prohibitive clause, however, Paragraph 6(a) would be meaningless if not given effect here because all the conduct it restricts could be freely pursued under Paragraph 12.

[*405] This court has previously recognized that, generally, a contract which expressly permits an activity will not be construed to prohibit other conduct necessary to carrying out that activity. "[Since] the covenant permits the conduct of the business itself, the conclusion is almost inescapable that it permits whatever is customarily and necessarily incidental thereto. We may not construe the covenant as prohibiting in one subdivision that which it expressly sanctions in another" (Premium Point Park Assn. v Polar Bar, 306 NY 507, 511). In Polar Bar, a refreshment stand was held to have an incidental right to maintain a parking lot, notwithstanding a restrictive covenant to the contrary, when the stand was located in an area not readily available to pedestrian traffic and 90% of the customers (which could reach 1,000 per day) arrived by car. In contrast, the record here does not demonstrate that petitioner's power to sublet or subdivide 100,000 square feet will be practically defeated if it is not allowed to make structural changes to the exterior wall, as opposed to being limited to erecting partitions and making other interior, nonstructural changes.

Petitioner has failed to establish either that the lease did not prohibit the proposed alterations or that it permitted them. As such, it has no right to make these modifications under RPAPL 803 or the contract.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Order affirmed, with costs.

II. ¿HAY *NUMERUS APERTUS* DE FEUDOS EN EL DERECHO ANGLOAMERICANO?

A. EL DOMINIO ÚTIL POSESORIO

EL FEUDO SENCILLO ABSOLUTO

FRANKIE IVEY AND OTHERS, Plaintiffs in Error, V. ELLA J. PEACOCK AND OTHERS, Defendants in

Error. Supreme Court of Florida, Division A 56 Fla. 440; 47 So. 481, June 1908

OPINION BY: COCKRELL

[*441] Upon the rejection of a deed of conveyance offered by the plaintiffs in an action of ejectment, a non-suit with bill of exceptions was taken and judgdment final entered for the defendants.

The plaintiffs claimed title as the heirs of the grantee named in the deed and an objection was interposed that no estate of inheritance passed thereunder. The deed nowhere contains the words "heirs" or "heirs of the body," but in the premises grants, bargains, sells, aliens, remises and releases and "forever quit claims" to the party of the second part the land by appropriate description and the habendum clause reads: "To have and to hold the said described property, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, to have and to hold the same in full right, title, interest or demand of what nature soever, as against the said parties of the first part, in fee simple forever." The deed was executed in 1887, and contained no reference to other deeds or instruments.

It is admitted that at the common law the word "heirs" was indispensable to create an estate of inheritance, and that Chapter 5154, Laws of 1903, Gen. Stats. § 2456, dispensing with words of limitation, is prospective only and does not purport to affect prior grants or conveyances. By express statutory enactment the Common law of England of a general nature are declared to be of force in this State, if not inconsistent with the Federal or State Constitutions or statutes. Gen. Stats. of Fla. § 59.

We do not find any decisions of this court directly upon the point, but both the decisions and the text writers are practically unanimous in stating that the words "heirs" is indispensable to the conveyance of an estate of inheritance by deed and that no substitute is [*442] possible, unless the common law has been changed by statute. Tiedeman Real Property, § 37; Tiffany Real Property, § 20; 1 Wash. Real

Prop. (6th Ed.) § 147; 11 Am. & Eng. Ency. Law (2nd Ed.) 367. We are not now concerned with the various possible exceptions such as grants to the State, trust deeds, conveyances to corporations, contemporaneous deeds, reconveyances.

The plaintiffs in error rely upon the statement of the law as given in 13 Cyc. 642. The author of the Article on Deeds there asserts that it is generally held essential that the deed read to the grantee and his heirs, but adds "It has, however, been held in a large number of decisions that the language of the whole instrument should be considered in order to discover the intent and that where there is a clear intention to pass a fee simple, the deed will be construed so as to effectuate such intention, although the word "heirs" or technical words of inheritance are omitted." An examination of the cases cited in support of the text will disclose, however, that they are founded upon statutes which come within some of the exceptions mentioned above or are cases construing wills not deeds.

The general rule of construction obtaining here as elsewhere that all parts of an instrument will be looked to and that construction adopted that carries out most clearly the evident intent of the parties does not authorize us the convert a life estate into a fee simple by construction.

The judgment is affirmed.

¿Debemos invocar una fórmula solemne para asegurar que creamos el feudo sencillo absoluto?

THE NEWPORT YACHT BASIN ASSOCIATION OF CONDOMINIUM OWNERS, Appellant, v. SUPREME NORTHWEST, INC., ET AL., Respondents.

Court of Appeals of Washington, Division One 168 Wn. App. 56; 277 P.3d 18, May 7, 2012, Filed

OPINION BY: DWYER

[*60] ¶1 DWYER, J. — Where the language of a recorded quitclaim deed unambiguously expresses the intent of the grantor to convey all of his or her interest in real property,

extrinsic evidence may not be used to demonstrate an intent to convey some lesser interest. Here, the Newport Yacht Basin Association of Condominium Owners (NYBA) appeals from the trial court's order denying its claim to quiet title to property described in a 1981 quitclaim deed. The trial court determined that the deed was not intended to convey fee simple title and that, even if this had been the [*61] intent of the parties, the deed was nevertheless unenforceable for a variety of legal and equitable reasons. However, because the language of the deed at issue unambiguously documents the intent of the grantors to convey fee title, the trial court erred by resorting to extrinsic evidence in order to derive a finding of intent that contradicts the written words of the deed. As the result of our review of this issue and other, ancillary, issues, we reverse in part and affirm in part.

I

¶2 In 2007, a commercial boat dealer, Supreme Northwest Inc. (doing business as Seattle Boat), purchased lakefront property (the commercial parcel) and an associated boat business for $4.15 million from Bridges Investment Group LLC. After closing, Seattle Boat sought approval from the city of Bellevue (City) to build a new storage and sales facility. NYBA, an unincorporated condominium association that manages the marina adjacent to the commercial parcel, was initially supportive of Seattle Boat's redevelopment plans. In the months following the sale, Alan Bohling, the president of Seattle Boat, and Kyle Anderson, the president of NYBA's board of directors, maintained an ongoing discussion of Seattle Boat's redevelopment plan and NYBA's resulting concerns regarding parking, ingress, egress, and traffic. However, following the City's issuance of a declaration of nonsignificance—an important checkpoint in the approval process—NYBA's membership voted overwhelmingly to oppose Seattle Boat's redevelopment project.

¶3 In June 2008, NYBA retrieved from its safe a document entitled "Quit Claim Deed," which purported to convey

three legally described strips of the commercial parcel from its original owners, John Radovich and Russell [*62] Keyes, to NYBA in 1980. The quitclaim deed had been properly recorded in 1981. An accompanying real estate tax affidavit, signed by NYBA's then-vice president and filed with the quitclaim deed, described the deed as a "document in correction of easements." Because the three strips of land described in the deed (designated as parcels A, B, and C) were located within the area that Seattle Boat was intending to redevelop, the permitting process was suspended until the validity of the quitclaim deed could be determined.

¶4 Both the commercial parcel and adjacent marina were previously owned by Radovich and Keyes. The two partners acquired the marina, submerged lands, and uplands in 1975. They converted the marina to condominium property in 1978. At this time, Radovich recorded a declaration of easements, which created 10 easements on and around the commercial parcel and the newly formed NYBA property. The legal descriptions of the boundaries of three of these easements—easements 4, 5, and 6—are identical to the descriptions of the land that Radovich and Keyes later conveyed to NYBA in the 1981 quitclaim deed.

¶5 Following the creation of the condominium, Radovich and Keyes leased the upland commercial parcel to Douglas Burbridge, who thereafter operated a boat business, Mercer Marine, on the property. In 1983, Burbridge agreed to purchase Keyes' one-half undivided interest in the commercial parcel. Keyes conveyed his interest by statutory warranty deed in 1991. In 2004, Burbridge formed Bridges and conveyed his interest in the commercial parcel to this investment company. In 2004, Bridges also purchased Radovich's one-half undivided interest in the commercial parcel. Both the deed from Keyes to Burbridge and the deed from Radovich to Bridges included the land described in the 1981 quitclaim deed. Similarly, when Bridges conveyed the commercial parcel to Seattle Boat by bargain and sale deed [*63] in March 2007, this deed also

included the land that had been described in the 1981 quitclaim deed.

¶6 In September 2008, NYBA brought suit against Seattle Boat, seeking a declaratory judgment quieting title to the three strips of land described in the quitclaim deed. It sought entry of a judgment declaring that the quitclaim deed either conveyed fee title to the property described therein or granted NYBA exclusive rights in that property. Seattle Boat counterclaimed based on adverse possession and brought a third party complaint against Burbridge and Bridges for failure to convey good title to the entire commercial parcel. Thereafter, Bridges brought a fourth party complaint against Radovich and Keyes for breach of their agreements to convey good title to the commercial parcel.

¶7 After a two-week bench trial, the trial court entered detailed findings of fact and conclusions of law in favor of Seattle Boat. The court determined that the 1981 quitclaim deed was not intended to convey fee simple title and, in addition, that the deed was unenforceable on a variety of legal and equitable bases.

¶8 NYBA appeals.

II

¶9 NYBA first contends that, because the 1981 quitclaim deed unambiguously expressed the intent of Radovich and Keyes to convey fee title to the three strips of land described in the deed, the trial court erred by concluding that the deed did not convey fee title. We agree.

[1] ¶10 In a bench trial where the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the court's conclusions of law. Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001). "Substantial evidence" is a quantum of evidence sufficient to persuade a rational, fair-minded person that [*64] the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We

review questions of law and conclusions of law de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (citing Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

[2, 3] ¶11 "[D]eeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document." Zunino v. Rajewski, 140 Wn. App. 215, 222, 165 P.3d 57 (2007). Interpretation of a deed is a mixed question of fact and law. Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 459 n.7, 243 P.3d 521 (2010). What the parties intended is a question of fact and the legal consequence of that intent is a question of law. Affiliated FM, 170 Wn.2d at 459 n.7.

[4] ¶12 In general, we determine the intent of the parties from the language of the deed as a whole. Sunnyside Valley, 149 Wn.2d at 880 (citing Zobrist v. Culp, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981)). "In the construction of a deed, a court must give meaning to every word if reasonably possible." Hodgins v. State, 9 Wn. App. 486, 492, 513 P.2d 304 (1973) (citing Fowler v. Tarbet, 45 Wn.2d 332, 334, 274 P.2d 341 (1954)). It has long been the rule of our state that, where the plain language of a deed is unambiguous, extrinsic evidence will not be considered. Sunnyside Valley, 149 Wn.2d at 880; In re Estate of Little, 106 Wn.2d 269, 287, 721 P.2d 950 (1986); City of Seattle v. Nazarenus, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962); Tacoma Mill Co. v. N. Pac. Ry., 89 Wash. 187, 201, 154 P. 173 (1916) ("[I]f the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence [*65] for the purpose of ascertaining their intention."). This rule is a practical consequence of the permanent nature of real property— unlike a contract for personal services or a sale of goods, the legal effect of a deed will outlast the lifetimes of both grantor and grantee, ensuring that evidence of the circumstances surrounding the transfer will become both increasingly unreliable and increasingly unobtainable with

the passage of time. Accordingly, the language of the written instrument is the best evidence of the intent of the original parties to a deed.

¶13 Nevertheless, where ambiguity exists, extrinsic evidence may be considered in ascertaining the intentions of the parties. Sunnyside Valley, 149 Wn.2d at 880. In such a situation, we will consider the circumstances of the transaction and the subsequent conduct of the parties in determining their intent at the time the deed was executed. King County v. Hanson Inv. Co., 34 Wn.2d 112, 126, 208 P.2d 113 (1949). Moreover, where we remain in doubt as to the parties' intent, in general, "'a deed will be construed against the grantor.'" Ray v. King County, 120 Wn. App. 564, 587 n.67, 86 P.3d 183 (2004) (quoting 17 WILLIAM B. STOEBUCK, WASHINGTON [*66] PRACTICE: REAL ESTATE: PROPERTY LAW § 7.9, at 463 (1995)).

¶14 The form of quitclaim deeds in Washington is governed by statute. The relevant statute stipulates that a quitclaim deed "may be in substance" in the following form:

The grantor (here insert the name or names and place of residence), for and in consideration of (here insert consideration) conveys and quitclaims to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of . . . . . , state of Washington. Dated this . . . . day of . . . . . , 19. . .

RCW 64.04.050.

¶15 Here, the 1981 quitclaim deed states that "[t]he Grantors ... convey[ ] and quit claim[ ] to [NYBA] the following described real estate, situated in the County of King, State of Washington, together with all after acquired title of the grantor(s) therein." The deed then recites the legal descriptions of three "strip[s] of land," parcels A, B, and C, that are identical to the legal descriptions of easements 4, 5, and 6 appearing in the declaration of easements previously issued to NYBA by Radovich and Keyes. Significantly, the deed also reserves to the grantors

an easement for ingress and egress across parcel C. The deed is dated July 23, 1980.

[5, 6] ¶16 Seattle Boat contends that the grantors' failure to employ the words "all interest in" creates a facial ambiguity in the deed that must be resolved by resort to extrinsic evidence. By omitting this "key phrase," Seattle Boat asserts, the grantors left unclear whether the deed was intended to convey all of their rights of ownership in the described parcels. 5 Where a statement is capable of two or more meanings, it is ambiguous. Hoglund v. Omak Wood [*67] Prods., Inc., 81 Wn. App. 501, 504, 914 P.2d 1197 (1996). The question of ambiguity is a matter of law to be determined by the court. Hoglund, 81 Wn. App. at 504.

5 As Seattle Boat correctly points out, unlike deeds that follow the statutory warranty or bargain and sale deed form, a quitclaim deed does not carry with it a presumption that a fee simple estate is being transferred. Roeder Co. v. K&E Moving & Storage Co., 102 Wn. App. 49, 56, 4 P.3d 839 (2000).

[7-10] ¶17 As an initial matter, a quitclaim deed need not precisely match the form described in RCW 64.04.050 in order to convey fee title. To the contrary, the statute stipulates that where a deed "in substance" conforms to the statutory language, the deed "shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee ... in fee of all the then existing legal and equitable rights of the grantor in the premises therein described." RCW 64.04.050. No Washington court has concluded that a quitclaim deed must contain the phrase "all interest in" to validly convey fee simple title. Indeed, as Professor Stoebuck has explained, the operative words of a quitclaim deed are "conveys and quitclaims." 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 14.2, at 116 (2d ed. 2004). It has long been the rule that a valid quitclaim deed "'passes all the right, title, and interest which the grantor has at the time of

making the deed and which is capable of being transferred by deed, unless a contrary intent appears.'" McCoy v. Lowrie, 44 Wn.2d 483, 486, 268 P.2d 1003 (1954) (quoting K.A. Drechsler, Annotation, Rights or Interests Covered by Quitclaim Deed, 162 A.L.R. 556, 557 (1946)).

¶18 Moreover, with regard to the quitclaim deed at issue herein, any potential ambiguity created by the absence of the words "all interest in" is dispelled when every word of the deed is given meaning. See Fowler, 45 Wn.2d at 334 ("It is the duty of the court to construe a deed so as to give some meaning to every word, if reasonably possible."). In addition to conveying the then-existing rights of the grantor, a quitclaim deed may also convey after-acquired title if words to this effect appear in the deed. RCW 64.04.050. The 1981 quitclaim deed specifies that, in addition to granting to NYBA the "real estate" described therein, the deed also conveys "all after acquired title" of the grantors to the [*68] described parcels. The inclusion of this language negates the possibility that the grantors intended anything but the conveyance of their entire interest in the described property. Even were the grantors to have held less than fee title to the parcels at the time the deed was executed, any and all later-obtained ownership interest was also conveyed to NYBA by the deed through inclusion of this language.

¶19 This conclusion is further bolstered by the grantors' reservation of an easement "for ingress and egress" over a portion of parcel C described in the deed. Such a reservation would make little sense if the grantors' intent was to retain fee title to the described property—if this was the intent of the conveyance, no easement benefitting the commercial parcel would be necessary.

¶20 As it is undisputed that Keyes and Radovich held fee title to portions of the described areas, and the unambiguous language of the deed makes clear that the intent of the grantors was to convey all of their interest in this land, the deed was sufficient to convey fee title.

Indeed, the trial court recognized that the quitclaim deed "purports to convey fee simple title" to NYBA.

¶21 Nevertheless, Seattle Boat contends that, pursuant to our Supreme Court's decision in Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 156 Wn.2d 253, 126 P.3d 16 (2006), a court must always consider extrinsic evidence when determining the intent of the parties to a deed. Initially, we note that Kershaw involved a deed for a railroad right-of-way—an area of law that has long received unique treatment by Washington courts. 1 WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK SERIES: REAL ESTATE ESSENTIALS § 5.8(2) (4th ed. 2009) (noting that railroad right-of-way cases constitute an exception to [*69] the general rules of deed construction); see Brown v. State, 130 Wn.2d 430, 436-37, 924 P.2d 908 (1996) (observing that decisions regarding railroad rights-of-way are "in considerable disarray and usually turn on a case-by-case examination of each deed"). Moreover, although our Supreme Court has, on three occasions, observed that surrounding circumstances may be considered in the absence of ambiguity when determining the intent of the parties to a railroad deed, the court has never seen fit to apply this principle outside of the context of railroad right-of-way cases.

[11] ¶22 Indeed, just one year before Kershaw, in a case that did not involve a railroad deed, the court explained that Washington law requires that the intent of the parties be determined from the unambiguous language of the document itself. In Niemann v. Vaughn Community Church, the court reaffirmed that "'[t]he intent of the parties is to be derived from the entire instrument and, if ambiguity exists, the situation and circumstances of the parties at the time of the grant are to be considered.'" 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (emphasis added) (quoting Harris v. Ski Park Farms, Inc., 120 Wn.2d 727, 739, 844 P.2d 1006 (1993)). More recently, in Kiely v. Graves, the court explained that where an interest in land is dedicated to a

city [*70] by the presentment of a plat, the grantor's intent must be determined "from the plat itself." 173 Wn.2d 926, 932-33, 271 P.3d 226 (2012) (citing Frye v. King County, 151 Wash. 179, 182, 275 P. 547 (1929)). In none of these three cases—Niemann, Kershaw, and Kiely—did the Supreme Court indicate that it was adopting a new rule of construction or departing from prior precedent. Thus, viewed as a whole, the cases confirm that the court—in deciding cases—has continued to adhere to its rule that a deed must be ambiguous before extrinsic evidence is properly considered, at least outside of the discrete subset of cases interpreting railroad right-of-way interests.

¶23 However, even if Seattle Boat is correct in contending that extrinsic evidence was properly considered by the trial court, the extrinsic evidence adduced at trial fails to demonstrate that the 1981 quitclaim deed was intended to convey anything less than fee title. Indeed, the only testimony of the parties to the transaction was that the quitclaim deed was intended to convey fee title. Radovich, the grantor of the deed, testified that he intended to convey "all of the interest we had" in the described property. Alan Lang, the president of NYBA at the time the quitclaim deed was executed, likewise testified that he understood the deed to be a conveyance of fee title.

¶24 Of even greater significance is the fact that the purposes for which a court may properly consider extrinsic evidence pursuant to our state's context rule are limited. As our Supreme Court has explained, a trial court may not consider:

Evidence of a party's unilateral or subjective intent as to the meaning of a ... word or term;

Evidence that would show an intention independent of the instrument; or

Evidence that would vary, contradict or modify the written word.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999); see also Bloome v. Haverly, 154 Wn. App. 129, 138-39, [*71] 225 P.3d 330 (2010). "Extrinsic evidence is

to be used to illuminate what was written, not what was intended to be written." Hollis, 137 Wn.2d at 697.

