fourth note. It used to be that if a contingent remainder did not vest, i.e. the condition was not satisfied or person not ascertained before

Fourth, a life estate may grant possession to A but be set to expire not on A's death but on B's. This is called a life estate per autre vie. Here's an example:

O to A for the life of B.

A has the present interest, which will expire when B dies. At that point, the property reverts to O, even if A is still alive.

Questions to Be Resolved

Just because we now know how to reduce ideally phrased grant language into the discrete forms of the traditional estates, it does not follow that we have resolved every problem that can arise with grantor's efforts to divide the timeline of future ownership. We will discuss three kinds of issues that can arise.

First is adjudicative: When we divide the timeline of ownership, those who occupy the property now may use it to the disadvantage of those will occupy later. What if the present owner wants or needs to sell the property but the future owner doesn't want it sold? What if the present owner doesn't maintain the property? Anytime property is owned by more than one human being, disagreements about how to use and care for that property are bound to arise.

Second is regulatory: Even if we know what grantor meant to do, we may not wish to allow it. There are three broad categories of regulation: (1) those meant to resolve disputes between owners of various slices of the timeline (usually a future interest holder suing to stop damage to the property by the present interest holder), (2) those concerned with preventing too much "dead-hand control," and (3) those applying public policies that would apply generally but which may take on more salience in land transactions.

With respect to the second, it is important to remember that the ability to dictate how property should be distributed and on what conditions confers on a grantor some control over the future. Through a grant, O can dictate that alcohol not be served on the premises or that the property only be used for residential purposes. This regulatory

power that will continue to be felt when O is long dead, thus the phrase “dead-hand control,” represents an instance of the problem law faces when adjudicating between the needs of the present and the prerogative of the future. The ability to grant property in this way is an incentive to acquire it and use it wisely. This benefits the present. But the chains it places on the future are, often, a cost. Some balance, it would seem, needs to be struck.

This account of dead-hand control is a tad misleading. After all O has no actual regulatory power over the property once it is granted away. If A’s ownership is limited by a condition that would see the property revert or go to some other party, A could always purchase that executory interest, merge the estates, and do as he or she pleases. O generally cannot dictate what happens on the property, but O can make it inconvenient or uneconomical to disobey his or her wishes. And as the number of parties with future interests rise and as they become difficult to ascertain, the transaction costs, setting aside the purchase prices, rise. Thus, dead-hand control is a concern, because O can indeed grant property in ways that make it extremely difficult to alienate and, therefore, extremely difficult to use as the present owner sees fit.

In the next sections, we will wrestle with these interpretive and regulatory issues.

Problems

In each problem, identify the interests. If the name of the interest or its validity depends on information not supplied, state what information is needed and how it would affect your answer.

1. I grant 101 Downing Street to A so long as marijuana is not used on the premises, and if marijuana is used on the premises, then to B.
2. To A for life, then to any of A's children who graduate from law school. [Note that in answering this question, you must analyze three situations separately: if A has no children at the time of the grant, if A has at least one child who has graduated from law school at the time of the grant, and if A has one or more children but none of them has graduated from law school at the time of the grant. Note that some of the other problems below also need to be analyzed in multiple ways depending on the facts at the time of the grant.]
3. O to A for life, then to B and his daughters.
4. To A, but if anyone smokes or vapes on the premises within 21 years of the death of the last surviving member of the cast and crew of *Harry Potter and the Deathly Hollows Part 2*, then to B.
5. I grant Blackacre to A so that she may grow oranges and nectarines.
6. O to A so long as A stays in law school.
7. I grant Blackacre A for life, then to B if B survives A.
8. O to A, but if A dies in the next thirty years, I want the property to go to B.
9. I grant Pemberly to to A for life, then to A's children for life, then to USC.
10. To A and his heirs so long as it is used as a hotel.
11. To A, but if A dies, then to B.
12. I grant OrangeAcre to A for life, then to B if B lives at least one year after A's death.
13. To A for life, then to A's children for life, then, after all of A's children have died, to USC to house visiting law professors. A has no children at the time of the grant.
14. I grant Netherfield to A for life, then to such of A's children who serve in the military before A's death for their lives, then to the first child born to my son C.

B. Waste

Melms v. Pabst Brewing Co.,
104 Wis. 7 (1899)

Winslow, J.

This is an action for waste, brought by reversioners against the defendant, which is the owner of an estate for the life of another in a quarter of an acre of land in the city of Milwaukee. The waste claimed is the destruction of a dwelling house upon the land, and the grading of the same down to the level of the street. The complaint demands double damages, under section 3176, Rev. St. 1898.