¶25 Here, the trial court improperly relied on extrinsic evidence to contradict the written words of the quitclaim deed. The court explained that the real estate excise tax affidavit filed by NYBA's vice president—stating that the quitclaim deed was a "document in correction of easements"—"confirmed" that the deed was intended merely to correct the declaration of easements previously issued by Radovich and Keyes. Similarly, the court found that references in the meeting minutes of the NYBA board of directors to the acquirement of "easements" through quitclaim deeds indicated that the intent of the deed was not to convey fee title but to grant easements. However, the 1981 quitclaim deed contains no reference to either a conveyance or correction of easements. Instead, the deed clearly documents the intent of the grantors to convey all ownership interest in the three easement areas—the "described real estate ... together with all after acquired interest." Accordingly, it was impermissible for extrinsic evidence to be relied upon in divining an intent in the grantors to convey something less than their entire interest in the land, as [*72] such evidence clearly contradicted the words of the deed. Similarly, extrinsic evidence was not properly relied upon to conclude that the quitclaim deed was intended as a correction of easements, as such an intention would be entirely independent of the instrument.

¶26 The trial court erred by relying on extrinsic evidence to determine that which it believed the parties "intended to be written." Hollis, 137 Wn.2d at 697. Because the words of the deed unambiguously document the intent of the grantors to convey their entire ownership interest in the described land, the 1981 quitclaim deed constitutes a valid conveyance of fee simple title.

III

[12] ¶27 NYBA next contends that the trial court erred by determining that, because Keyes and Radovich failed to comply with statutory and local requirements governing the

subdivision of real property, the quitclaim deed constitutes an "illegal and unenforceable conveyance." We agree.

¶28 As an alternative basis for decision, the trial court ruled that the deed was unenforceable because Radovich and Keyes did not comply with statutory procedures for subdividing property. At the time the quitclaim deed was executed, former RCW 58.17.060 (1974) provided that "[t]he legislative body of a city ... shall adopt regulations and procedures ... for the summary approval of short plats and short subdivisions, or revision thereof." The Bellevue City Code set forth multiple requirements on short subdivision applicants. Failure to comply with such provisions constitutes a misdemeanor. RCW 58.17.300. It is undisputed that Radovich and Keyes did not comply with these requirements prior to execution of the quitclaim deed. Accordingly, [*73] the trial court concluded that it could not "condone such conduct by enforcing the Quit Claim Deed."

¶29 As an initial matter, the rial court's reliance on Berg v. Ting, 125 Wn.2d 544, 886 P.2d 564 (1995), and Dickson v. Kates, 132 Wn. App. 724, 133 P.3d 498 (2006), for the proposition that a deed is "void on its face for failing to comply with statutory requirements" is misplaced. In each of these cases, the court held that a deed was unenforceable because it lacked a property description sufficient to satisfy the statute of frauds. Neither case stands for the more general proposition, asserted by Seattle Boat, that a deed is unenforceable because it fails to comply with some other statutory or local regulatory requirement.

¶30 Moreover, the trial court's ultimate conclusion—that a deed issued in violation of the provisions of chapter 58.17 RCW is unenforceable—is irreconcilable with that statutory scheme. Although RCW 58.17.210 provides that certain permits may not be issued on illegally subdivided property, this section exempts an innocent purchaser from these consequences, indicating that, at minimum, such purchases are permissible. Furthermore, this section stipulates that any purchaser—innocent or not—may

recover damages incurred as a result of buying land that has been subdivided in violation of either state or local regulations. RCW 58.17.210. Alternatively, the purchaser may choose to "rescind the sale or transfer and recover costs ... occasioned thereby." RCW 58.17.210. A statutory scheme that leaves the choice of remedies to the discretion of the purchaser [*74] clearly contemplates that illegally subdivided land may be bought and sold. Moreover, if, as the trial court determined, such transfers could be voided at the request of a third party, the purchaser would be deprived of these statutory remedies. Such an outcome would undermine the legislature's statutory scheme governing the regulation of subdivisions.

¶31 The legislature's determination that a purchaser may elect a remedy in an action against the seller of illegally subdivided land is irreconcilable with the trial court's determination that the deed was—as a matter of law—unenforceable. The court erred by determining that, because the quitclaim deed resulted in an illegal subdivision, the deed could not be enforced.

IV

[13] ¶32 NYBA next contends that the trial court erred by determining that, because NYBA is an unincorporated association, it could not take title to the property conveyed and, thus, that the quitclaim deed is void. We agree.

¶33 As Seattle Boat points out, at common law, unincorporated associations could not legally hold title to real property. 2 WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK § 32.5(6) (3d ed. 1996) ("Generally it has been held that unincorporated associations ... cannot hold title to real property because they are not legal entities."). However, this does not mean that a conveyance to such an association is unenforceable. Instead, because property titled in the name of an unincorporated association belongs to its members, the legal effect of a conveyance to an unincorporated association is that the property is owned by the association's members. See 6 AM. JUR. 2D

Associations and Clubs § 12 (2008) ("[T]he legal effect of a gift to a voluntary, unincorporated association is a gift to its individual members."); 2 WASH. STATE BAR ASS'N, supra, at § 32.5(6) (noting that real property owned by unincorporated associations is "generally recognized as belonging to the members of the association").

[*75] ¶34 Here, it is undisputed that NYBA is an unincorporated association. Accordingly, the real estate described in the quitclaim deed and conveyed to NYBA is owned by the condominium members as tenants in common. The trial court erred by concluding, as a matter of law, that a deed conveying real property to an unincorporated association is unenforceable.

V

[14] ¶35 NYBA next contends that the trial court erred by determining that the quitclaim deed is unenforceable because NYBA's declaration was not "amended to include a description of the common areas and facilities." We agree.

¶36 Pursuant to the Horizontal Property Regimes Act, chapter 64.32 RCW, a condominium declaration must describe a condominium's common areas. RCW 64.32.090(4). However, Seattle Boat points to no authority indicating that the failure of a declaration to properly reflect the acquisition of such property actually limits the validity of the property's conveyance. On appeal, Seattle Boat contends [*76] that the purpose of this requirement is to put "the world on notice [regarding an association's] understanding of land ownership," and that, because NYBA failed to do so, Seattle Boat took superior title to the easement areas by recording its deed to the commercial parcel. However, this assertion ignores the fact that NYBA recorded the 1981 quitclaim deed. Washington's recording act is a "race-notice" statute, and the recording of a deed "imparts constructive notice of the estate or interest acquired to all subsequent purchasers, whether or not they are bona fide purchasers for value and whether or not they have actual notice of the conveyance." 2 WASH. STATE

BAR ASS'N, supra, at § 32.6(3), at 32-34, 35 (citing Biles-Coleman Lumber Co. v. Lesamiz, 49 Wn.2d 436, 438, 302 P.2d 198 (1956)); see also Alby v. Banc One Fin., 156 Wn.2d 367, 371, 128 P.3d 81 (2006) (observing that, where earlier deed was recorded, subsequent purchaser of land was on notice of restrictions in earlier deed). Accordingly, Seattle Boat had constructive notice that the easement areas had previously been conveyed.

¶37 Seattle Boat has advanced no reasonable basis for us to conclude that the failure to amend a condominium declaration to reflect a conveyance of real property invalidates that conveyance. The proper remedy is for NYBA's declaration to be amended. The trial court erred by determining, as a matter of law, that the deed was unenforceable for this reason.

VI

¶38 NYBA next asserts that the trial court erred by concluding that the association lost its right to seek enforcement of the quitclaim deed based upon the equitable doctrines of laches and equitable estoppel. We agree.

[15-17] ¶39 Laches is an equitable defense that is based on estoppel. Real Progress, Inc. v. City of Seattle, 91 Wn. App. 833, 843-44, [*77] 963 P.2d 890 (1998). The doctrine applies when the defendant affirmatively establishes "(1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action." Davidson v. State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). "To constitute laches there must not only be a delay in the assertion of a claim but also some change of condition must have occurred which would make it inequitable to enforce it." Waldrip v. Olympia Oyster Co., 40 Wn.2d 469, 477, 244 P.2d 273 (1952). "[W]hen asserted in opposition to the interest of a landowner, [laches] must be proved by clear and convincing evidence." Arnold v. Melani, 75 Wn.2d 143, 148, 449 P.2d 800, 450 P.2d 815 (1968). The question of

whether a particular case is one to which a grant of equitable relief, in some form, is appropriate is subject to de novo review. Niemann, 154 Wn.2d at 374.

[18, 19] ¶40 Here, the trial court determined that NYBA had unreasonably delayed the commencement of its quiet title action because "for decades" it failed to seek judicial enforcement of the quitclaim deed or to "assert any ownership" over the property described therein. However, the evidence adduced at trial indicates that NYBA and Mercer Marine, Seattle Boat's predecessor in interest, generally co-existed in peace, and that legal action was therefore unnecessary prior to Seattle Boat's acquisition of the commercial parcel. Nevertheless, Seattle Boat asserts that NYBA was required to raise a claim of fee title ownership in [*78] 2004, when Burbridge proposed a redevelopment project that would involve a reconfiguration of the easement areas described in the quitclaim deed. However, NYBA never agreed to that project, and Burbridge did not, in fact, proceed with his plans for redevelopment. Accordingly, there is no evidence that NYBA ever unreasonably delayed legal action during the period prior to Seattle Boat's acquisition of the commercial parcel—Burbridge's conduct simply did not give rise to a dispute requiring the commencement of legal action.

¶41 Seattle Boat nevertheless contends that NYBA unreasonably delayed legal action in the periods just before and subsequent to its purchase of the commercial parcel. One month prior to the sale, Alan Bohling, Seattle Boat's president, met with the Kyle Anderson, the president of the NYBA board, to discuss Seattle Boat's general redevelopment plan. Although Bohling provided no specifics of the plan, because the parties discussed the demolition of a NYBA-owned structure within parcel B, Seattle Boat asserts that NYBA was required to bring an action to quiet title at that time. However, Bohling himself testified that, while such a discussion took place, the parties also discussed moving NYBA's offices into a new building to be constructed on the commercial parcel to ameliorate

the impact of the demolition. Because this plan offered a substantial benefit to NYBA, and because the plan was never finalized, it was not shown by clear and convincing evidence that NYBA should have known it had a cause of action against Seattle Boat at that time.

¶42 Indeed, discussions between Seattle Boat and NYBA regarding the redevelopment plan continued in the period after Seattle Boat closed on the property. Although Anderson "steadfastly" maintained the position that NYBA had exclusive use of the areas described in the quitclaim deed, his discussions with Bohling continued to be "constructive and amiable conversations where I felt that [Bohling] really got what our concerns were and was willing and open to [*79] working towards a resolution." Bohling likewise testified that these discussions proceeded in "a great spirit of cooperation." Indeed, it was only when Seattle Boat indicated its unwillingness to accommodate NYBA's parking concerns—at some time soon after NYBA's February 2008 board meeting—that Anderson realized the parties had encountered a "major, major sticking point."

¶43 Until that time, NYBA could reasonably have believed that any dispute with Seattle Boat could be resolved without resort to litigation. Laches cannot apply where a plaintiff has no reason to believe that legal action is necessary. See Assocs. Hous. Fin. LLC v. Stredwick, 120 Wn. App. 52, 62, 83 P.3d 1032 (2004). As NYBA commenced this lawsuit on September 9, 2008, only seven months passed between the time when NYBA should first have determined that litigation might be necessary and the time that it actually brought suit against Seattle Boat. Such a delay does not support the application of laches. Compare Gardner v. Herbert, 165 Wash. 429, 434, 5 P.2d 782 (1931) (holding no laches where husband permitted divorced wife to use land for 15 months after receiving deed), with Davidson, 116 Wn.2d at 26-27 (holding that 62-year delay in bringing claim supports application of laches to bar claim).

[20-23] ¶44 Nor do the facts of this case support the trial court's application of equitable estoppel. The elements of equitable estoppel are (1) an act or omission by the first party, (2) an act by another party in reliance on the first party's act, and (3) an injury that would result to the relying party if the first party were not estopped from repudiating the original act. Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993). This doctrine is not favored and must be proved by clear, cogent, and convincing evidence. Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992). Moreover, our Supreme Court has explained that "mere silence or acquiescence will not operate to work an estoppel where the other party has [*80] constructive notice of public records which disclose the true facts." Waldrip, 40 Wn.2d at 476. "Where the parties have equal means of knowledge there can be no estoppel in favor of either." Waldrip, 40 Wn.2d at 476.

¶45 Here, the quitclaim deed was recorded in 1981. Accordingly, Seattle Boat had constructive knowledge of NYBA's ownership of the easement areas. See Biles-Coleman Lumber Co., 49 Wn.2d at 438. Because the public record discloses "the true facts," Waldrip, 40 Wn.2d at 476, there can be no estoppel in favor of Seattle Boat. Indeed, Seattle Boat makes no effort to defend this conclusion of law on appeal. The trial court erred by applying the doctrines of laches and equitable estoppel in determining that the deed was unenforceable.

VII

¶46 NYBA next contends that the trial court erred by concluding that the quitclaim deed must be set aside based upon a lack of consideration in the conveyance from Radovich and Keyes to NYBA in 1980. For several reasons, we agree.

[24] ¶47 First, as a threshold matter, a stranger to a contract may not challenge the contract's validity based on inadequate consideration. Because consideration constitutes the heart of the parties' bargain, this defense to a contract is

personal to the contracting parties. See, e.g., Spanish Oaks, Inc. v. Hy-Vee, Inc., 265 Neb. 133, 138, 655 N.W.2d 390 (2003) ("'[T]he fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.'" (quoting In re Vic Supply Co., 227 F.3d 928 (7th Cir. 2000))). Here, neither NYBA nor Radovich—the parties to the 1980 transaction [*81] that resulted in the 1981 recording of the quitclaim deed—challenged the conveyance of the deed based upon an asserted lack of consideration. The trial court erred by determining that the quitclaim deed must be set aside on this basis.

[25] ¶48 Second, setting aside the quitclaim deed constitutes a form of rescission. Thus, if the trial court was cancelling the contract of conveyance by declaring the deed unenforceable (hence ruling that title never left Radovich and Keyes in favor of NYBA), restitution of the purchase price was a necessary corollary to this ruling. The parties never addressed or considered this issue and, needless to say, the trial court, as a result, never made any finding on the matter. NYBA could not rightly be deprived of the benefit of its bargain without a resultant return to it of the purchase price. But, here, that happened. This was error.

[26] ¶49 Third, calculating the amount of restitution would have been nigh impossible—making rescission an inappropriate remedy. Here, as explained more fully below, part of the consideration that Radovich and Keyes received from NYBA was NYBA's forbearance from suing them for providing parking in an amount less than the law required. In this regard, the conveyance of the quitclaim interest operated, in part, as an accord and satisfaction of that claim. By 2004, Radovich and Keyes had accepted—and consumed—over two decades of this benefit. No way exists for a trial court to order them to disgorge this benefit back to the purchaser (NYBA) as part of rescinding the contract of sale of the land described in the quitclaim deed. Thus, the remedy sought (by a stranger to the contract)—rescission of the contract of sale and restoration of the

parties to their precontract status—was impossible to grant, even if it had been requested by an entity with standing to make such a request.

[27] ¶50 Fourth, the evidence presented on the question of lack of consideration was not of a type that would allow for a court to order rescission (as opposed to compensatory [*82] damages). Seattle Boat's claim—in large part—rested on its assertion that NYBA did not follow through with its promise to pay all future taxes on the property. For a century, it has been the law of this state that such a claim does not support rescission as a remedy. Hewett v. Dole, 69 Wash. 163, 170, 124 P. 374 (1912). Once title has transferred, failure to pay further sums owing does not constitute failure of consideration in the formation of a contract—it constitutes a breach of the contract. The appropriate remedy is an award of damages. Hewett, 69 Wash. at 170. Only by proving fraud in the inception of the contract would a vendor have a right to rescission as a remedy. Hewett, 69 Wash. at 169-70. However, there is "no authority holding that a preconceived intention not to perform is established merely by a subsequent failure or refusal to perform." Hewett, 69 Wash. at 170. Thus, the evidence presented was not of a type that could lend itself to supporting an order rescinding the sale.

[28, 29] ¶51 Finally, the evidence presented at trial—as a whole—does not establish a lack of consideration. As our Supreme Court has long recognized, "[g]enerally speaking, inadequacy of price is not sufficient, standing by itself, to authorize a court of equity to set aside a deed." Downing v. State, 9 Wn.2d 685, 688, 115 P.2d 972 (1941). Only where the inadequacy of consideration for conveyance of realty is so great as to shock the conscience may a court invoke its equitable power to set aside the conveyance. Downing, 9 Wn.2d at 688; see also Binder v. Binder, 50 Wn.2d 142, 150, 309 P.2d 1050 (1957). However, quitclaim deeds are commonly used in transactions that are not the result of a sale for value. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL

ESTATE: PROPERTY LAW § 7.2, at 472 (2d ed. 2004). Such instruments are "used in donative transactions, in which, despite the recital of consideration in the deed, no actual consideration passes except perhaps love and affection." 17 STOEBUCK & WEAVER, supra, § 7.2, at 472. Similarly, quitclaim deeds are often used "to clear title, to [*83] correct errors in prior deeds, and to adjust disputed boundaries between adjoining landowners." 17 STOEBUCK & WEAVER, supra, § 7.2, at 472. In such circumstances, "the common practice in Washington ... to recite consideration of 'ten dollars and other good and valuable consideration' is sufficient to support a conveyance by deed." 17 STOEBUCK & WEAVER, supra, § 7.7, at 483.

¶52 Here, the quitclaim deed recited as consideration "Ten ... Dollars, and other good and valuable consideration." As an initial matter, the trial court's determination that "no consideration was provided to Radovich and Keyes in exchange for the Quit Claim Deed" is not supported by substantial evidence. The undisputed evidence at trial indicates that, at a minimum, NYBA paid back taxes on the easement areas for the years of 1978, 1979, and 1980. Nevertheless, Seattle Boat contends that the recited dollar amount—even when coupled with NYBA's payment of the back taxes—is so inadequate as to shock the conscience. This assertion, however, ignores the fact that Radovich and Keyes had provided NYBA with far less parking than promised or required by law. Conveying fee title to the easement areas was one attempt to remedy this situation and, thus, to avoid litigation between NYBA and Radovich. Given the purposes for which the deed was executed, and recognizing that at least some consideration was given, the consideration for the deed was not so inadequate as to shock the conscience. The trial court erred by concluding to the contrary.

[*84] VIII

¶53 NYBA contends, finally, that the trial court erred by concluding that Mercer Marine, Seattle Boat's predecessor

in interest, acquired a narrow strip of frontage property and a vault located within parcel B by way of adverse possession. We disagree.

[30, 31] ¶54 Adverse possession requires possession that was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the statutory 10-year period. Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). "Hostility ... 'does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner.'" Chaplin, 100 Wn.2d at 857-58 (quoting King v. Bassindale, 127 Wash. 189, 192, 220 P. 777 (1923)).

¶55 Without citation to the record, NYBA asserts that Mercer Marine's use of the frontage property and vault was permissive and not hostile. However, the trial court's factual findings with regard to this issue are well supported by substantial evidence. There was ample evidence adduced at trial indicating that Mercer Marine made use of these areas as would a true owner. Moreover, NYBA points to no evidence in the record indicating that it ever consented to Mercer Marine's use of the frontage area or the vault. Because the necessary elements of adverse possession are established by these findings of fact, the court did not err by concluding that Seattle Boat, as successor in interest to Mercer Marine, acquired these portions of NYBA's property by adverse possession.

[*85] ¶56 We reverse the trial court's determinations that the quitclaim deed did not convey fee title and that the deed was unenforceable. We affirm the court's determination that Seattle Boat acquired portions of NYBA's property through adverse possession.

EL FEUDO POR VIDA

Evelyn WHITE and Sandra White Perry, Petitioners, v. Helen BROWN et al., Respondents. Supreme Court of Tennessee 559 S.W.2d 938, December 27, 1977

OPINION BY: BROCK

[*938] This is a suit for the construction of a will. The Chancellor held that the will passed a life estate, but not the remainder, in certain realty, leaving the remainder to pass by inheritance to the testatrix's heirs at law. The Court of Appeals affirmed.

Mrs. Jessie Lide died on February 15, 1973, leaving a holographic will which, in its entirety, reads as follows:

"April 19, 1972

"I, Jessie Lide, being in sound mind declare this to be my last will and testament. I appoint my niece Sandra White Perry to be the executrix of my estate. I wish Evelyn White to have my home to live in and not to be sold.

"I also leave my personal property to Sandra White Perry. My house is not to be sold.

Jessie Lide"

(Underscoring by testatrix).

Mrs. Lide was a widow and had no children. Although she had nine brothers and [*939] sisters, only two sisters residing in Ohio survived her. These two sisters quitclaimed any interest they might have in the residence to Mrs. White. The nieces and nephews of the testatrix, her heirs at law, are defendants in this action.

Mrs. White, her husband, who was the testatrix's brother, and her daughter, Sandra White Perry, lived with Mrs. Lide as a family for some twenty-five years. After Sandra married in 1969 and Mrs. White's husband died in 1971, Evelyn White continued to live with Mrs. Lide until Mrs. Lide's death in 1973 at age 88.

Mrs. White, joined by her daughter as executrix, filed this action to obtain construction of the will, alleging that she is vested with a fee simple title to the home. The defendants contend that the will conveyed only a life estate to Mrs. White, leaving the remainder to go to them under our laws of intestate succession. The Chancellor held that the will unambiguously conveyed only a life interest in the home to Mrs. White and refused to consider extrinsic evidence concerning Mrs. Lide's relationship with her surviving relatives. Due to the debilitated condition of the property

and in accordance with the desire of all parties, the Chancellor ordered the property sold with the proceeds distributed in designated shares among the beneficiaries.

I.

Our cases have repeatedly acknowledged that the intention of the testator is to be ascertained from the language of the entire instrument when read in the light of surrounding circumstances. See, e.g., Harris v. Bittikofer, 541 S.W.2d 372, 384 (Tenn. 1976); Martin v. Taylor, 521 S.W.2d 581, 584 (Tenn. 1975); Hoggatt v. Clopton, 142 Tenn. 184, 192, 217 S.W. 657, 659 (1919). But, the practical difficulty in this case, as in so many other cases involving wills drafted by lay persons, is that the words chosen by the testatrix are not specific enough to clearly state her intent. Thus, in our opinion, it is not clear whether Mrs. Lide intended to convey a life estate in the home to Mrs. White, leaving the remainder interest to descend by operation of law, or a fee interest with a restraint on alienation. Moreover, the will might even be read as conveying a fee interest subject to a condition subsequent (Mrs. White's failure to live in the home).

In such ambiguous cases it is obvious that rules of construction, always yielding to the cardinal rule of the testator's intent, must be employed as auxiliary aids in the courts' endeavor to ascertain the testator's intent.

In 1851 our General Assembly enacted two such statutes of construction, thereby creating a statutory presumption against partial intestacy.

Chapter 33 of the Public Acts of 1851 (now codified as T.C.A. §§ 64-101 and 64-501) reversed the common law presumption that a life estate was intended unless the intent to pass a fee simple was clearly expressed in the instrument. T.C.A. § 64-501 provides:

"Every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument."

Chapter 180, Section 2 of the Public Acts of 1851 (now codified as T.C.A. § 32-301) was specifically directed to the operation of a devise. In relevant part, T.C.A. § 32-301 provides:

[*940] "A will . . . shall convey all the real estate belonging to [the testator] or in which he had any interest at his decease, unless a contrary intention appear by its words and context."

Thus, under our law, unless the "words and context" of Mrs. Lide's will clearly evidence her intention to convey only a life estate to Mrs. White, the will should be construed as passing the home to Mrs. White in fee. "'If the expression in the will is doubtful, the doubt is resolved against the limitation and in favor of the absolute estate.'" Meacham v. Graham, 98 Tenn. 190, 206, 39 S.W. 12, 15 (1897) (quoting Washbon v. Cope, 144 N.Y. 287, 39 N.E. 388); Weiss v. Broadway Nat'l Bank, 204 Tenn. 563, 322 S.W.2d 427 (1959); Cannon v. Cannon, 182 Tenn. 1, 184 S.W.2d 35 (1945).

Several of our cases demonstrate the effect of these statutory presumptions against intestacy by construing language which might seem to convey an estate for life, without provision for a gift over after the termination of such life estate, as passing a fee simple instead. In Green v. Young, 163 Tenn. 16, 40 S.W.2d 793 (1931), the testatrix's disposition of all of her property to her husband "to be used by him for his support and comfort during his life" was held to pass a fee estate. Similarly, in Williams v. Williams, 167 Tenn. 26, 65 S.W.2d 561 (1933), the testator's devise of real property to his children "for and during their natural lives" without provision for a gift over was held to convey a fee. And, in Webb v. Webb, 53 Tenn.App. 609, 385 S.W.2d 295 (1964), a devise of personal property to the testator's wife "for her maintenance, support and comfort, for the full period of her natural life" with complete powers of alienation but without provision for the remainder passed absolute title to the widow.

II.

Thus, if the sole question for our determination were whether the will's conveyance of the home to Mrs. White "to live in" gave her a life interest or a fee in the home, a conclusion favoring the absolute estate would be clearly required. The question, however, is complicated somewhat by the caveat contained in the will that the home is "not to be sold" — a restriction conflicting with the free alienation of property, one of the most significant incidents of fee ownership. We must determine, therefore, whether Mrs. Lide's will, when taken as a whole, clearly evidences her intent to convey only a life estate in her home to Mrs. White.

Under ordinary circumstances a person makes a will to dispose of his or her entire estate. If, therefore, a will is susceptible of two constructions, by one of which the testator disposes of the whole of his estate and by the other of which he disposes of only a part of his estate, dying intestate as to the remainder, this Court has always preferred that construction which disposes of the whole of the testator's estate if that construction is reasonable and consistent with the general scope and provisions of the will. See Ledbetter v. Ledbetter, 188 Tenn. 44, 216 S.W.2d 718 (1949); Cannon v. Cannon, supra; Williams v. Williams, supra; Jarnagin v. Conway, 21 Tenn. 50 (1840); 4 Page, Wills § 30.14 (3d ed. 1961). A construction which results in partial intestacy will not be adopted unless such intention clearly appears. Bedford v. Bedford, 38 Tenn.App. 370, 274 S.W.2d 528 (1954); Martin v. Hale, 167 Tenn. 438, 71 S.W.2d 211 (1934). It has been said that the courts will prefer any reasonable construction or any construction which does not do violence to a testator's language, to a construction which results in partial intestacy. Ledbetter, supra.

The intent to create a fee simple or other absolute interest and, at the same time to impose a restraint upon its alienation can be clearly expressed. If the testator specifically declares that he devises land to A "in fee simple" or to A "and his heirs" but that A shall not have the

power to alienate the land, there is but one tenable construction, viz., the testator's intent is to impose a restraint upon a fee simple. To construe such language to create a life estate would [*941] conflict with the express specification of a fee simple as well as with the presumption of intent to make a complete testamentary disposition of all of a testator's property. By extension, as noted by Professor Casner in his treatise on the law of real property:

"Since it is now generally presumed that a conveyor intends to transfer his whole interest in the property, it may be reasonable to adopt the same construction, [conveyance of a fee simple] even in the absence of words of inheritance, if there is no language that can be construed to create a remainder." 6 American Law of Property § 26.58 (A. J. Casner ed. 1952).

In our opinion, testatrix's apparent testamentary restraint on the alienation of the home devised to Mrs. White does not evidence such a clear intent to pass only a life estate as is sufficient to overcome the law's strong presumption that a fee simple interest was conveyed.

Accordingly, we conclude that Mrs. Lide's will passed a fee simple absolute in the home to Mrs. White. Her attempted restraint on alienation must be declared void as inconsistent with the incidents and nature of the estate devised and contrary to public policy. Nashville C & S.L.Ry. v. Bell, 162 Tenn. 661, 39 S.W.2d 1026 (1931).

The decrees of the Court of Appeals and the trial court are reversed and the cause is remanded to the chancery court for such further proceedings as may be necessary, consistent with this opinion. Costs are taxed against appellees.

DISSENT BY: HARBISON

HARBISON, Justice, dissenting.

With deference to the views of the majority, and recognizing the principles of law contained in the majority opinion, I am unable to agree that the language of the will

of Mrs. Lide did or was intended to convey a fee simple interest in her residence to her sister-in-law, Mrs. Evelyn White.

The testatrix expressed the wish that Mrs. White was "to have my home to live in and not to be sold". The emphasis is that of the testatrix, and her desire that Mrs. White was not to have an unlimited estate in the property was reiterated in the last sentence of the will, to wit: "My house is not to be sold."

The testatrix appointed her niece, Mrs. Perry, executrix and made an outright bequest to her of all personal property.

The will does not seem to me to be particularly ambiguous, and like the Chancellor and the Court of Appeals, I am of the opinion that the testatrix gave Mrs. White a life estate only, and that upon the death of Mrs. White the remainder will pass to the heirs at law of the testatrix.

The cases cited by petitioners in support of their contention that a fee simple was conveyed are not persuasive, in my opinion. Possibly the strongest case cited by the appellants is Green v. Young, 163 Tenn. 16, 40 S.W.2d 793 (1931), in which the testatrix bequeathed all of her real and personal property to her husband "to be used by him for his support and comfort during his life." The will expressly stated that it included all of the property, real and personal, which the testatrix owned at the time of her death. There was no limitation whatever upon the power of the husband to use, consume, or dispose of the property, and the Court concluded that a fee simple was intended.

In the case of Williams v. Williams, 167 Tenn. 26, 65 S.W.2d 561 (1933), a father devised property to his children "for and during their natural lives" but the will contained other provisions not mentioned in the majority opinion which seem to me to distinguish the case. Unlike the provisions of the present will, other clauses in the Williams will contained provisions that these same children were to have "all the residue of my estate personal or mixed of which I shall die possessed or seized, or to which I shall be entitled at the time of my decease, to have and to hold

the same to them and their executors and administrators and assigns forever."

[*942] Further, following some specific gifts to grandchildren, there was another bequest of the remainder of the testator's money to these same three children. The language used by the testator in that case was held to convey the fee simple interest in real estate to the children, but its provisions hardly seem analogous to the language employed by the testatrix in the instant case.

In the case of Webb v. Webb, 53 Tenn.App. 609, 385 S.W.2d 295 (1964), the testator gave his wife all the residue of his property with a clear, unqualified and unrestricted power of use, sale or disposition. Thereafter he attempted to limit her interest to a life estate, with a gift over to his heirs of any unconsumed property. Again, under settled rules of construction and interpretation, the wife was found to have a fee simple estate, but, unlike the present case, there was no limitation whatever upon the power of use or disposition of the property by the beneficiary.

On the other hand, in the case of Magevney v. Karsch, 167 Tenn. 32, 65 S.W.2d 562 (1933), a gift of the residue of the large estate of the testator to his daughter, with power "at her demise [to] dispose of it as she pleases . . . ." was held to create only a life estate with a power of appointment, and not an absolute gift of the residue. In other portions of the will the testator had given another beneficiary a power to use and dispose of property, and the Court concluded that he appreciated the distinction between a life estate and an absolute estate, recognizing that a life tenant could not dispose of property and use the proceeds as she pleased. 167 Tenn. at 57, 65 S.W.2d at 569.

In the present case the testatrix knew how to make an outright gift, if desired. She left all of her personal property to her niece without restraint or limitation. As to her sister-in-law, however, she merely wished the latter have her house "to live in", and expressly withheld from her any power of sale.

The majority opinion holds that the testatrix violated a rule of law by attempting to restrict the power of the donee to dispose of the real estate. Only by thus striking a portion of the will, and holding it inoperative, is the conclusion reached that an unlimited estate resulted.

In my opinion, this interpretation conflicts more greatly with the apparent intention of the testatrix than did the conclusion of the courts below, limiting the gift to Mrs. White to a life estate. I have serious doubt that the testatrix intended to create any illegal restraint on alienation or to violate any other rules of law. It seems to me that she rather emphatically intended to provide that her sister-in-law was not to be able to sell the house during the lifetime of the latter—a result which is both legal and consistent with the creation of a life estate.

In my opinion the judgment of the courts below was correct and I would affirm.

IKIE BRIGGS, Appellant, vs. ESTATE OF ODESSA V. BRIGGS, Deceased. Appellee. Court of Appeals of Tennessee, Western Section, at Jackson 950 S.W.2d 710, February 21, 1997, FILED

OPINION BY: CRAWFORD

[*710] This is a will construction case. Respondent, Ikie Briggs, appeals from the order of the probate court construing the Last Will and Testament of Odessa V. Briggs in favor of the petitioner, Frances Duncan Briggs.

[*711] Odessa V. Briggs died on February 4, 1980, and her holographic will was admitted to probate on February 26, 1980. Her Last Will and Testament provides as follows:

This is my last will & testament. I hereby revoke all former wills. At my death I request that all my just debts be paid out of my estate.

Everything I possess at the time of my death I bequeath as follows

Cash: To my grandsons Joe Briggs and Charles A. Briggs $ 3,000.00 each

To my granddaughter Mrs. Karen Trainum $ 3,000.00. To Fisherville Baptist Church Cemetery endowment fund $ 1,000.00 for upkeep of the Briggs family graves. To Reid Cemetery fund $ 300.00. The Balance of Cash to be divided equally between my sons Ikie Briggs and Merle F. Briggs.

All real estate (except for my 1/2 half Hays Crossing farm and all Pickwick property which they may sell and divide) I leave in trust to my two sons (Merle & Ikie) their lifetime. At their death to be divided equally between surviving heirs. They Merle & Ikie are to collect, divide and use all income from rents, timber & etc.

I hereby appoint Merle Briggs my son, executor of my estate without the necessity of making bond or making any report or settlement with the Courts.

(signed) Odessa V. Briggs

The real estate involved consists of 13 separate properties. The properties are valuable because of their income stream from rents and because of the value of the timber. After their mother's death, Merle and Ikie Briggs shared all of the income, rents, expenses, and taxes on the properties equally and both worked on the properties.

Merle Briggs died on June 27, 1993 leaving his wife Frances Duncan Briggs, the petitioner, and their children. Merle Briggs's will left his entire estate to his wife. Since the death of his brother, Ikie Briggs has taken the position that he is the sole life tenant entitled to all of the proceeds from the properties, and that Frances Briggs has no rights in the property until his death. Frances Briggs, on the other hand, asserts that Merle Briggs's share passed to her by virtue of Merle's will and that she stands in his place as a life tenant. The language of the will that is in dispute states, "All real estate . . . I leave in trust to my two sons (Merle & Ikie) their lifetime. At their death to be divided equally between surviving heirs."

On June 30, 1994, Frances Briggs filed a petition in the probate court entitled "Petition to Construe Provisions in Will and for Temporary Restraining Order." The petition

alleges that the concurrent life estate left to Merle Briggs, Jr. and Ikie Briggs is to be measured by their two lives, and that the life estate will continue until the death of Ikie Briggs and then the properties will vest in their heirs. Frances Briggs also alleges that there is an immediate threat to her legal interests that will result in irreparable damages because of Ikie Briggs's activities on the land. The probate court issued the temporary restraining order prohibiting Ikie Briggs from terminating or entering into any rental contracts or agreements and restraining him from cutting or selling any timber from the subject land.

On August 18, 1994, Ikie Briggs responded to the petition and asserted that he is the sole remaining life tenant, and that he alone is entitled to all proceeds, rents, hunting rights and is entitled to cut and sell the timber. He avers that, upon his death, the property will be divided among his and Merle Briggs's surviving heirs.

After a bench trial, the probate court held in favor of Frances Briggs. The probate court found that "this clause is a clear, unmistakable and certain statement of Odessa V. Briggs's intent to devise a life estate to her two sons, Merle F. Briggs, Jr., and Ikie Briggs, which life estate is to continue until the death of Ikie Briggs, Merle F. Briggs, Jr., having predeceased his brother." The probate court further found that "the clear, certain and unmistakable intent of Odessa V. [*712] Briggs was that each of her sons was to share equally in the life estate and that upon Merle F. Briggs, Jr.'s death, his share was to pass to his heirs at law or under the provisions of his will until the death of Ikie Briggs, at which time, the life estate will terminate and all properties will then be divided equally between their surviving heirs."

Ikie Briggs appeals the order of the probate court and presents one issue for review: whether the probate court erred in its interpretation of the estate created by the Last Will and Testament of Odessa V. Briggs.

The construction of a will is a question of law for the court. Presley v. Hanks, 782 S.W.2d 482, 487 (Tenn. App. 1989).

The cardinal rule in construction of all wills is that the court shall seek to discover the intention of the testator and give effect to it unless it contravenes some rule of law or public policy. Third Nat'l Bank in Nashville v. First American Nat'l Bank of Nashville, 596 S.W.2d 824, 828 (Tenn. 1980).

The testator's intention is to be ascertained from the particular words used in the will itself, from the context in which those words are used, and from the general scope and purposes of the will, read in the light of the surrounding and attending circumstances. Presley, 782 S.W.2d at 487. In construing a will it is necessary to look to the entire will and the testator's intention must be determined from what he has written and not from what it is supposed he intended. Id. at 488. A will should be construed to give effect to every word and clause contained therein. Id. at 489.

Ikie Briggs claims that he is entitled to be the sole life tenant, including 100% of the proceeds from the properties. Frances Briggs, on the other hand, argues that the clear intent of the will was for the sons and their heirs to be treated equally. In this case, it seems clear that Odessa Briggs wanted to treat her sons equally. She divided the balance of her cash between them equally. She allowed them to sell and divide her Hays Crossing farm and Pickwick properties. She wanted Merle and Ikie Briggs to collect and divide the income and rents from her property. It also appears that she wanted to treat her sons' heirs equally because she wanted the properties to be divided equally among the surviving heirs at the termination of the life estate. Therefore, we must interpret the nature of the estate created by the will grounded in the knowledge that Odessa Briggs intended equal treatment between her sons and their heirs.

The trial court found that Odessa Briggs devised a life estate in her properties to her two sons, Merle and Ikie Briggs. We agree. We believe that the language, "All real estate . . . I leave in trust to my two sons (Merle & Ikie)

their lifetime," creates one life estate measured by both lives. In its Memorandum Opinion filed September 14, 1995, the trial court succinctly characterized the life estate in this case:

"An estate to A during life and the lives of B and C, is cumulative, and will continue during the lives of all three." Alexander v. Miller, 54 S.W. 65, 81 (Tenn. 1871). Odessa's holographic will expressly stated that the estate was not to be divided equally between surviving heirs until "their death." This Court construes "their death" to mean both Merle's and Ikie's. Therefore, the life estate is limited by the lives of both Merle and Ikie and is now to remain intact until the death of Ikie.

Ikie Briggs argues that the clause, "At their death to be divided equally between surviving heirs," refers to the first point in time when both sons are deceased, which would make the death of Ikie Briggs the time for the properties to be divided equally between the surviving heirs. It is true that the surviving heirs cannot divide the properties equally between themselves until the death of Ikie Briggs because the life estate remained intact after Merle Briggs' death and does not terminate until Ikie Briggs's death. However, this division deals with the remainder. A question still remains about the status of Merle Briggs's life estate of interest in the property.