The quarter of an acre of land in question is situated upon Virginia street, in the city of Milwaukee, and was the homestead of one Charles T. Melms, deceased. The house thereon was a large brick building, built by Melms in the year 1864, and cost more than \$20,000. At the time of the building of the house, Melms owned the adjoining real estate, and also owned a brewery upon a part of the premises. Charles T. Melms died in the year 1869, leaving his estate involved in financial difficulties. After his decease, both the brewery and the homestead were sold and conveyed to the Pabst Brewing Company, but it was held in the action of Melms v. Brewing Co., 93 Wis. 140, 66 N. W. 244, that the brewing company only acquired Mrs. Melms' life estate in the homestead, and that the plaintiffs in this action were the owners of the fee, subject to such life estate. As to the brewery property, it was held in an action under the same title, decided at the same time, and reported in 93 Wis. 153, 66 N. W. 518, that the brewing company acquired the full title in fee.

The homestead consists of a piece of land 90 feet square, in the center of which the aforesaid dwelling house stood; and this parcel is connected with Virginia street on the south by a strip 45 feet wide and 60 feet long, making an exact quarter of an acre. It clearly appears by the evidence that after the purchase of this land by the brewing company the general character of real estate upon Virginia street about the homestead rapidly changed, so that soon after the year 1890 it became wholly undesirable and unprofitable as residence property. Factories and railway tracks increased in the vicinity, and the balance of the property was built up with brewing buildings, until the quarter of an acre homestead in question became an isolated lot and building, standing from

20 to 30 feet above the level of the street, the balance of the property having been graded down in order to fit it for business purposes.

The evidence shows without material dispute that, owing to these circumstances, the residence, which was at one time a handsome and desirable one, became of no practical value, and would not rent for enough to pay taxes and insurance thereon; whereas, if the property were cut down to the level of the street, so that it was capable of being used as business property, it would again be useful, and its value would be largely enhanced. Under these circumstances, and prior to the judgment in the former action, the defendant removed the building, and graded down the property to about the level of the street, and these are the acts which it is claimed constitute waste.

The action was tried before the court without a jury, and the court found, in addition to the facts above stated, that the removal of the building and grading down of the earth was done by the defendant in 1891 and 1892, believing itself to be the owner in fee simple of the property, and that by said acts the estate of the plaintiffs in the property was substantially increased, and that the plaintiffs have been in no way injured thereby. Upon these findings the complaint was dismissed, and the plaintiffs appeal.

Our statutes recognize waste, and provide a remedy by action, and the recovery of double damages therefor (Rev. St. 1898, § 3170 et seq.); but they do not define it. It may be either voluntary or permissive, and may be of houses, gardens, orchards, lands, or woods (Id. § 3171); but, in order to ascertain whether a given act constitutes waste or not, recourse must be had to the common law as expounded by the text-books and decisions.

In the present case a large dwelling house, expensive when constructed, has been destroyed, and the ground has been graded down, by the owner of the life estate, in order to make the property serve business purposes. That these acts would constitute waste under ordinary circumstances cannot be doubted. It is not necessary to delve deeply into the Year Books, or philosophize extensively as to the meaning of early judicial utterances, in order to arrive at this conclusion. The following definition of “waste” was approved by this court in *Bandlow v. Thieme*, 53 Wis. 57, 9 N. W. 920:

It may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title.” In the same case it was also said: “The damage

being to the inheritance, and the heir of the reversioner having the right of action to recover it, imply that the injury must be of a lasting and permanent character.

And in *Brock v. Dole*, 66 Wis. 142, 28 N. W. 334, it was also said that any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration.

These recent judicial utterances in this court settle the general rules which govern waste without difficulty, and it may be said, also, that these rules are in accord with the general current of the authorities elsewhere. But, while they are correct as general expressions of the law upon the subject, and were properly applicable to the cases under consideration, it must be remembered that they are general rules only, and, like most general propositions, are not to be accepted without limitation or reserve under any and all circumstances.

Thus the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of meliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate. *Bewes, Waste*, p. 134, and cases cited. Again, and in accordance with this same principle, the rule that any change in a building upon the premises constitutes waste has been greatly modified, even in England; and it is now well settled that, while such change may constitute technical waste, still it will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change, which rather improves the inheritance than injures it. *Doherty v. Allman*, 3 App. Cas. 709; *In re McIntosh*, 61 Law J. Q. B. 164.

Following the same general line of reasoning, it was early held in the United States that, while the English doctrine as to waste was a part of our common law, still that the cutting of timber in order to clear up wild land and fit it for cultivation, if consonant with the rules of good husbandry, was not waste, although such acts would clearly have been waste in England. *Tied. Real Prop. (Eng. Ed.)* § 74; *Rice, Mod. Law Real Prop.* §§ 160, 161; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

These familiar examples of departure from ancient rules will serve to show that, while definitions have remained much the same, the law upon the subject of waste is not an unchanging and unchangeable code, which was crystallized for all time in the days of feudal tenures, but that it is subject to such reasonable modifications as may be demanded by the growth of civilization and varying conditions. And so it is now laid down that the same act may be waste in one part of the country while in another it is a

legitimate use of the land, and that the usages and customs of each community enter largely into the settlement of the question. Tied. Real Prop. (Eng. Ed.) § 73.