Once again, the trial court succinctly stated the issue, "Whether the entire life estate vests in Ikie upon Merle's death, or whether Merle's life estate passes to his heirs under the provisions of Merle's will [*713] measured by the life of Ikie." Ikie Briggs argues that an interest in a life estate is not inheritable. He relies on Harwell v. Harwell, 151 Tenn. 587, 271 S.W. 353 (1924), where the Court, quoting from 21 C.J. 938, said: "A life estate is not an estate of inheritance, but is a freehold, whether for the tenant's own life or for that of another person." 151 Tenn. at 598. This reliance is misplaced. The question pertaining to a life estate measured by the life of another was not before the Court; therefore, the language relied upon is dicta.

Frances Briggs argues that a life estate measured by two lives is an estate of inheritance and may be devised. We agree. In Alexander v. Joseph Miller's Heirs, 54 Tenn. 65 (1871), the Supreme Court stated, "An estate in land for the life of another person is an estate of inheritance is such a sense as that it may be inherited by the heir." 54 Tenn. at 83. Under Alexander, a life estate held by A for the lives of B and C does not end until the death of B and C. The life estate held by A can be inherited by A's heirs and held until the death of B and C. The death of A does not end the life estate because the life estate is not measured by A's life. Therefore, A's interest is devisable until the death of B and C.

We believe that Merle Briggs could have sold his share to any willing buyer, but that the buyer would have only had rights in the life estate until the death of both Merle and Ikie Briggs. 2 See United States v. 654.8 Acres of Land, 102 F. Supp. 937, 941 (E.D. Tenn. 1952). Because the life estate was measured by an additional life, Merle Briggs's life estate was devisable.

2 The life tenant could not sell the interest in fee simple absolute because he or she does not own the interest in fee simple. A tenant for life cannot dedicate any interest in the fee. McKinney v. Duncan, 121 Tenn. 265, 274, 118 S.W. 683 (1908). A holder of a life estate can convey his interest in the land but cannot create a greater interest than which he owns. Collins v. Held, 174 Ind. App. 584, 369 N.E.2d 641, 647 (Ind. Ct. App. 1977).

We also note that Odessa Briggs's will does not provide for the surviving life tenant to take the interest of the deceased life tenant for the remaining term of the life estate. T.C.A. § 66-1-107 (1993) provides:

66-1-107. Survivorship in joint tenancy abolished. - In all estates, real and personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators, respectively, of

the tenant so dying, in the same manner as estates held by tenancy in common.

Without any express provision in the will, there is no right of survivorship between the joint tenants, Ikie Briggs and Merle Briggs.

We hold that Frances Briggs is entitled to Merle Briggs's life estate until the death of Ikie Briggs, at which time the properties should be divided equally among the surviving heirs. The life estate owned by Frances Briggs, a life estate per autre vie (a life estate measured by the life of another) satisfies the intent of Odessa Briggs that the brother and the heirs share equally.

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant.

DANIEL G. NELSON, Appellant, v. IRENE PARKER, Appellee, v. NBD BANK, N.A. and DONALD HAWKINS, Appellees. Supreme Court of Indiana 687 N.E.2d 187, November 13, 1997, Filed

OPINION BY: BOEHM

The issue in this case is whether a deed "subject to a life estate" in a third person validly creates that life estate. We hold that it does and overrule earlier authority to the contrary.

Factual and Procedural Background

Russell Nelson died in August 1994, three months after executing a warranty deed containing the following language:

Convey and warrant to

RUSSELL H. NELSON, DURING HIS LIFETIME, AND UPON HIS DEATH, SHALL PASS TO DANIEL NELSON.

SUBJECT TO: EASEMENTS, LIENS, ENCUMBRANCES, LIFE ESTATE IN IRENE PARKER, AND RESTRICTIONS OF RECORD.

(Capital letters and underscoring in original.) Daniel was Russell's son. Irene Parker had lived with Russell for thirteen years prior to his death and remained on the

property after he died. In September 1994 Daniel initiated this action to eject Parker, asserting that the deed did not effectively grant Parker a life estate. On cross-motions for summary judgment, the trial court agreed with Parker that she held a valid life estate and granted her motion for summary judgment. The court concluded that the object of deed construction is to ascertain the intent of the parties. Looking at the language of the deed as a whole, the court found that Russell intended to create a life estate in Parker. Daniel appealed.

[*188] In the trial court, both parties based their contention on their view of the grantor's intent. In the Court of Appeals Daniel made a new argument. He characterized the "subject to a life estate" language as improperly "reserving" an interest in a stranger to the deed. A "reservation" is "[a] clause in a deed or other instrument of conveyance by which the grantor creates, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it; such as rent, or an easement." BLACK'S LAW DICTIONARY 1307 (6th ed. 1990). As the definition suggests, at common law a grantor could reserve an interest only for the grantor, but not for a third person, or "stranger" to the deed. Words of reservation were not considered to be words of "grant" and so could not create an interest in another. Daniel cited this Court's decision in Ogle v. Barker, 224 Ind. 489, 68 N.E.2d 550 (1946) which upheld this common law rule. Because Parker was a "stranger to the deed," Daniel argued, the reservation of a life estate to her was void.

The Court of Appeals accepted Daniel's characterization of the "subject to" language as a reservation but declined to follow the common law rule. Rather, citing Brown v. Penn Cent. Corp., 510 N.E.2d 641, 643 (Ind. 1987) and Kirtley v. McClelland, 562 N.E.2d 27, 36 (Ind. Ct. App. 1990), the court found the grantor's intent to be controlling. In affirming judgment for Parker, the court found that Russell's intent to create a life estate in Parker was clear

from the deed's language and the surrounding circumstances at the time of the deed's execution. Nelson v. Parker, 670 N.E.2d 962, 963-64 (Ind. Ct. App. 1996). More importantly, the court analyzed and rejected the rule upheld in Ogle that a grantor cannot by reservation convey a life estate in real property to a party who is a stranger to the deed. Id. at 964. The court noted that the rule's validity had already been questioned in Brademas v. Hartwig, 175 Ind. App. 4, 369 N.E.2d 954 (1977). In Brademas, the court followed § 472 of the Restatement of Property and held that a reservation in a deed of an easement to a third party was valid when the intention of the parties was "patently evident." Id. at 7-8, 369 N.E.2d at 956-57. In rejecting Daniel's argument, the Court of Appeals also commented that the common law rule was derived from efforts, dating back to feudal times, to limit conveyance by deed as a substitute for livery by seisin. Nelson, 670 N.E.2d at 964 (citing Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 498 P.2d 987, 989, 102 Cal. Rptr. 739 (Cal. 1972) (explaining the history of the rule and concluding that "it is clearly an inapposite feudal shackle today.")). Noting that other jurisdictions had also decided against the wisdom of the rule id. at 964 n.4, the court held that Russell's intent to create a life estate in Parker trumped application of the common law rule. We granted transfer because of the apparent conflict between the Court of Appeals opinion and the decision of this Court in Ogle.

Section 472 of the Restatement provides: "By a single instrument of conveyance, there may be created an estate in land in one person and an easement in another." RESTATEMENT OF PROPERTY § 472 (1944). Comment b to this section states that:

an easement may be created in C by a deed by A which purports to convey Blackacre to B in fee reserving an easement to C. If, in other respects, the necessary formalities for the creation of an easement are complied with, such a reservation operates as an effective

conveyance to the person in whose favor the reservation is, in terms, made.

Discussion

There are no facts in dispute. In view of the plain language of the deed, the fact that the life estate language was underscored, and the circumstance that Parker had lived in the house as Russell's companion for thirteen years, we agree with the trial court and the Court of Appeals that Russell's intent to create a life estate in Parker is clearly reflected in this record. The question then [*189] becomes whether stare decisis requires adherence to Ogle.

Although it is arguable whether the "subject to" language created a "reservation" in the first place, we agree with the Court of Appeals that the common law rule upheld in Ogle serves no practical purpose today. It is a trap for the unwary and if enforced serves only to frustrate the intent of the grantor. Inadvertent use of the word "reservation," or other clumsy effort to grant an interest in land should not frustrate an otherwise clear intent based on mindless adherence to a formal and outdated rule. As noted by the Court of Appeals, our decision to override the questionable wisdom of this rule is in line with that of several other jurisdictions, as well as scholarly opinion. Aszmus v. Nelson, 743 P.2d 377 (Alaska 1987); Borough of Wildwood Crest v. Smith, 210 N.J. Super. 127, 509 A.2d 252 (N.J. Super. Ct. App. Div. 1986), cert. denied, 107 N.J. 51, 526 A.2d 139 (N.J. 1986); Simpson v. Kistler Inv. Co., 713 P.2d 751 (Wyo. 1986); Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983); Wlllard, 498 P.2d at 987; Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964); Zurn Indus. Inc. v. Lawyers Title Ins. Co., 33 Ohio App. 3d 59, 514 N.E.2d 447 (Ohio Ct. App. 1986); 14 POWELL ON REAL PROPERTY Chap. 81A 119-122, 122, P 899[3][g] (1997) (asking why it is necessary to dwell on "the unfortunate use of a particular word."); ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 719 (1984) (the rule has been "increasingly discredited"); W.W. Allen, Annotation, Reservation or Exception in Deed in

Favor of Stranger, 88 A.L.R. 2d 1199, 1202 (1963 & Supp. 1993) (intent ought to be favored over use of words reservation or exception).

Not all courts agree. See generally Allen, 88 A.L.R. 2d at 1199. Estate of Thomson v. Wade, 69 N.Y.2d 570, 509 N.E.2d 309, 516 N.Y.S.2d 614 (N.Y. 1987) appears to be the case most frequently cited in support of the common law rule. In that case, the New York Court of Appeals upheld the rule, noting that any frustration it caused to the grantor's intent could easily be avoided by a direct conveyance. A grantor could first convey an easement to a "third person" and then convey the fee, literally "subject to" an already existing easement. Although this procedure avoids frustrating the grantor's intent there is no reason to force the grantor to do in two steps what could otherwise be done in one. Further, as the Indiana Court of Appeals remarked in Brademas, the Ogle rule did not prevent the grantor from first reserving to himself then conveying the reserved interest to a third party. Brademas, 175 Ind. App. at 8, 369 N.E.2d at 957. Thus, under Ogle, Russell could have "reserved" a life estate to himself, and then simply conveyed it to Parker without encountering any legal impediment. The sum of this is that the rule functions solely as an obstacle to conveying interests in land, but serves no purpose. This is not a function consistent with our modern preference for effecting the grantor's clear intent.

Estate of Thomson concluded that the common law rule protects the rights of bona fide purchasers and avoids conflicts of ownership. Estate of Thomson, 509 N.E.2d at 310. But the court did not explain how the rule served these ends. In this case, Daniel's interest appears from the deed to be a fee simple interest subject to a life estate. We see no reason and no policy to be furthered by imposing an artificial and unintended result on the parties. A bona fide purchaser of an identical interest would have reasonably believed that the interest was, as the deed said, "subject to" a life estate. Any examiner of an abstract or title policy for

this property is fairly notified of Parker's interest. Thus, as the Willard court noted, a purchaser faced with this language would assume it to be at least potentially valid and pay less for property erroneously encumbered by "reservation" or by "subject to" language, only to receive a windfall if the interest is later deemed void because of the common law rule. Willard 498 P.2d at 989-90. In addition to working this sort of inequitable result generally, the rule would work an unfair, [*190] if not inequitable, result in this case. Daniel presumably knew the contents of the deed and knew of Russell's intentions when the deed was drafted in May, but did not contest Parker's interest until after the alleged error became uncorrectable by reason of Russell's death in August. As to the concern expressed in Estate of Thomson for conflicts of ownership, the rule as relied upon by Daniel fueled an otherwise nonexistent conflict.

Finally, Estate of Thomson relied on the public policy favoring certainty in the area of property law: "[where] settled rules are necessary and necessarily relied upon, stability and adherence to precedent are generally more important than a better or even a 'correct' rule of law." Estate of Thomson, 509 N.E.2d at 310 (internal quotation marks and citation omitted). We recognize the importance of settled rules in property law. Stability is desirable so planners can predict the outcome of the use of formulaic language and rely on achieving the conventional result. But it is hard to imagine who reasonably and in good faith could rely on a failed reservation clause to obliterate an apparently intended interest. This Court is not persuaded that the public policy of promoting settled rules requires adherence to a vestige of ancient conveyancing law that has only pernicious effects. To the extent Ogle holds otherwise, it is overruled.

Conclusion

The trial court's grant of summary judgment in favor of Parker is affirmed.

Herbert L. MAHRENHOLZ et al., Plaintiffs-Appellants, v. COUNTY BOARD OF SCHOOL TRUSTEES OF LAWRENCE COUNTY et al., Defendants-Appellees. Appellate Court of Illinois, Fifth District 93 Ill. App. 3d 366; 417 N.E.2d 138, January 29, 1981, Filed

OPINION BY: JONES

[*367] This case involves an action to quiet title to real property located in Lawrence County, Illinois. Its resolution depends on the judicial construction of language in a conveyance of that property. The case is before us on the pleadings, plaintiffs' third amended complaint having been dismissed by a final order. The pertinent facts are taken from the pleadings.

On March 18, 1941, W. E. and Jennie Hutton executed a warranty deed in which they conveyed certain land, to be known here as the Hutton School grounds, to the trustees of School District No. 1, the predecessors of the defendants in this action. The deed provided that "this land to be used for school purpose only; otherwise to revert to Grantors herein." W. E. Hutton died intestate on July 18, 1951, and Jennie Hutton died intestate on February 18, 1969. The Huttons left as their only legal heir their son Harry E. Hutton.

The property conveyed by the Huttons became the site of the Hutton School. Community Unit School District No. 20 succeeded to the grantee of the deed and held classes in the building constructed upon the land until May 30, 1973. After that date, children were transported to classes held at other facilities operated by the District. The District has used the property since then for storage purposes only.

Earl and Madeline Jacqmain executed a warranty deed on October 9, 1959, conveying to the plaintiffs over 390 acres of land in Lawrence County and which included the 40-acre tract from which the Hutton School grounds were taken. When and from whom the Jacqmains acquired the

land is not shown and is of no consequence in this appeal. The deed from the Jacqmains to the plaintiffs excepted the Hutton School grounds, but purported to convey the disputed future interest, with the following language:

[*368] "Also, except the following tract of land which was on the 18th day of March, 1951, by the said grantors [sic] conveyed to the Trustees of Schools of District No. One (1) of the Town of Allison, in the County of Lawrence and State of Illinois, and described as follows:

[legal description]

and containing one and one-half (1 1/2) acres, more or less; Reversionary interest to Grantees; …"

On May 7, 1977, Harry E. Hutton, son and sole heir of W. E. and Jennie Hutton, conveyed to the plaintiffs all of his interest in the Hutton School land. This document was filed in the recorder's office of Lawrence County on September 7, 1977. On September 6, 1977, Harry Hutton disclaimed his interest in the property in favor of the defendants. The disclaimer was in the form of a written document entitled "Disclaimer and Release." It contained the legal description of the Hutton School grounds and recited that Harry E. Hutton disclaimed and released any possibility of reverter or right of entry for condition broken, or other similar interest, in favor of the County Board of School Trustees for Lawrence County, Illinois, successor to the Trustees of School District No. 1 of Lawrence County, Illinois. The document further recited that it was made for the purpose of releasing and extinguishing any right Harry E. Hutton may have had in the "interest retained by W. E. Hutton and Jennie Hutton * * * in that deed to the Trustees of School District No. 1, Lawrence County, Illinois dated March 18, 1941, and filed on the same date * * *." The disclaimer was filed in the recorder's office of Lawrence County on October 4, 1977.

The plaintiffs filed a complaint in the circuit court of Lawrence County on April 9, 1974, in which they sought to quiet title to the school property in themselves, by virtue of

the interests acquired from the Jacqmains. This complaint was amended but later dismissed on defendants' motion.

A second amended complaint was filed on September 7, 1977. This alleged that the plaintiffs owned the property through the conveyance from Harry Hutton. The defendants moved to dismiss this complaint because (1) the plaintiffs did not meet the equitable requirements which would entitle them to have title quieted in them, and (2) Harry Hutton had no interest in the school property, as he never acted to re-enter it. The second amended complaint was dismissed on August 17, 1978, by an order which did not specify the reasons for the decision.

The plaintiffs filed a third amended complaint on September 13, 1978. This complaint recited the interests acquired from the Jacqmains and from Harry Hutton. On March 21, 1979, the trial court entered an order dismissing this complaint. In the order the court found that the

"[W]arranty deed dated March 18, 1941, from W.E. Hutton and [*369] Jennie Hutton to the Trustees of School District No. 1, conveying land here concerned, created a fee simple subject to a condition subsequent followed by the right of entry for condition broken, rather than a determinable fee followed by a possibility of reverter."

Plaintiffs have perfected an appeal to this court.

The basic issue presented by this appeal is whether the trial court correctly concluded that the plaintiffs could not have acquired any interest in the school property from the Jacqmains or from Harry Hutton. Resolution of this issue must turn upon the legal interpretation of the language contained in the March 18, 1941, deed from W. E. and Jennie Hutton to the Trustees of School District No. 1:

"this land to be used for school purpose only; otherwise to revert to Grantors herein."

In addition to the legal effect of this language we must consider the alienability of the interest created and the effect of subsequent deeds.

The parties appear to be in agreement that the 1941 deed from the Huttons conveyed a defeasible fee simple estate to

the grantee, and gave rise to a future interest in the grantors (see Restatement of Property § 153 (1936)), and that it did not convey a fee simple absolute, subject to a covenant. The fact that provision was made for forfeiture of the estate conveyed should the land cease to be used for school purposes suggests that this view is correct. Dunne v. Minsor (1924), 312 Ill. 333, 143 N.E. 842; Newton v. Village of Glen Ellyn (1940), 374 Ill. 50, 27 N.E.2d 821; Restatement of Property §§ 44, 45 (1936).

The future interest remaining in this grantor or his estate can only be a possibility of reverter or a right of re-entry for condition broken. As neither interest may be transferred by will nor by inter vivos conveyance (Ill. Rev. Stat. 1979, ch. 30, par. 37b), and as the land was being used for school purposes in 1959 when the Jacqmains transferred their interest in the school property to the plaintiffs, the trial court correctly ruled that the plaintiffs could not have acquired any interest in that property from the Jacqmains by the deed of October 9, 1959.

Consequently this court must determine whether the plaintiffs could have acquired an interest in the Hutton School grounds from Harry Hutton. The resolution of this issue depends on the construction of the language of the 1941 deed of the Huttons to the school district. As urged by the defendants, and as the trial court found, that deed conveyed a fee simple subject to a condition subsequent, followed by a right of re-entry for condition broken. As argued by the plaintiffs, on the other hand, the deed conveyed a fee simple determinable followed by a possibility of reverter. In either case, the grantor and his heirs retain an interest in the property which may become possessory if the condition is broken. We [*370] emphasize here that although section 1 of "An Act relating to Rights of Entry or Re-entry for breach of condition subsequent and possibilities of reverter" effective July 21, 1947 (Ill. Rev. Stat. 1979, ch. 30, par. 37b) provides that rights of re-entry for condition broken and possibilities of reverter are neither alienable nor devisable, they are inheritable. (Deverick v.

Bline (1949), 404 Ill. 302, 89 N.E.2d 43.) The type of interest held governs the mode of reinvestment with title if reinvestment is to occur. If the grantor had a possibility of reverter, he or his heirs become the owner of the property by operation of law as soon as the condition is broken. If he has a right of re-entry for condition broken, he or his heirs become the owner of the property only after they act to retake the property.