This is entirely consistent with, and in fact springs from, the central idea upon which the disability of waste is now, and always has been, founded, namely, the preservation of the property for the benefit of the owner of the future estate without permanent injury to it. This element will be found in all the definitions of waste, namely, that it must be an act resulting in permanent injury to the inheritance or future estate. It has been frequently said that this injury may consist either in diminishing the value of the inheritance, or increasing its burdens, or in destroying the identity of the property, or impairing the evidence of title.

The last element of injury so enumerated, while a cogent and persuasive one in former times, has lost most, if not all, of its force, at the present time. It was important when titles were not registered, and descriptions of land were frequently dependent upon natural monuments, or the uses to which the land was put; but since the universal adoption of accurate surveys, and the establishment of the system of recording conveyances, there can be few acts which will impair any evidence of title. *Doherty v. Allman*, supra; *Bewes, Waste*, pp. 129, 130, et seq. But the principle that the reversioner or remainder-man is ordinarily entitled to receive the identical estate, or, in other words, that the identity of the property is not to be destroyed, still remains, and it has been said that changes in the nature of buildings, though enhancing the value of the property, will constitute waste if they change the identity of the estate. *Brock v. Dole*, supra.

This principle was enforced in the last-named case, where it was held that a tenant from year to year of a room in a frame building would be enjoined from constructing a chimney in the building against the objection of his landlord. The importance of this rule to the landlord or owner of the future estate cannot be denied. Especially is it valuable and essential to the protection of a landlord who rents his premises for a short time. He has fitted his premises for certain uses. He leases them for such uses, and he is entitled to receive them back at the end of the term still fitted for those uses; and he may well say that he does not choose to have a different property returned to him from that which he leased, even if, upon the taking of testimony, it might be found of greater value by reason of the change.

Many cases will be found sustaining this rule; and that it is a wholesome rule of law, operating to prevent lawless acts on the part of tenants, cannot be doubted, nor is it intended to depart therefrom in this decision. The case now before us, however,

bears little likeness to such a case, and contains elements so radically different from those present in *Brock v. Dole* that we cannot regard that case as controlling this one.

There are no contract relations in the present case. The defendants are the grantees of a life estate, and their rights may continue for a number of years. The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence, and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by, and preserve the useless dwelling house, so that he may at some future time turn it over to the reversioner, equally useless?

Certainly, all the analogies are to the contrary. As we have before seen, the cutting of timber, which in England was considered waste, has become in this country an act which may be waste or not, according to the surrounding conditions and the rules of good husbandry; and the same rule applies to the change of a meadow to arable land. The changes of conditions which justify these departures from early inflexible rules are no more marked nor complete than is the change of conditions which destroys the value of residence property as such, and renders it only useful for business purposes.

Suppose the house in question had been so situated that it could have been remodeled into business property; would any court of equity have enjoined such remodeling under the circumstances here shown, or ought any court to render a judgment for damages for such an act? Clearly, we think not. Again, suppose an orchard to have become permanently unproductive through disease or death of the trees, and the land to have become far more valuable, by reason of new conditions, as a vegetable garden or wheat field, is the life tenant to be compelled to preserve or renew the useless orchard, and forego the advantages to be derived from a different use? Or suppose a farm to have become absolutely unprofitable by reason of change of market conditions as a grain farm, but very valuable as a tobacco plantation, would it be waste for the life tenant to change the use accordingly, and remodel a now useless barn or granary into a tobacco shed? All these questions naturally suggest their own answer, and it is

certainly difficult to see why, if change of conditions is so potent in the case of timber, orchards, or kind of crops, it should be of no effect in the case of buildings similarly affected.

It is certainly true that a case involving so complete a change of situation as regards buildings has been rarely, if ever, presented to the courts, yet we are not without authorities approaching very nearly to the case before us. Thus, in the case of *Doherty v. Allman*, before cited, a court of equity refused an injunction preventing a tenant for a long term from changing storehouses into dwelling houses, on the ground that by change of conditions the demand for storehouses had ceased, and the property had become worthless, whereas it might be productive when fitted for dwelling houses.

Again, in the case of *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588, which was an action for permissive waste against a tenant in dower, who had permitted large barns and outbuildings upon a plantation to fall into decay, it was held that, as these buildings had been built before the Civil War to accommodate the operation of the plantation by slaves, it was not necessarily waste to tear them down, or allow them to remain unrepaired, after the war, when the conditions had completely changed by reason of the emancipation, and the changed methods of use resulting therefrom; and that it became a question for the jury whether a prudent owner of the fee, if in possession, would have suffered the unsuitable barns and buildings to have fallen into decay, rather than incur the cost of repair.

This last case is very persuasive and well reasoned, and it well states the principle which we think is equally applicable to the case before us. In the absence of any contract, express or implied, to use the property for a specified purpose, or to return it in the same condition in which it was received, a radical and permanent change of surrounding conditions, such as is presented in the case before us, must always be an important, and sometimes a controlling, consideration upon the question whether a physical change in the use of the buildings constitutes waste. In the present case this consideration was regarded by the trial court as controlling, and we are satisfied that this is the right view.

This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as

here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under proper instructions, or for the court, where, as in the present case, the question is tried by the court.

Judgment affirmed