It is alleged, and we must accept, that classes were last held in the Hutton School in 1973. Harry Hutton, sole heir of the grantors, did not act to legally retake the premises but instead conveyed his interest in that land to the plaintiffs in 1977. If Harry Hutton had only a naked right of re-entry for condition broken, then he could not be the owner of that property until he had legally re-entered the land. Since he took no steps for a legal re-entry, he had only a right of re-entry in 1977, and that right cannot be conveyed inter vivos. On the other hand, if Harry Hutton had a possibility of reverter in the property, then he owned the school property as soon as it ceased to be used for school purposes. Therefore, assuming (1) that cessation of classes constitutes "abandonment of school purposes" on the land, (2) that the conveyance from Harry Hutton to the plaintiffs was legally correct, and (3) that the conveyance was not pre-empted by Hutton's disclaimer in favor of the school district, the plaintiffs could have acquired an interest in the Hutton School grounds if Harry Hutton had inherited a possibility of reverter from his parents.

The difference between a fee simple determinable (or determinable fee) and a fee simple subject to a condition subsequent, is solely a matter of judicial interpretation of the words of a grant. (Pfeffer v. Lebanon Land Development Corp. (1977), 46 Ill. App. 3d 186, 360 N.E.2d 1115.) As Blackstone explained, there is a fundamental theoretical difference between a conditional estate, such as a fee simple subject to a condition subsequent, and a limited estate, such as a fee simple determinable.

"A distinction is however made between a condition in deed and a limitation, which Littleton denominates also a condition in law. For when an estate is so expressly confined and limited by the words of it's [sic] creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation: as when land is granted to a man, so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £ 500. and the like. In such case the estate determines as soon as the contingency [*371] happens, (when he ceases to be parson, marries a wife, or has received the £ 500.) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of £ 40. by the grantor, or so that the grantee continues unmarried, or provided he goes to York, etc.) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heir or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate." (Emphasis in original.) 2 W. Blackstone, Commentaries *155.

A fee simple determinable may be thought of as a limited grant, while a fee simple subject to a condition subsequent is an absolute grant to which a condition is appended. In other words, a grantor should give a fee simple determinable if he intends to give property for so long as it is needed for the purposes for which it is given and no longer, but he should employ a fee simple subject to a condition subsequent if he intends to compel compliance with a condition by penalty of a forfeiture. School District No. 6 v. Russell (1964), 156 Colo. 75, 396 P.2d 929.

Following Blackstone's examples, the Huttons would have created a fee simple determinable if they had allowed the school district to retain the property so long as or while it

was used for school purposes, or until it ceased to be so used. Similarly, a fee simple subject to a condition subsequent would have arisen had the Huttons given the land upon condition that or provided that it be used for school purposes. In the 1941 deed, though the Huttons gave the land "to be used for school purpose only, otherwise to revert to Grantors herein," no words of temporal limitation, or terms of express condition, were used in the grant.

The plaintiffs argue that the word "only" should be construed as a limitation rather than a condition. The defendants respond that where ambiguous language is used in a deed, the courts of Illinois have expressed a constructional preference for a fee simple subject to a condition subsequent. (Storke v. Penn Mutual Life Insurance Co. (1945), 390 Ill. 619, 61 N.E.2d 552.) Both sides refer us to cases involving deeds which contain language analogous to the 1941 grant in this case.

We believe that a close analysis of the wording of the original grant shows that the grantors intended to create a fee simple determinable followed by a possibility of reverter. Here, the use of the word "only" immediately following the grant "for school purpose" demonstrates that the Huttons wanted to give the land to the school district only as long as it was needed and no longer. The language "this land to be used for school purpose only" is an example of a grant which contains a limitation within [*372] the granting clause. It suggests a limited grant, rather than a full grant subject to a condition, and thus, both theoretically and linguistically, gives rise to a fee simple determinable.

The second relevant clause furnishes plaintiffs' position with additional support. It cannot be argued that the phrase "otherwise to revert to grantors herein" is inconsistent with a fee simple subject to a condition subsequent. Nor does the word "revert" automatically create a possibility of reverter. But, in combination with the preceding phrase, the provisions by which possession is returned to the grantors seem to trigger a mandatory return rather than a permissive

return because it is not stated that the grantor "may" re-enter the land. See City of Urbana v. Solo Cup Co. (1979), 66 Ill. App. 3d 45, 383 N.E.2d 262.

The terms used in the 1941 deed, although imprecise, were designed to allow the property to be used for a single purpose, namely, for "school purpose." The Huttons intended to have the land back if it were ever used otherwise. Upon a grant of exclusive use followed by an express provision for reverter when that use ceases, courts and commentators have agreed that a fee simple determinable, rather than a fee simple subject to a condition subsequent, is created. (1 Simes & Smith, The Law of Future Interests § 286, at 344 n.58 (2d ed. 1956).) Our own research has uncovered cases from other jurisdictions and sources in which language very similar to that in the Hutton deed has been held to create a fee simple determinable:

"[A conveyance] 'for the use, intent and purpose of a site for a School House * * * [and] whenever the said School District removes the School House from said tract of land or whenever said School House ceases to be used as the Public School House * * * then the said Trust shall cease and determine and the said land shall revert to [the grantor and his heirs.]'" (Consolidated School District v. Walter (1954), 243 Minn. 159, 160, 66 N.W.2d 881, 882.)

"'[I]t being absolutely understood that when said land ceases to be used for school purposes it is to revert to the above grantor, his heirs.'" (United States v. 1119.15 Acres of Land (E.D. Ill. 1942), 44 F. Supp. 449.)

"'That I, S.S. Gray (Widower), for and in consideration of the sum of Donation to Wheeler School District to be used by said Wheeler Special School District for school and church purposes and to revert to me should school and church be discontinued or moved.'" (Williams v. Kirby School District No. 32 (1944), 207 Ark. 458, 461, 181 S.W.2d 488, 490.)

"It is understood and agreed that if the above described land is abandoned by the said second parties and not used for school purposes then the above described land reverts to

the party of the [*373] first part." (School District No. 6 v. Russell (1964), 156 Colo. 75, 76, 396 P.2d 929, 930.)

"[T]o B and C [trustees of a school district] and their heirs and successors for school purposes and to revert to the grantor when it ceases to be so used." Restatement of Property § 44, comment l, illustration 17V (1936).

Thus, authority from this State and others indicates that the grant in the Hutton deed did in fact create a fee simple determinable. We are not persuaded by the cases cited by the defendants for the terms of conveyance in those cases distinguish them from the facts presented here.

In Board of Education v. Trustees of the First Baptist Church (1872), 63 Ill. 204, the deed provided that the property was to be used for church purposes only, but when it ceased to be so used, the trustees were to pay the grantor $ 200, and the grantees would then have an absolute title. This is certainly no authority for this case because no interest in the land beyond the receipt of $ 200 was created in the grantor.

The deed in Sherman v. Town of Jefferson (1916), 274 Ill. 294, 295-96, 113 N.E. 624, 625, stated,

"'This conveyance is made, understood and agreed by and between the parties hereto upon the express condition that the premises conveyed shall be occupied, used and enjoyed for town purposes only, and upon ceasing to be so used and enjoyed by the said party of the second part, in whole or in any part thereof, the conveyance above becomes and remains absolutely void and of no longer force, effect or obligation as against the said party of the first part, his heirs and assigns.'"

This conveyance may be distinguished from the Hutton deed because the reversion clause in Sherman provided that the grant would, upon breach of condition, be void only against the grantor. This unusual language is merely another way to state that the grantee may retain possession until the grantor re-enters the property.

The estate created in Latham v. Illinois Central R.R. Co. (1912), 253 Ill. 93, 97 N.E. 254, was held to be a fee simple

subject to a condition subsequent. Land was conveyed to a railroad in return for the railroad's agreement to erect and maintain a passenger depot and a freight depot on the premises. The deed was made to the grantee, "'their successors and assigns forever, for the uses and purposes hereinafter mentioned, and for none other.'" (253 Ill. 93, 96.) Those purposes were limited to "'railroad purposes only.'" (253 Ill. 93, 96.) The deed provided "that in case of non-user of said premises so conveyed for the uses and purposes aforesaid, that then and in that case the title to said premises shall revert back to [the grantors], their heirs, executors, administrators and assigns.'" (253 Ill. 93, 96-97.) The property was granted to the railroad to have and hold [*374] forever, "'subject, nevertheless, to all the conditions, covenants, agreements and limitations in this deed expressed.'" (253 Ill. 93, 97.) The estate in Latham may be distinguished from that created here in that the former was a grant "forever" which was subjected to certain use restrictions while the Hutton deed gave the property to the school district only as long as it could use it.

In Northwestern University v. Wesley Memorial Hospital (1919), 290 Ill. 205, 207, 125 N.E. 13, a conveyance was "made upon the express condition that said Wesley Hospital, the grantee herein, shall erect a hospital building on said lot * * * and that on the failure of said Wesley Hospital to carry out these conditions the title shall revert to Northwestern University." This language cannot be interpreted as creating anything but a fee simple subject to a condition subsequent, and the court so held.

The defendants also direct our attention to the case of McElvain v. Dorris (1921), 298 Ill. 377, 131 N.E. 608. There, land was sold subject to the following condition: "This tract of land is to be used for mill purposes, and if not used for mill purposes the title reverts back to the former owner." (298 Ill. 377, 378.) When the mill was abandoned, the heirs of the grantor brought suit in ejectment and were successful. The Supreme Court of Illinois did not mention

the possibility that the quoted words could have created a fee simple determinable but instead stated,

"Annexed to the grant there was a condition subsequent, by a breach of which there would be a right of re-entry by the grantor or her heirs at law. [Citations.] A breach of the condition in such a case does not, of itself, determine the estate, but an entry, or some act equivalent thereto, is necessary to revest the estate, and bringing a suit in ejectment is equivalent to such re-entry." (298 Ill. 377, 379.)

It is urged by the defendants that McElvain v. Dorris stands for the proposition that the quoted language in the deed creates a fee simple subject to a condition subsequent. We must agree with the defendants that the grant in McElvain is strikingly similar to that in this case. However, the opinion in McElvain is ambiguous in several respects. First, that portion of the opinion which states that "Annexed to the grant there was a condition subsequent * * *" may refer to the provision quoted above, or it may refer to another provision not reproduced in that opinion. Second, even if the court's reference is to the quoted language, the holding may reflect only the court's acceptance of the parties' construction of the grant. (A similar procedure was followed in Trustees of Schools v. Batdorf (1955), 6 Ill. 2d 486, 130 N.E.2d 111, as noted by defendants.) After all, as an action in ejectment was brought in McElvain, the difference between a fee simple determinable and a fee simple subject to a condition subsequent would have no practical effect and the court did not discuss it.

[*375] To the extent that McElvain holds that the quoted language establishes a fee simple subject to a condition subsequent, it is contrary to the weight of Illinois and American authority. A more appropriate case with which to resolve the problem presented here is North v. Graham (1908), 235 Ill. 178, 85 N.E. 267. Land was conveyed to trustees of a church under a deed which stated that "said tract of land above described to revert to the party of the first part whenever it ceases to be used or occupied for a

meeting house or church." Following an extended discussion of determinable fees, the court concluded that such an estate is legal in Illinois and that the language of the deed did in fact create that estate.

North v. Graham, like this case, falls somewhere between those cases in which appears the classic language used to create a fee simple determinable and that used to create a fee simple subject to a condition subsequent. The language used classically to create a fee simple determinable is "so long as it is used for * * *," as may be seen in Blackert v. Dugosh (1957), 12 Ill. 2d 171, 145 N.E.2d 606; Carlsen v. Carter (1941), 377 Ill. 484, 36 N.E.2d 740; Pure Oil Co. v. Miller-McFarland Drilling Co. (1941), 376 Ill. 486, 34 N.E.2d 854; Regular Predestinarian Baptist Church v. Parker (1940), 373 Ill. 607, 27 N.E.2d 522; Dees v. Cheuvronts (1909), 240 Ill. 486, 88 N.E. 1011; Danaj v. Anest (1979), 77 Ill. App. 3d 533, 396 N.E.2d 95.

The language used typically to create a fee simple subject to a condition subsequent is, variously, "'provided it be used for * * *'" (O'Donnell v. Robson (1909), 239 Ill. 634, 636, 88 N.E. 175); "'that in case of breach in these covenants * * * said premises shall immediately revert * * *'" (Storke v. Penn Mutual Life Insurance Co. (1945), 390 Ill. 619, 621, 61 N.E.2d 552); "'and if this agreement is broken, said land shall revert * * *'" (Wakefield v. VanTassel (1903), 202 Ill. 41, 42, 66 N.E. 830, writ of error dismissed (1904), 192 U.S. 601, 48 L. Ed. 583, 24 S. Ct. 850); "'[i]n the event the [grantee] shall fail to perform * * * all the above requirements and conditions, all the lands * * * shall revert * * *'" (Gray v. Chicago, Milwaukee & St. Paul Ry. Co. (1901), 189 Ill. 400, 404, 59 N.E. 950).

Although the word "whenever" is used in the North v. Graham deed, it is not found in a granting clause, but in a reverter clause. The court found this slightly unorthodox construction sufficient to create a fee simple determinable, and we believe that the word "only" placed in the granting clause of the Hutton deed brings this case under the rule of North v. Graham.

We hold, therefore, that the 1941 deed from W. E. and Jennie Hutton to the Trustees of School District No. 1 created a fee simple determinable in the trustees followed by a possibility of reverter in the Huttons and their heirs. Accordingly, the trial court erred in dismissing [*376] plaintiffs' third amended complaint which followed its holding that the plaintiffs could not have acquired any interest in the Hutton School property from Harry Hutton. We must therefore reverse and remand this cause to the trial court for further proceedings.

We refrain from deciding the following issues: (1) whether the 1977 conveyance from Harry Hutton was legally sufficient to pass his interest in the school property to the plaintiffs, (2) whether Harry Hutton effectively disclaimed his interest in the property in favor of the defendants by virtue of his 1977 disclaimer, and (3) whether the defendants have ceased to use the Hutton School grounds for "school purposes."

¿Qué consecuencia práctica para este caso conlleva el que se haya constituido un feudo determinable o un feudo sencillo sujeto a una condición resolutoria?

KACZYNSKI v. LINDAHL. Court of Appeals of Michigan 5 Mich. App. 377; 146 N.W.2d 675, December 8, 1966, Decided

OPINION BY: KAVANAGH

[*379] This was an action to remove a condition which had been inserted by defendants-appellees in a deed to land subsequently acquired by plaintiffs-appellants.

The restriction contained in appellants' deed provides for a reversion to the grantor or his heirs if the grantee, his heirs or assigns, keep for sale or permit liquor to be sold on the premises or use the premises for a dance hall or tavern and thus is a condition subsequent.

Appellants bought the property in 1960 and were aware of the restriction. They own and operate a gasoline station, grocery store, restaurant and motel at an intersection of two

highways in a sparsely populated resort area. In May of 1965, the Michigan Liquor Control Commission issued a "take-out" license to appellants who have thus far made no attempt to sell.

At the hearing, appellee stated that all land sold by him in the past 15 years contained the same restriction with the exception of one piece of property in Iron City itself. Appellee stated that he inserted the restriction in the conveyances due to his personal and religious conviction against the sale of liquor as well as to enhance the salability of the retained land which he wanted to keep residential in nature.

The trial court upheld the restrictions as valid and denied the relief sought by plaintiffs who now bring this appeal.

Appellants first urge upon us that the restriction in their deed is invalid for two reasons, the first [*380] being appellees' purpose for inserting the restriction and the second that it is an unreasonable restraint upon their use of the premises.

We find this contention to be without merit. In addition to their personal beliefs, the appellees herein inserted the restriction with a view towards increasing the aesthetic and salable value of the remaining property. Such purposes are not illegal and are not reasons for declaring a restriction invalid. Nor is the restriction an unreasonable restraint on the use of the premises. There is nothing unreasonable in appellees' disposing of their property for such purposes and indeed it is their right so to do. See Chippewa Lumber Co. v. Tremper (1889), 75 Mich 36 (4 LRA 373, 13 Am St Rep 420); and Jenks v. Pawlowski (1893), 98 Mich 110 (22 LRA 863, 39 Am St Rep 522).

By statute, CL 1948, § 554.46 (Stat Ann 1957 Rev § 26.46), courts may wholly disregard a condition annexed to a grant of land that is merely nominal or that evinces no intention of actual or substantial benefit to the party in whose favor it is to be performed. A restriction against the sale of liquor is not such. See Smith v. Barrie (1885), 56

Mich 314 (56 Am Rep 391); and Watrous v. Allen (1885), 57 Mich 362 (58 Am Rep 363).

A careful reading of the authorities cited us by appellants fails to convince us that their position is tenable. In the case of Grant v. Craigie (1940), 292 Mich 658, the court did not refuse to enforce a restriction in a deed, but rather, refused to imply the existence of a restriction in the deed. However, the court clearly stated at pp 661, 662 that,

"It is universally accepted that a grantor in conveying property may impose restrictions as to the use thereof. The only limitations on this right are that it shall be exercised reasonably, with due regard [*381] to public policy, and without creating any unlawful restraint of trade. A covenant not to use premises for the purpose of vending spirituous liquors is not contrary to public policy and is valid and enforcible."

Appellant last contends that the sale of beer and wine on the premises for consumption off the premises would not violate the restriction. We do not agree. The language of the condition is clear. The condition is "against the sale of intoxicating liquors" and provides for a reversion if the appellants "shall keep for sale or permit liquor to be sold."

The Michigan liquor control act, CLS 1961, § 436.2 (Stat Ann 1957 Rev § 18.972), defines beer and wine as classifications of alcoholic liquor and this has been held to be "intoxicating." See People v. McCoy (1922), 217 Mich 575. In answer to this very contention which appellant now raises, the court in Grandmont Improvement Association v. Liquor Control Commission (1940), 294 Mich 541 stated (pp 544, 545):

"The language used in creating the restriction was plain, simple and unambiguous. To adopt appellant's argument would result in an unwarranted modification of the language used."

We therefore affirm the decision of the trial court. Appellees may tax their costs.

Ella FORSGREN, Plaintiff and Respondent, v. James H. SOLLIE and Anne Marie Brown Sollie, and Hal A. LaFleur and Marjorie L. Archibald LaFleur aka Marjorie L. Archibald, Defendants and Appellants. Supreme Court of Utah 659 P.2d 1068, February 28, 1983, Filed

OPINION BY: ALMON

[*104] This is an appeal from a summary judgment, rendered in a declaratory judgment action, in which certain conditions annexed to a devise of real property were held void.

Wynell McCreary and Wilson Ashley McCreary were married from 1946 until their divorce on March 24, 1975. Two children were born during their marriage, namely, Lynn Ashley McCreary, a son, and Mary Elizabeth M. Turner, a daughter.

On November 5, 1977, Wilson died testate. His will was admitted to probate in Conecuh County, Alabama, with his daughter Mary serving as administratrix. The disputed section of the will provided as follows:

"I will and devise unto my two children, Lynn Ashley McCreary and Mary Elizabeth McCreary Abbott [now Mary Elizabeth M. Turner], jointly, share and share alike equally, all of my real estate owned by me at the time of my death, or to which I may be entitled, absolutely and in fee simple. TO HAVE AND TO HOLD unto my said two children, jointly, share and share alike, equally, absolutely and in fee simple, forever.

"PROVIDED, HOWEVER, that the above devise is made subject to the following conditions: If at any time after my death my said two children, or either of them, should attempt to convey any part of my said lands to their mother (my ex-wife), or should they, or either of them, allow to her the right of possession or use or benefit of said lands, or any part thereof, then and in any of said events, the devise herein made to said [*105] child or children shall be and become void, and the interest herein devised unto said child or children shall vest in my two sisters, Carolyn McCreary

Pritchett and Wilsie McCreary Gillespie, jointly, share and share alike, absolutely and in fee simple."

On April 23, 1979, Lynn McCreary died intestate, leaving as his only heirs at law his mother, Wynell, and his sister, Mary, who was also appointed as administratrix of his estate.

On November 6, 1979, an action for declaratory judgment was filed on behalf of both Mary, as administratrix of the estates of her father and brother, and Wynell, individually, against Wilson's sisters, Carolyn McCreary Pritchett and Wilsie McCreary Gillespie. The plaintiffs sought a determination of the rights of the parties under the second section of Wilson's will. The complaint stated that:

"5. A juticiable [sic] controversy exist [sic] between the parties in that the defendants are purported to claim an interest in the estate of Lynn Ashley McCreary by virtue of the provision of the will of Wilson Ashley McCreary providing for divestiture of title. As Lynn Ashley McCreary died intestate, with his only heirs at law being his sister, Elizabeth M. Turner, and his mother, Wynell McCreary, [the latter] would be entitled to an undivided one half interest in the estate of Lynn Ashley McCreary, and as such would be entitled to an undivided one fourth interest in the estate of Wilson Ashley McCreary under the laws of descent and distribution of the State of Alabama. However, because of the said provision referred to in said will the plaintiff Elizabeth M. Turner, as representative of the estate of Wilson Ashley McCreary and Lynn Ashley McCreary, is unable to ascertain how to disburse any settlements from the estates of Wilson Ashley McCreary and Lynn Ashley McCreary. Also, because of the provision referred to above in said will, there is a cloud on the title to the real estate owned by Wilson Ashley McCreary at the time of his death, and Elizabeth M. Turner is unable to sell or mortgage said property, as an individual or as the representative of said estates, because of the cloud on the title to said property."

Motions for summary judgment were filed by both the plaintiffs and defendants. The trial court granted the plaintiffs' motion, finding that the second paragraph of the second section of Wilson's will (hereinafter referred to as the divesting provision) was void as a matter of law.

We quote in part from the trial court's judgment:

"8. The plaintiffs contend that said provision is invalid as being an absolute restraint on alienation. This Court agrees with this contention of the plaintiffs. Should this provision be held valid, no one could purchase said property or take a mortgage on said property from Mary Elizabeth M. Turner or Wynell McCreary with the certain knowledge that the provision had not been breached. With the provision in effect, the title to said lands is completely unmarketable because the title to the property would be unsettled for as long as Wynell McCreary lived. If the provision is valid, no judicial action could ever finally settle the title as this case, if tried on the present facts, would not be res judicata as to any later acts which the defendants might claim breached the will. The law in Alabama is that once a fee simple estate has been devised, an absolute restraint on the power of alienation is void as against public policy. Libby v. Winston, 207 Ala. 681, 93 So. 631 (1922). Because of the said provision, no intending purchaser or mortgagee from Mrs. Turner or Mrs. McCreary could know with certainty that the provision had not been breached in some manner or would [not] subsequently be breached in some manner, thus preventing said intending purchaser or mortgagee from receiving a good and valid fee simple title. Therefore, the said provision must be held null and void. This Court has found no Alabama cases on this point, but the Minnesota case of Morse v. [*106] Blood , 68 Minn. 442, 71 N.W. 682 (1892) concerned a provision in a will that was very similar to the provision in the McCreary will. The testator in the Minnesota case provided that the devisee should 'in no case give or bequeath one cent of said estate to any member of my family, or to any relation of her own'. In Morse, the Court held as follows:

"'If the condition is good, any purchaser from plaintiff [of any] parcel takes it at the peril of subsequent forfeiture by any act done by plaintiff after the purchase amounting to a breach of the condition. Thus, plaintiff might give one of her relatives or one of the testator's family a meal of victuals out of the property left to her by her deceased husband, and it would forfeit the whole estate so devised to her, as well as that part of it which she had conveyed away to strangers as that part which she still held.'

"Should Mary Elizabeth M. Turner convey to a stranger her interest in all of the land with the exception of one acre, and subsequent to that conveyance she conveyed to her mother the one remaining acre, or allowed to her the right of possession or use or benefit of the one acre, then the conveyance to the stranger would fail if the provision is valid. This would be so even though there had been no breach of the provision at the time of the conveyance to the stranger. The Court further finds that this restraint clause of the will could be interpreted in such a manner that, if Lynn A. McCreary had, during his lifetime, and in spite of the strenuous objection of his sister, Mary Elizabeth M. Turner, conveyed one acre of said lands to his mother and placed her in possession of same, such action on his part would have divested him and his protesting sister of this inheritance as well and voided and/or forfeited all prior conveyances by either of them to strangers. Therefore, the Court finds that these provisions of said will create an absolute restraint of alienation.

"9. This Court further finds that the provision providing for forfeiture is null and void because of vagueness and uncertainty. The acts that would constitute 'the right of possession or use or benefit of said lands' are uncertain. This phrase has no definite legal construction or interpretation and can mean many things to many people. Title to real estate should not be subject to forfeiture on such uncertain, indefinite and vague conditions.

"WHEREFORE, the premises considered, it is ORDERED and ADJUDGED as follows:

"1. That the second paragraph of paragraph SECOND of the Last Will and Testament of Wilson Ashley McCreary, deceased, dated April 8, 1975, is held to be null and void and of no effect, and any interest present, future, contingent or otherwise allegedly created by said paragraph SECOND in said will in favor of Carolyn McCreary Pritchett or Wilsie McCreary Gillespie is likewise cancelled and held for naught.

"2. That Lynn Ashley McCreary and Mary Elizabeth McCreary Abbott took title to all real estate, owned by Wilson Ashley McCreary at the time of his death, or to which he was entitled, in fee simple absolute, without restriction upon said fee simple estate.

"3. That Wynell McCreary and Mary Elizabeth M. Turner inherited an undivided one-half (1/2) interest each in the estate of Lynn Ashley McCreary, deceased, according to the laws of descent and distribution in effect in Alabama at the time of his death. . . ."

We initially find that the trial court improperly designated the divesting provision as an "absolute" restraint on alienation. We associate the modifier "absolute" with a provision which, without qualification, undertakes to deny the devisee of a legal estate in fee simple the power to alienate his acquired estate, or which, without qualification, undertakes to render such an estate forfeitable on any attempted alienation. See, 6 R. Powell and P. Rohan, The Law of Real Property, §§ 839, 840 (1981).

[*107] The divesting provision is qualified so that it does not completely prohibit the legal power to alienate. Only the mother, Wynell, is excluded as a permissible alienee: "If at any time after my death my said two children, or either of them, should attempt to convey any part of my said lands to their mother (my ex-wife). . . ." In addition, the divesting provision poses prohibitions against the mother's possession and use of the land which only incidentally restrain alienation. We conclude that these portions of the divesting provision created respectively a "direct" and an "indirect" restraint on alienation.

"A direct restraint on alienation is a provision in a deed, will, contract or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation. . . . An indirect restraint on alienation, arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability. Indirect restraints on alienation arise on the creation of future interests and of trusts."

L. Simes and A. Smith, The Law of Future Interests, § 1112 (2d ed. 1956) (hereinafter cited as Simes).

The direct restraint herein is the type which purports to penalize the exercise of the power of alienation. Qualified so as to only prohibit alienation to the mother, this restraint was exerted in the form of an estate in fee simple defeasible with an executory limitation. Should the children attempt to alienate to their mother, an executory interest held by Wilson's sisters will vest in derogation of the estate devised to said child or children.

"Alabama has long recognized the existence and viability of the estate in fee simple defeasible. McRee's Adm'rs v. Means, 34 Ala. 349 (1859); Flinn v. Davis, 18 Ala. 132 (1850). It has been defined as '"an estate in fee simple which is subject to a special limitation, a condition subsequent, an executory limitation, or a combination of such restrictions."' Brashier v. Burkett, 350 So. 2d 309, 313 (Ala. 1977). Restatement, Property, § 16. An executory interest or limitation is a nonvested interest in a transferee which is so limited that it will vest on the happening of a condition . . . or on the occurrence of an event which is certain to take place, and which vests in derogation of a vested interest. Simes, Handbook of the Law of Future Interests, § 12, p. 25 (2d ed. 1966). It has also been defined as any future interest which is created in a person other than the transferor [and which] is not a remainder. Bergin

and Haskell, Preface to Estates in Land and Future Interests, Ch. 3, p. 83 (1966).

"Such interests are denominated executory interests rather than contingent remainders because there can be no contingent remainders after a fee simple. Simes on Future Interests, supra, § 12."

Bradley v. Eskridge, 361 So. 2d 100, 101 (Ala. 1978).

The indirect restraint on alienation arose out of Wilson's attempt to discourage his children from allowing their mother to possess, use, or benefit from the devised lands. Again, the fee simple defeasible with an executory interest was the device employed: ". . . should they, or either of them, allow to her the right of possession or use or benefit of said lands, or any part thereof . . . the devise . . . shall be and become void, and the interest . . . shall vest in my two sisters. . . ." Undoubtedly, this provision was not aimed at restraining the childrens' ability to alienate. In practice, however, few persons would be interested in buying or taking a mortgage on the land without first obtaining a conveyance of the future interest held by Wilson's sisters. Alienability is indirectly restrained because the possibility of forfeiture impairs the marketability of the property.

Having so classified these restraints on alienation, we turn now to the trial court's decision that the restraints rendered the divesting provision void. Simes, at § 1148, addresses generally the type of direct restraint involved here:

[*108] "A condition subsequent, special limitation, or executory limitation to the effect that a fee simple shall be forfeited or shall terminate on alienation is generally held void. This would appear to be true though the condition or limitation is attached to an otherwise defeasible fee simple. Here, however, we find a somewhat stronger minority view than in the case of directions not to alienate the fee. An Alabama decision sustains a condition subsequent to the effect that conveyance was permissible only with the consent of the grantors or their legal representatives." (Emphasis added; footnotes omitted.)

The Alabama decision cited in Simes is Libby v. Winston, 207 Ala. 681, 93 So. 631 (1922). In Libby, this Court sustained a direct restraint on alienation because it was attempted by means of a defeasible estate.

Desiring to keep with the rationale of Libby, supra, and authorities cited therein, we hold that the direct restraint upon the childrens' power to alienate to their mother was "validly interposed" by means of a defeasible estate. We quote from Libby, supra, 207 Ala. at 683-84, as follows:

"The rule — stated in Hill v. Gray, 160 Ala. 273, 276, 49 South. 676, and in Graves v. Wheeler, 180 Ala. 412, 416, 61 South. 341 — which pronounces void clauses in deeds or devises in absolute, not partial, restraint of the power of alienation of land conveyed or devised, is predicated of a grant or devise in fee simple. The essence of the stated rule is that the attempted restraint upon the power of alienation is inconsistent with the grant, the power to sell or lease being an inseparable incident of an estate in unqualified fee; and to allow such restraint would offend public policy. Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61, 73, et seq., contains a discriminative and instructive treatment of the subject. . . . The application of the rule to the instrument under consideration depends upon its character as a conveyance. If it is not a grant in fee, the rule of Hill v. Gray, supra, is inapplicable. The conclusion upon this question turns, of course, upon the character of the grant, the instrument's construction and its effect in that aspect. . . . [Emphasis added.]

"This grantor, Winston, through the use of the phrase, in the granting clause 'hath upon the conditions hereinafter mentioned,' and through the further confirmatory phrase, as expressive of the grantee's covenant and agreement, that 'this sale and conveyance shall hold good and valid only upon the compliance by the grantee and 'her lawful representatives with the following conditions' conveyed to the grantee a conditional fee only, a defeasible estate, subject to divestiture upon breach of conditions. Carter v. Chaudron, 21 Ala. 72, 89, 90; Hitt Lbr. Co. v. Cullman

Coal Co., 200 Ala. 415, 416, 417, 76 South. 347. The grantor's intent to convey a defeasible estate only is clear and unequivocal. His language leaves no doubt of his purpose in that respect. . . .

"Consistent with the observations of Christiancy, J., in Mandlebaum v. McDonell, 29 Mich. 78, 88, 18 Am. Rep. 61, 68, that many restrictions or qualifications upon the rights of devisees or grantees may be validly interposed 'by making the estate itself dependent upon such condition, the annotation to Latimer v. Waddell, 3 L.R.A. (N.S.) pp. 676, 677, contains many illustrations of this means by which offense to the rule against suspension of the power of alienation has been held to be avoided. . . .

"The instrument not being a grant in unqualified fee, but a grant of an estate defeasible upon breach of condition subsequent defined therein, the condition in restraint of alienation is not offensive to [*109] the rule against the suspension of the power of alienation stated in Hill v. Gray, 160 Ala. 273, 276, 49 South. 676. . . ."

Beginning with an excerpt from Mandlebaum v. McDonell, supra, we quote from the annotation to Latimer v. Waddell, 3 L.R.A. (N.S.) 676:

"'Nor does the question involve an inquiry how far a somewhat similar object might have been accomplished by making this estate in fee in these devisees defeasible, upon the condition of their executing, before a certain period, a conveyance, . . . the property being limited over to another, or to be forfeited and revert on breach of the condition. In these cases there would be some party besides these devisees interested in the observance of the condition, with a right to take advantage of the breach, viz., the heirs of the devisor or the person to whom the property was limited over. It is quite possible that many restrictions or qualifications upon the right of devisees or grantees may be made effectual by making the estate itself dependent upon such condition, to which it could not be subjected if the estate given is absolute.' . . . [Emphasis added.]

"It is said, arguendo, in Conger v. Lowe, 124 Ind. 368, 9 L.R.A. 165, 24 N.E. 889, that even estates in fee simple may be subjected to valid limitations over, upon condition that the grantee or devisee convey it; that the foundation of the power to restrain alienation rests upon the fact that there remains, or is vested, in someone, a valid remainder or reversion, who is entitled to take advantage of the prohibited act.

"After a review of analogous English decisions, the court, in Fowlkes v. Wagoner (Tenn. Ch. App.) 46 S.W. 586, draws from them the following conclusion: That, in order to make a restriction upon alienation, even for a limited time, good, there must be a provision for the cessor of the estate upon violation of the restricting clause; and that this may be done by annexing a clause that, upon breach of the condition restraining alienation, the grantor or his heirs at law may enter, or that the estate will cease, which is another form of the same thing; and that, in default of this appearing clearly, the restriction will be void for repugnancy.

"Then, after reviewing a number of the leading American decisions, the same court, in the same case, declares that the conflict among the American cases is more in terms than in substance; that the vital point in all of them is that, in order to make the provision undertaking to create a partial restraint upon alienation legal, there must be, in some form, a provision for cessor upon violation of the restraining clause; that this may be done either by a condition annexed to the estate, or by a conditional limitation; that, under the form of a condition annexed, or breach thereof the grantor or his heirs may enter; that, under the form of a conditional limitation, the same result may occur, or the estate may go over according to the terms of the limitation; and that the confusion in the American authorities has arisen from a failure to note the two forms in which the restriction may appear. 3 . . . [Emphasis added.]

"A clause restraining a devisee from selling the lands devised before she became forty years of age, and giving a remainder over in case of her death under forty, was upheld upon the ground that a conditional fee was thereby created, in Matlock v. Lock, (Ind. App.) [38 Ind. App. 281] 73 N.E. 171.

"It is fully admitted in Anderson v. Cary, 36 Ohio St. 506, 38 Am. Rep. 602, that a grantor may restrain or limit the enjoyment of land granted by trusts, conditions, or covenants, or transfer an estate therein, less than the whole; but the court makes a distinction between such conveyances and an attempt to convey a [*110] fee simple and then take from it its inherent alienable quality by a clause restraining its alienation for a limited period."

3 While the estate herein is defeasible by operation of an executory interest, rather than a condition subsequent as in Libby, supra, we find no restrictions in Libby as to the form in which the defeasible estate must appear.

We note that Simes, at § 1151, goes on to specifically discuss the type of direct restraint created here:

"It is uncertain what the courts would hold if the condition were against alienation to one named person. It may be said that in some cases the courts do apparently discriminate as to the degree of restraint of alienability, and that to restrict alienation only as to a small class of persons does not affect the marketability of property greatly. Doubtless that is true. But the great difficulty would be to know where to draw the line. If a condition against alienation to a single person is permissible, then why not allow it as to two persons, or a dozen persons, or as to all the members of a given race? And, if that were permitted, it would be but a step farther to recognize a condition restraining alienation as to a class consisting of all members of the human race except X. Obviously, this last would be bad. Yet if the line be drawn at any intermediate point, it would seem to be more or less arbitrary." (Footnote omitted.)

Taking heed of this observation, we will rely upon the authorities cited above and forego any attempt at

conditioning the validity of the direct restraint upon the fact that only Wynell McCreary was excluded as a permissible alienee.

As for the indirect restraint on alienation arising from this defeasible estate, the rule against perpetuities serves as the restricting rule.

"Although the rules relating to direct and indirect restraints have a common objective — to keep land freely alienable — they do not work in quite the same way. Indirect restraints are curbed by the rule against perpetuities and rules analogous thereto. In general, this rule lays down a period within which an interest must vest in order to be valid. Since it is the creation of the future interests which gives rise to the inalienability, the total remedy would be to prevent all future interests. Such a remedy, however, is too drastic and would eliminate the freedom of disposition now possible. The rule is thus a partial remedy, preventing only the creation of interests which are too remote, and thus tolerating some degree of practical inalienability arising from the existence of valid future interests. . . .

"American law appears to single out two types of indirect restraints for special regulation: That which is involved in the contingent or executory future interest and that which is involved in the indestructible private trust. At least in so far as the future interest is concerned, the restricting rule is everywhere known as the rule against perpetuities. And whether the indestructible trust or the future interest is involved, the restraint would appear to be void unless it is certain to be removed within a life or lives in being and twenty-one years beyond."

Simes, at §§ 1116, 1202 (footnotes omitted; emphasis added).

In this case, however, we need not consider whether the indirect restraint will be removed within the period specified by the rule against perpetuities. We find that the wording of the conditions which indirectly restrain alienation — forfeiture of ownership should the children

allow to their mother "the right of possession or use or benefit" of the land — is too vague to be enforced.

Perhaps the trial court said it best: "the acts that would constitute 'the right of possession or use or benefit of said lands' are uncertain. This phrase has no definite legal construction or interpretation and can mean many things to many people." The rule is settled that an estate in fee simple cannot be made defeasible upon such vague and uncertain conditions.

"Where the estate or interest is created in one clause of a will in clear and decisive terms, that interest cannot be taken away or diminished by raising a doubt upon the extent and meaning of subsequent clauses, nor by inference therefrom, nor by any subsequent words that [*111] are not as clear and decisive as the words of the clause giving the interest or estate. Austin v. Pepperman, 278 Ala. 551, 179 So. 2d 299 (1965); Sewell v. Byars, 271 Ala. 148, 122 So. 2d 398 (1960)."

Arguably, the other condition within the divesting provision — forfeiture of ownership should the children "attempt to convey" to their mother — is also uncertain. Conceivably, activity which is only preliminary to an actual conveyance of title (negotiation, making an offer, contacting an attorney, etc.) could be construed as an "attempt." Our view is that "attempt to convey" is not indefinite in meaning. Rather, it is the language which most accurately describes an actual transfer of title. Under the operation of the divesting provision, any conveyance of title by the children to their mother would be ineffective. Such a transfer could never be more than an "attempt."

In conclusion, then, we hold that the divesting provision does not improperly restrain alienation. At the same time, we hold that the wording of the provision is vague and unenforceable insofar as the condition against the mother's "right of possession or use or benefit."

The remaining condition — that the children not convey to their mother — is definite and enforceable, but has not yet occurred. The sisters claim that this condition has been

fulfilled because the son attempted to convey the property to his mother by dying intestate. The trial court adequately answered this contention as a matter of law: "As Lynn A. McCreary has no control over his own death or over the laws of intestate succession of the State of Alabama, this Court finds no merit in such argument." They also argue that by adding her mother's name to the suit, Mary is attempting to convey the property to her. The trial court also answered this contention by stating that "The filing of a declaratory judgment action to determine these rights cannot be found to be a breach of said provision."

Upon Wilson's death, his two children each received half of an estate in fee simple defeasible in all of his real property. Because the children have never violated the condition against conveyance, the son, Lynn, died possessed of his undivided one-half interest in the land. His sister, Mary, and his mother, Wynell, then inherited equal shares of this interest under the laws of descent and distribution.

Thus, the summary judgment in favor of plaintiffs-appellees is due to be affirmed in part and reversed in part, and the cause remanded.

Affirmed in part, reversed in part, and remanded.

Ella FORSGREN, Plaintiff and Respondent, v. James H. SOLLIE and Anne Marie Brown Sollie, and Hal A. LaFleur and Marjorie L. Archibald LaFleur aka Marjorie L. Archibald, Defendants and Appellants. Supreme Court of Utah 659 P.2d 1068, February 28, 1983, Filed

OPINION BY: OAKS

[*1068] This appeal concerns the effect of a condition in a deed. After a trial, the district court held that the deed created a fee simple subject to a condition subsequent, and that the grantor had reacquired the fee by reentry upon condition unfulfilled. We affirm.

The facts are essentially uncontested. In February, 1960, the plaintiff (grantor) conveyed 1.4 acres of unimproved property to James H. Sollie. This property had 73 feet of frontage on the west side of Washington Boulevard north

of Ogden, and abutted land owned by the grantor on the north and south. The consideration was approximately $1,400, paid in cash. Sollie planned to build a residence on the property, to be used as a church by his small Baptist group until they were able to build a larger building. The warranty deed contained the following provisions:

This property is conveyed on the condition that the grantee will build a partition fence along the South side of the above described property, being the North line of property now owned by the grantor. That he will have the above described property surveyed at his own expense, and that the survey must have been made, and the fence erected before any construction or placement of improvements on said property.

[*1069] This property is conveyed to be used as and for a church or residence purposes only.

Sollie never built the fence, completed the survey, or built anything on the property. He paid no taxes. He left the state sometime in the early 1960s. A portion of the property, the east 71 feet along the frontage, was sold for taxes in May, 1967, and was purchased for and conveyed to the grantor. Shortly thereafter, the grantor reentered the property, which remained unimproved, mowing the weeds annually, doing some fencing, and paying some real estate taxes. (The record is unclear as to the years and the tracts on which the grantor paid taxes.)

In 1972, the defendants LaFleur, who were strangers to the title, purchased the property (except the 71 feet on the frontage) at a tax sale. Thereafter, they paid some of the real estate taxes. In 1978, defendants located Sollie in Georgia. They paid him $1,500 and Sollie and his wife quitclaimed their interest in the property to the defendants LaFleur.

In 1979 and 1980, the grantor excavated and poured concrete for footings for a small building she was constructing on the property. She testified that she dug the footings herself. Observing this, defendants drove a tractor on the property and knocked over the foundations. The

grantor then brought this action to quiet her title to the property.

The district court held that neither party had met the requirements for perfecting title by adverse possession. That decision is not challenged on appeal. As for the chain of title, the court concluded that conditions subsequent for which no time of performance was specified were performable within a reasonable time, failing which the grantor could enforce the right of reentry. Holding that the specified conditions were not performed within a reasonable time and that the grantor had exercised her right of reentry in 1967, the court decreed fee simple ownership in the plaintiff grantor.

On this appeal, defendants rely on the well-settled principles that conditions controlling the use of deeded property are strictly construed against the grantor, and that forfeitures are not favored. E.g., Hawley v. Kafitz, 148 Cal. 393, 83 P. 248 (1905); Bou v. Willits, 61 Cal. App. 32, 214 P. 519 (1923); Rowe v. May, 44 N.M. 264, 267, 101 P.2d 391, 393 (1940); Gange v. Hayes, 193 Or. 51, 61, 237 P.2d 196, 200 (1951). Specifically, defendants argue that this deed could not create a condition subsequent because it contained no words indicating a reversion or forfeiture. Stinson v. Oklahoma Railway, 190 Okla. 624, 126 P.2d 260 (1942).

A fee simple subject to a condition subsequent is an interest in which, upon the occurrence or nonoccurrence of a stated event, the grantor or his successor has the power, at his option, to terminate the estate and reacquire the property. Warren Irrigation Co. v. Brown, 28 Utah 2d 103, 107, 498 P.2d 667, 669-70 (1972); Preas v. Phebus, 2 Utah 2d 229, 234, 272 P.2d 159, 162 (1954); Restatement of Property § 24 (1936). This power of termination is sometimes referred to as a right of reentry, though that terminology is not used in the Restatement. When an estate is conveyed on contingency (condition subsequent or determinable) and no time is specified for the contingency, the law will imply a reasonable time for the event. Salt Lake City v. State, 101

Utah 543, 546-49, 125 P.2d 790, 791-93 (1942), and authorities cited.

[*1070] A deed provision specifying or limiting the use to which the property is to be put, or stating that the property is conveyed in consideration of a stated specification or limitation of use, does not, by itself, create a condition subsequent. E.g., Davis v. St. Joe School District, 225 Ark. 700, 284 S.W.2d 635 (1955); Allen v. Trustees of Great Neck Free Church, 240 A.D. 206, 269 N.Y.S. 341, aff'd mem., 265 N.Y. 570, 193 N.E. 324 (1934); First Presbyterian Church v. Tarr, 63 Ohio App. 286, 26 N.E.2d 597 (1939).

A condition subsequent is normally created by words like "on condition that," "provided that," or phrases of like import, coupled with a provision that if the stated event occurs or does not occur, the grantor "may enter and terminate the estate hereby conveyed" or a phrase of like import. Restatement of Property § 45 comment j (1936). However, the Restatement further states that "the phrase 'upon express condition that' usually indicates an intent to create an estate in fee simple subject to a condition subsequent, even when no express clause for re-entry, termination or reverter accompanies it." Id. at comment 1; also see comment n.

Consistent with the Restatement, there are ample instances where a deed provision using the word "condition" has been interpreted as creating a fee simple subject to a condition subsequent even though there was no express provision for reentry or revesting of the estate. Papst v. Hamilton, 133 Cal. 631, 66 P. 10 (1901); Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896); Watson v. Dalton, 146 Neb. 78, 84, 18 N.W.2d 658, 662-63 (1945). As the court stated in Papst v. Hamilton, supra, all that is necessary is that the language clearly shows the intent of the grantor to make the estate conditional, "and where this is the case, a clause of re-entry is unnecessary." 133 Cal. at 633, 66 P. at 10. We quoted this case with approval in Salt Lake City v. State, 101 Utah at 550-51, 125 P.2d at 793.

In determining whether the language of a deed is sufficient to manifest an intent to create a power of termination in the grantor or his successors, the courts have used four factors:
1. The language of the instrument;
2. The nature of the event specified in the condition and its importance to the grantor;
3. The amount of consideration paid for the transfer in proportion to the full value of the estate in fee; and
4. The existence of facts showing the grantor's intent to benefit the adjacent land by the restriction imposed on the conveyed land.
Restatement of Property § 45 comment p (Supp. 1948).
Applying those factors to the provisions before us, we agree with the district court's conclusion that this deed created a fee simple subject to a condition subsequent. (1) In its express language, the deed conveyed the property "on the condition that . . . ." Although the sentence structure admits of some doubt, in the context of the trial testimony on why the conveyance was made we interpret the language of condition to apply to the provision on use [*1071] "for a church or residence purposes only," as well as to the partition fence and the survey. (2) The condition on use was apparently the motivating cause for the grantor's transfer of this property to Sollie. (3) Sollie paid $1,400 for the 1.4 acres. The record is silent on the full value of this property in fee. (4) The conditions on fencing and surveying were obviously intended to benefit the adjacent property, owned by the grantor, but this cannot be said of the condition on use.
All in all, if the conditions specified here were only those pertaining to fencing and surveying, we would be loath to find a condition subsequent, especially in the absence of an express provision for reentry or revesting. But the centrality of the condition on use in the context of this conveyance persuades us that this deed created a fee simple subject to a condition subsequent.
We also agree with the district court's conclusion on the content of the condition on use and sustain its finding that

the condition had been breached. Two cases relied on by this Court in Salt Lake City v. State, supra, hold that when property is conveyed on condition that it be used only for a particular type of building the grantee has an obligation to build the building within a reasonable time, failing which the grantor has a power of termination. Trustees of Union College v. City of New York, 173 N.Y. 38, 65 N.E. 853 (1903); Norton v. Valentine, 151 A.D. 392, 135 N.Y.S. 1084 (1912). That interpretation serves the purpose of requiring that property restricted as to use be put to that use within a reasonable time or be freed from the restriction by being restored to the grantor or his successors.

The condition not having been fulfilled within a reasonable time, the grantor exercised her power of termination by reentering the premises and thereby reacquired the property in fee simple. The judgment quieting title in the plaintiff grantor is affirmed. Costs to respondent.

DISSENT BY: HOWE

I dissent.

I believe this case is governed by the rule of law stated in the majority opinion that a provision in a deed specifying or limiting the use to which property is to be put does not by itself create a condition subsequent. That is exactly what we have here. There was no provision in the deed giving the grantor the right of re-entry and revesting title in her. Moreover, with regard to the use to be put to the property, all we have here is one terse sentence: "This property is conveyed to be used as and for a church or residence purposes only." No words appear which would make a condition subsequent such as "on condition that," "provided that," or "upon express condition that." In the absence of language providing for re-entry and the absence of words which create a condition subsequent, I find no clear showing of intent of the grantor to make the estate which was conveyed conditional.

The majority opinion reaches out to make the condition specified here pertaining to fencing and surveying apply also to the provision in the following paragraph that the

property is to be used for a church or residence only. I am unable to make that jump. The majority opinion notes that "if the conditions specified here were only those pertaining to fencing and surveying, we would be loath to find a condition subsequent, especially in the absence of an express provision for reentry or revesting." Yet, the opinion has no hesitancy in applying the condition to a later separate paragraph regarding use, to which it is doubtful that it was ever meant to apply. Having made that jump, the majority then reasons that the grantor would have the right of re-entry.

After concluding that the condition applies not just to fencing and surveying but to the use of the property as well, the majority then holds that when property is conveyed on condition that it be used only for a particular type of building, the grantee has an obligation to build the building [*1072] within a reasonable time, failing which the grantor has a power of termination. The majority cites in support thereof Salt Lake City v. State, 101 Utah 543, 125 P.2d 790 (1942) and two cases cited and discussed therein, Trustees of Union College v. City of New York, 173 N.Y. 38, 65 N.E. 853 (1903) and Norton v. Valentine, 151 App.Div. 392, 135 N.Y.S. 1084 (1912). However, in each of those cases there was contained in the deed an express provision that if the land were used for any purpose other than that stated in the deed (Governor's residence, tabernacle and pastor's residence and City Hall), the land would revert to the grantor. In those cases the intent of the grantor is clear and manifest. I have no quarrel with the law which revests title in the grantor when the property is not so used within a reasonable time. However, in the instant case all we have is the naked statement that the property conveyed is to be used as and for a church or residence purposes only. This could be nothing more than an attempt on the part of the grantor to prevent the property from being used for commercial or industrial purposes which would interfere with her enjoyment in residing on her remaining property.

It does not appear to affirmatively require that a church or residence ever be built.

No condition having been clearly expressed, and recognizing the fact that conditions controlling the use of deeded property are strictly construed against the grantor, and that forfeitures are not favored, I am led to conclude that the judgment below should be reversed.

MOUNTAIN BROW LODGE NO. 82, INDEPENDENT ORDER OF ODD FELLOWS, Plaintiff and Appellant, v. Joseph L. TOSCANO et al., Defendants and Respondents. Court of Appeal of California, Fifth Appellate District 257 Cal. App. 2d 22; 64 Cal. Rptr. 816, December 14, 1967

OPINION BY: GARGANO

[*23] This action was instituted by appellant, a nonprofit corporation, to quiet its title to a parcel of real property which it acquired on April 6, 1950, by gift deed from James V. Toscano and Maria Toscano, both deceased. Respondents are the trustees and administrators of the estates of the deceased grantors and appellant sought to quiet its title as to their interest in the land arising from certain conditions contained in the gift deed.

The matter was submitted to the court on stipulated facts and the court rendered judgment in favor of respondents. However, it is not clear from the court's findings of fact and conclusions of law whether it determined that the conditions were not void and hence refused to quiet appellant's title for this reason, or whether it decided that appellant had not broken the conditions and then erroneously concluded that "neither party has a right to an anticipatory decree" until a violation occurs. Thus, to avoid prolonged litigation the parties have stipulated that when the trial court rendered [*24] judgment refusing to quiet appellant's title it simply decided that the conditions are not void and that its decision on this limited issue is the only question presented in this appeal. We shall limit our discussion accordingly.

The controversy between the parties centers on the language contained in the habendum clause of the deed of conveyance which reads as follows: "Said property is restricted for the use and benefit of the second party, only; and in the event the same fails to be used by the second party or in the event of sale or transfer by the second party of all or any part of said lot, the same is to revert to the first parties herein, their successors, heirs or assigns." Respondents maintain that the language creates a fee simple subject to a condition subsequent and is valid and enforceable. On the other hand, appellant contends that the restrictive language amounts to an absolute restraint on its power of alienation and is void. It apparently asserts that, since the purpose for which the land must be used is not precisely defined, it may be used by appellant for any purpose and hence the restriction is not on the land use but on who uses it. Thus, appellant concludes that it is clear that the reversionary clause was intended by grantors to take effect only if appellant sells or transfers the land.

(1) Admittedly, the condition of the habendum clause which prohibits appellant from selling or transferring the land under penalty of forfeiture is an absolute restraint against alienation and is void. The common law rule prohibiting restraint against alienation is embodied in Civil Code section 711 which provides: " Conditions restraining alienation, when repugnant to the interest created, are void." However, this condition and the condition relating to the use of the land are in the disjunctive and are clearly severable. In other words, under the plain language of the deed the grantors, their successors or assigns may exercise their power of termination "if the land is not used by the second party" or "in the event of sale or transfer by second party." Thus, the invalid restraint against alienation does not necessarily affect or nullify the condition on land use (Los Angeles Inv. Co. v. Gary, 181 Cal. 680 [186 P. 596, 9 A.L.R. 115]).

(2a) The remaining question, therefore, is whether the use condition created a defeasible fee as respondents maintain

or whether it is also a restraint against alienation and nothing more as appellant alleges. Significantly, appellant is a non-profit corporation organized for lodge, fraternal and [*25] similar purposes. Moreover, decedent, James V. Toscano, was an active member of the lodge at the time of his death.

(3) In addition, the term "use" as applied to real property can be construed to mean a "right which a person has to use or enjoy the property of another according to his necessities" (Mulford v. LeFranc (1864) 26 Cal. 88, 102). (2b) Under these circumstances it is reasonably clear that when the grantors stated that the land was conveyed in consideration of "love and affection" and added that it "is restricted for the use and benefit of the second party" they simply meant to say that the land was conveyed upon condition that it would be used for lodge, fraternal and other purposes for which the non-profit corporation was formed. Thus, we conclude that the portion of the habendum clause relating to the land use, when construed as a whole and in light of the surrounding circumstances, created a fee subject to a condition subsequent with title to revert to the grantors, their successors or assigns if the land ceases to be used for lodge, fraternal and similar purposes for which the appellant is formed. (4) No formal language is necessary to create a fee simple subject to a condition subsequent as long as the intent of the grantor is clear. (5) It is the rule that the object in construing a deed is to ascertain the intention of the grantor from words which have been employed and from surrounding circumstances (Brannan v. Mesick, 10 Cal. 95; Aller v. Berkeley Hall School Foundation, 40 Cal.App.2d 31 [103 P.2d 1052]; Schofield v. Bany, 175 Cal.App.2d 534 [346 P.2d 891].)

It is of course arguable, as appellant suggests, that the condition in appellant's deed is not a restriction on land use but on who uses it. (6) Be this as it may, the distinction between a covenant which restrains the alienation of a fee simple absolute and a condition which restricts land use and creates a defeasible estate was long recognized at

common law and is recognized in this state. Thus, conditions restricting [*26] land use have been upheld by the California courts on numerous occasions even though they hamper, and often completely impede, alienation. A few examples follow: Mitchell v. Cheney Slough Irr. Co., 57 Cal.App.2d 138 [134 P.2d 34] (irrigation ditch); Aller v. Berkeley Hall School Foundation, 40 Cal.App.2d 31 [103 P.2d 1052] (exclusively private dwellings); Rosecrans v. Pacific Electric Ry. Co., 21 Cal.2d 602 [134 P.2d 245] (to maintain a train schedule); Shultz v. Beers, 111 Cal.App.2d 820 [245 P.2d 334] (road purposes); Firth v. Marovich, 160 Cal. 257 [116 P. 729, Ann.Cas. 1912D 1190] (residence only).

Moreover, if appellant's suggestion is carried to its logical conclusion it would mean that real property could not be conveyed to a city to be used only for its own city purposes, or to a school district to be used only for its own school purposes, or to a church to be used only for its own church purposes. Such restrictions would also be restrictions upon who uses the land. And yet we do not understand this to be the rule of this state. For example, in Los Angeles Inv. Co. v. Gary, supra, 181 Cal. 680, land had been conveyed upon condition that it was not to be sold, leased, rented or occupied by persons other than those of Caucasian race. The court held that the condition against alienation of the land was void, but upheld the condition restricting the land use. Although a use restriction compelling racial discrimination is no longer consonant with constitutional principles under more recent decisions, the sharp distinction that the court drew between a restriction on land use and a restriction on alienation is still valid. For further example, in the leading and often cited case of Johnston v. City of Los Angeles, 176 Cal. 479 [168 P. 1047], the land was conveyed to the City of Los Angeles on the express condition that the city would use it for the erection and maintenance of a dam, the land to revert if the city ceased to use it for such purposes. The Supreme Court held that the condition created a defeasible estate,

apparently even though it was by necessity a restriction on who could use the land.

Our independent research indicates that the rule is the same in other jurisdictions. In Regular Predestinarian Baptist Church v. Parker, 373 Ill. 607 [27 N.E.2d 522, 137 A.L.R. [*27] 635], a condition "'To have and to hold . . . as long as the same is used by the Regular Predestinarian Baptist Church as a place of meeting . . .'" was deemed to have created a defeasible estate by the Supreme Court of Illinois. In Frensley v. White, 208 Okla. 209 [254 P.2d 982, 983], the deed to the trustees of a religious organization contained the following language: "'To Have And To Hold said above described premises unto the said Trustees and their successors in office, as aforesaid, in trust, so long as said premises shall be held, kept and used by said church or any branch thereof, or any successor thereto for a place of divine worship, for the use of the ministry and membership of said church, subject to the usages, discipline and ministerial appointments of said church as from time to time authorized and declared by the General Council of the Assemblies of God Church and by the Annual Council within whose bounds said premises are, or may hereafter be situated.'" The Supreme Court of Oklahoma treated the estate as a fee determinable, notwithstanding the extreme language of the deed which not only limited the land use but who could use it.

In Merchants Bank & Trust Co. v. New Canaan Historical Soc., 133 Conn. 706 [54 A.2d 696, 172 A.L.R. 1275], a parcel of real property was willed to the New Canaan Library Association "'upon the condition and provided, however, that if said property shall not be used by said Library Association for the purposes of its organization, this devise shall terminate and the property become a part of my residuary estate. . . .'" There, as here, the language of the condition did not precisely define the restricted use but expressly permitted any use for which the library association was formed. The Supreme Court of Errors of

Connecticut clearly indicated that the will had created a fee determinable.

For the reasons herein stated, the first paragraph of the judgment below is amended and revised to read:

"1. That at the time of the commencement of this action title to the parcel of real property situated in the City of Los Banos, County of Merced, State of California, being described as:

Lot 20 Block 72 according to the Map of the Town of Los Banos

was vested in the Mountain Brow Lodge No. 82, Independent Order of Odd Fellows, subject to the condition that said property is restricted for the use and benefit of the second party only; and in the event the same fails to be used by the [*28] second party the same is to revert to the first parties herein, their successors, heirs or assigns."

As so modified the judgment is affirmed. Respondents to recover their costs on appeal.

DISSENT BY: STONE

I dissent. I believe the entire habendum clause which purports to restrict the fee simple conveyed is invalid as a restraint upon alienation within the ambit of Civil Code, section 711. It reads: "Said property is restricted for the use and benefit of the second party, only; and in the event the same fails to be used by the second party or in the event of sale or transfer by the second party of all or any part of said lot the same is to revert to the first parties herein, their successors, heirs or assigns."

If the words "sale or transfer," which the majority find to be a restraint upon alienation, are expunged, still the property cannot be sold or transferred by the grantee because the property may be used by only the I.O.O.F. Lodge No. 82, upon pain of reverter. This use restriction prevents the grantee from conveying the property just as effectively as the condition against "sale or transfer . . . of all or any part of said lot." (Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 682 [186 P. 596, 9 A.L.R. 115]; Property Restatement, § 404 et seq.; 2 Witkin, Summary of Cal. Law (1960) Real

Property, p. 1004; Simes, Perpetuities in California since 1951, 18 Hastings L.J., p. 248.)

Certainly, if we are to have realism in the law, the effect of language must be judged according to what it does. When two different terms generate the same ultimate legal result, they should be treated alike in relation to that result.

Section 711 of the Civil Code expresses an ancient policy of English common law. The wisdom of this proscription as [*29] applied to situations of this kind is manifest when we note that a number of fraternal, political and similar organizations of a century ago have disappeared, and others have ceased to function in individual communities. Should an organization holding property under a deed similar to the one before us be disbanded one hundred years or so after the conveyance is made, the result may well be a title fragmented into the interests of heirs of the grantors numbering in the hundreds and scattered to the four corners of the earth.

The majority opinion cites a number of cases holding use restrictions in deeds to be valid, but these restrictions impose limitations upon the manner in which the property may be used. The majority equates these cases with the restriction in the instant case to use by only Lodge No. 82. It seems to me that a restriction upon the use that may be made of land must be distinguished from a restriction upon who may use it. In the first place, a restriction upon the kind of use does not restrain alienation because the property may be conveyed to anyone, subject to the restriction. Moreover, as Professor Simes points out in his article, Restricting Land Use in California by Rights of Entry and Possibility of Reverter, 13 Hastings Law Journal No. 3, page 293, where changed circumstances are shown a court of equity will free land from a property use restriction.

There is a judicially-created exception to public policy against restraint of alienation embodied in Civil Code section 711 which is broadly defined as "restraint on alienation when reasonable as to purpose." (Coast Bank v.

Minderhout, supra, [*30] 61 Cal.2d 311 [38 Cal.Rptr. 505, 392 P.2d 265].) In discussing this subject, a comment in 12 U.C.L.A. Law Review No. 3, says, in part, at pages 955-958: "The alienability of realty has long been a jealously guarded incident of a fee simple estate. All jurisdictions invalidate absolute restraints on alienation, and an overwhelming majority void restraints partial as to persons and temporary as to time. California has codified the common law rule of restraints on alienation in Civil Code section 711. This provision not only voids restraints created by the grantor of an estate in a deed or conveyance but has been judicially interpreted to void restraints created by covenants executed separately from a deed. In mitigation of the harshness stemming from the rule invalidating restraints, both case law and statutory exceptions have been promulgated in most jurisdictions. In California, a restraint on the transfer of shares in a corporation has been upheld, as have the restraints created by the spendthrift trust, a lease for a term of years, and a restraint on the alienability of a life estate. The decision in Minderhout distinguished California as the first state not to invalidate a restraint on alienation when reasonable as to purpose." (Italics added.)

As I view the restraint in the instant case, it accomplishes no reasonable purpose within the rationale of Coast Bank v. Minderhout, supra, that would justify the indefinite suspension of alienation.

It also appears that there is some correlation between a restriction upon who may use property, and the exclusion of a racial group from the use of property prohibited by Civil Code section 782. That section provides:

"Any provision in any deed of real property in California, whether executed before or after the effective date of this section, which purports to restrict the right of any persons to sell, lease, rent, use or occupy the property to persons of a particular racial, national or ethnic group, by providing for payment of a penalty, forfeiture, reverter, or otherwise, is void."

The Restatement of the Law of Property finds parallel reasoning applicable to the two kinds of restrictions, as it is said, in volume 4, chapter 30, section 406, page 2412, that: "m. Analogous rule — Use by racial or social group excluded. The exclusion of a racial or social group is sometimes attempted by a provision designed to prevent use or occupancy of designated land by persons of this excluded group. Such a provision is not a 'restraint on alienation' within the meaning [*31] of that term as defined in § 404. It has the effect, however, of curtailing alienability and the validity of such a provision is determined by the same considerations as are stated in Comment l. The applicable rule is analogous to the rule stated in this Section."

The usual restriction in violation of section 782 specifically excludes Negroes, orientals, or other ethnic groups from using property. Here, everyone is excluded except members and guests of Mountain Brow Lodge No. 82, I.O.O.F. Restricting use of land indefinitely to a particular person or class of persons, or a particular organization, if held permissible, will open the way for violation of Civil Code section 782 by use of an inverse exclusionary clause.

In any event, it seems to me that quite aside from section 782, the entire habendum clause is repugnant to the grant in fee simple that precedes it. I would hold the property free from restrictions, and reverse the judgment.

B. EL DOMINIO DIRECTO NO POSESORIO

LOS INTERESES FUTUROS

Henry M. BAKER et al., Defendants-Appellants, v. Anna Plaxico WEEDON, Complainant-Appellee. Supreme Court of Mississippi 262 So. 2d 641; 1972, April 10, 1972

OPINION BY: PATTERSON

[*641] This is an appeal from a decree of the Chancery Court of Alcorn County. It directs a sale of land affected by a life estate and future interests with provision for the investment of the proceeds. The interest therefrom is to be

paid to the life tenant for her maintenance. We reverse and remand.

John Harrison Weedon was born in High Point, North Carolina. He lived throughout the South and was married twice prior to establishing his final residence in Alcorn County. His first marriage to Lula Edwards resulted in two siblings, [*642] Mrs. Florence Weedon Baker and Mrs. Delette Weedon Jones. Mrs. Baker was the mother of three children, Henry Baker, Sarah Baker Lyman and Louise Virginia Baker Heck, the appellants herein. Mrs. Delette Weedon Jones adopted a daughter, Dorothy Jean Jones, who has not been heard from for a number of years and whose whereabouts are presently unknown.

John Weedon was next married to Ella Howell and to this union there was born one child, Rachel. Both Ella and Rachel are now deceased.

Subsequent to these marriages John Weedon bought Oakland Farm in 1905 and engaged himself in its operation. In 1915 John, who was then 55 years of age, married Anna Plaxico, 17 years of age. This marriage, though resulting in no children, was a compatible relationship. John and Anna worked side by side in farming this 152.95-acre tract of land in Alcorn County. There can be no doubt that Anna's contribution to the development and existence of Oakland Farm was significant. The record discloses that during the monetarily difficult years following World War I she hoed, picked cotton and milked an average of fifteen cows per day to protect the farm from financial ruin.

While the relationship of John and Anna was close and amiable, that between John and his daughters of his first marriage was distant and strained. He had no contact with Florence, who was reared by Mr. Weedon's sister in North Carolina, during the seventeen years preceding his death. An even more unfortunate relationship existed between John and his second daughter, Delette Weedon Jones. She is portrayed by the record as being a nomadic person who

only contacted her father for money, threatening on several occasions to bring suit against him.

With an obvious intent to exclude his daughters and provide for his wife Anna, John executed his last will and testament in 1925. It provided in part:

Second; I give and bequeath to may beloved wife, Anna Plaxco Weedon all of my property both real, personal and mixed during her natural life and upon her death to her children, if she has any, and in the event she dies without issue then at the death of my wife Anna Plaxco Weedon I give, bequeath and devise all of my property to my grandchildren, each grandchild sharing equally with the other.

Third; In this will I have not provided for my daughters, Mrs. Florence Baker and Mrs. Delett Weedon Jones, the reason is, I have given them their share of my property and they have not looked after and cared for me in the latter part of my life.

Subsequent to John Weedon's death in 1932 and the probate of his will, Anna continued to live on Oakland Farm. In 1933 Anna, who had been urged by John to remarry in the event of his death, wed J. E. Myers. This union lasted some twenty years and produced no offspring which might terminate the contingent remainder vested in Weedon's grandchildren by the will.

There was no contact between Anna and John Weedon's children or grandchildren from 1932 until 1964. Anna ceased to operate the farm in 1955 due to her age and it has been rented since that time. Anna's only income is $ 1000 annually from the farm rental, $ 300 per year from sign rental and $ 50 per month by way of social security payments. Without contradiction Anna's income is presently insufficient and places a severe burden upon her ability to live comfortably in view of her age and the infirmities therefrom.

In 1964 the growth of the city of Corinth was approaching Oakland Farm. A right-of-way through the property was sought by the Mississippi State Highway Department for

the construction of U.S. Highway 45 bypass. The highway department located Florence Baker's three children, the contingent remaindermen by [*643] the will of John Weedon, to negotiate with them for the purchase of the right-of-way. Dorothy Jean Jones, the adopted daughter of Delette Weedon Jones, was not located and due to the long passage of years, is presumably dead. A decree pro confesso was entered against her.

Until the notice afforded by the highway department the grandchildren were unaware of their possible inheritance. Henry Baker, a native of New Jersey, journeyed to Mississippi to supervise their interests. He appears, as was true of the other grandchildren, to have been totally sympathetic to the conditions surrounding Anna's existence as a life tenant. A settlement of $ 20,000 was completed for the right-of-way bypass of which Anna received $ 7500 with which to construct a new home. It is significant that all legal and administrative fees were deducted from the shares of the three grandchildren and not taxed to the life tenant. A contract was executed in 1970 for the sale of soil from the property for $ 2500. Anna received $ 1000 of this sum which went toward completion of payments for the home.

There was substantial evidence introduced to indicate the value of the property is appreciating significantly with the nearing completion of U.S. Highway 45 bypass plus the growth of the city of Corinth. While the commercial value of the property is appreciating, it is notable that the rental value for agricultural purposes is not. It is apparent that the land can bring no more for agricultural rental purposes than the $ 1000 per year now received.

The value of the property for commercial purposes at the time of trial was $ 168,500. Its estimated value within the ensuing four years is placed at $ 336,000, reflecting the great influence of the interstate construction upon the land. Mr. Baker, for himself and other remaindermen, appears to have made numerous honest and sincere efforts to sell the property at a favorable price. However, his endeavors have

been hindered by the slowness of the construction of the bypass.

Anna, the life tenant and appellee here, is 73 years of age and although now living in a new home, has brought this suit due to her economic distress. She prays that the property, less the house site, be sold by a commissioner and that the proceeds be invested to provide her with an adequate income resulting from interest on the trust investment. She prays also that the sale and investment management be under the direction of the chancery court.

The chancellor granted the relief prayed by Anna under the theory of economic waste. His opinion reflects:

. . . The change of the economy in this area, the change in farming conditions, the equipment required for farming, and the age of this complainant leaves the real estate where it is to all intents and purposes unproductive when viewed in light of its capacity and that a continuing use under the present conditions would result in economic waste.

The contingent remaindermen by the will, appellants here, were granted an interlocutory appeal to settle the issue of the propriety of the chancellor's decree in divesting the contingency title of the remaindermen by ordering a sale of the property.

The weight of authority reflects a tendency to afford a court of equity the power to order the sale of land in which there are future interests. Simes, Law of Future Interest, section 53 (2d ed. 1966), states:

By the weight of authority, it is held that a court of equity has the power to order a judicial sale of land affected with a future interest and an investment of the proceeds, where this is necessary for the preservation of all interests in the land. When the power is exercised, the proceeds of the sale are held in a judicially created trust. The beneficiaries of the trust are the persons who held interests in the land, and the beneficial interests [*644] are of the same character as the legal interests which they formally held in the land.

See also Simes and Smith, The Law of Future Interest, § 1941 (2d ed. 1956).

This Court has long recognized that chancery courts do have jurisdiction to order the sale of land for the prevention of waste. Kelly v. Neville, 136 Miss. 429, 101 So. 565 (1924). In Riley v. Norfleet, 167 Miss. 420, 436-437, 148 So. 777, 781 (1933), Justice Cook, speaking for the Court and citing Kelly, supra, stated:

. . . The power of a court of equity on a plenary bill, with adversary interest properly represented, to sell contingent remainders in land, under some circumstances, though the contingent remaindermen are not then ascertained or in being, as, for instance, to preserve the estate from complete or partial destruction, is well established.

While Mississippi and most jurisdictions recognize the inherent power of a court of equity to direct a judicial sale of land which is subject to a future interest, nevertheless the scope of this power has not been clearly defined. It is difficult to determine the facts and circumstances which will merit such a sale.

It is apparent that there must be "necessity" before the chancery court can order a judicial sale. It is also beyond cavil that the power should be exercised with caution and only when the need is evident. Lambdin v. Lambdin, 209 Miss. 672, 48 So.2d 341 (1950). These cases, Kelly, Riley and Lambdin, supra, are all illustrative of situations where the freehold estate was deteriorating and the income therefrom was insufficient to pay taxes and maintain the property. In each of these this Court approved a judicial sale to preserve and maintain the estate. The appellants argue, therefore, that since Oakland Farm is not deteriorating and since there is sufficient income from rental to pay taxes, a judicial sale by direction of the court was not proper.

The unusual circumstances of this case persuade us to the contrary. We are of the opinion that deterioration and waste of the property is not the exclusive and ultimate test to be used in determining whether a sale of land affected by future interest is proper, but also that consideration should be given to the question of whether a sale is necessary for

the best interest of all the parties, that is, the life tenant and the contingent remaindermen. This "necessary for the best interest of all parties" rule is gleaned from Rogers, Removal of Future Interest Encumbrances - Sale of the Fee Simple Estate, 17 Vanderbilt L.Rev. 1437 (1964); Simes, Law of Future Interest, supra; Simes and Smith, The Law of Future Interest, § 1941 (1956); and appears to have the necessary flexibility to meet the requirements of unusual and unique situations which demand in justice an equitable solution.

Our decision to reverse the chancellor and remand the case for his further consideration is couched in our belief that the best interest of all the parties would not be served by a judicial sale of the entirety of the property at this time. While true that such a sale would provide immediate relief to the life tenant who is worthy of this aid in equity, admitted by the remaindermen, it would nevertheless under the circumstances before us cause great financial loss to the remaindermen.

We therefore reverse and remand this cause to the chancery court, which shall have continuing jurisdiction thereof, for determination upon motion of the life tenant, if she so desires, for relief by way of sale of a part of the burdened land sufficient to provide for her reasonable needs from interest derived from the investment of the proceeds. The sale, however, is to be made only in the event the parties cannot unite to hypothecate the land for sufficient funds for the life tenant's reasonable needs. By affording the options above we [*645] do not mean to suggest that other remedies suitable to the parties which will provide economic relief to the aging life tenant are not open to them if approved by the chancellor. It is our opinion, shared by the chancellor and acknowledged by the appellants, that the facts suggest an equitable remedy. However, it is our further opinion that this equity does not warrant the remedy of sale of all of the property since this would unjustly impinge upon the vested rights of the remaindermen.

EL *TRUST*

BROADWAY NATIONAL BANK vs. Charles W. ADAMS & another. Supreme Court of Massachusetts 133 Mass. 170, June 29, 1882, Decided

OPINION BY: MORTON

[*170] The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semiannually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of [*171] said seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the plaintiff under an order of the court, it would be in

direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. Braman v. Stiles, 2 Pick. 460. Perkins v. Hays, 3 Gray 405. Russell v. Grinnell, 105 Mass. 425. Hall v. Williams, 120 Mass. 344. Sparhawk v. Cloon, 125 Mass. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223 a. Blackstone Bank v. Davis, 21 Pick. 42.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and puritie of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of [*172] one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the cestui que trust takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed,

has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in Sparhawk v. Cloon, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the cestui que trust, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. Brandon v. Robinson, 18 Ves. 429. Green v. Spicer, 1 Russ. & Myl. 395. Rochford v. Hackman, 9 Hare, 475. Trappes v. Meredith, L. R. 9 Eq. 229. Snowdon v. Dales, 6 Sim. 524. Rippon v. Norton, 2 Beav. 63.

The English rule has been adopted in several of the courts of this country. Tillinghast v. Bradford, 5 R.I. 205. Heath v. Bishop, 4 Rich. Eq. 46. Dick v. Pitchford, 1 Dev. & Bat. Eq. 480. Mebane v. Mebane, 4 Ired. Eq. 131.

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. Holdship v. Patterson, 7 Watts 547. Shankland's appeal, 47 Pa. 113. Rife v. Geyer, 59 Pa. 393. White v. White, 30 Vt. 338. Pope v. Elliott, 47 Ky. 56, 8 B. Mon. 56. Nichols v. Eaton, 91 U.S. 716, 23 L. Ed. 254. Hyde v. Woods, 94 U.S. 523, 24 L. Ed. 264.

[*173] The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the

case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semiannually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the cestui que trust which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds [*174] are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and

the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire jus disponendi, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.

JONES v. HARRISON et al. Circuit Court of Appeals, Eighth Circuit 7 F.2d 461, July 31, 1925
OPINION BY: AMIDON

[*462] This is a petition in a bankruptcy proceeding filed by the appellant as trustee to sequester for the benefit of creditors the interest of the bankrupt in a trust estate created by his father's will. The referee sustained the petition and granted the relief prayed for. The trial court reversed that decision and entered a decree dismissing the petition on the merits. The present appeal seeks a review of that decree.

These are the facts: In September, 1911, John T. Ready, the bankrupt's father, made his will. After providing for numerous personal bequests he bequeathed to the bankrupt, his only son, in fee simple, nearly all his real estate. This included two dwelling houses in Sedalia, Mo., and other property in Greenfield, in that state, and a considerable body of land. this property is given to the bankrupt absolutely. By the sixteenth and seventeenth paragraphs of the will the testator creates a trust to hold certain notes and mortgages, and 50 shares of stock in the Date County Bank. The declaration of trust empowers the trustees to collect the interest and principal of the notes and mortgages, and the dividends on the stock. It authorizes them to reinvest funds not needed to carry out the trust in real estate securities in Dade county, Mo., and gives specific directions on that subject. This part of the will further provides that the income from the trust estate shall be first used to pay the expenses of the trust and taxes thereon, and on certain real estate bequeathed to the son, with a few other minor items.

Upon the son's reaching the age of 25 years the will directs the trustees as follows:

"To pay over to him out of the trust funds other than the Dade County Bank stock, the sum of ten thousand dollars either in cash or securities as he may prefer to receive and from that time or for the next ten years until my said son shall have arrived at the age of thirty-five years I direct that yearly all the balance of the net income after deducting the

payments of the taxes and the expenses of the trust shall be turned over by my said trustee or trustees as the case may be to my said son John Thomas Ready direct and I further direct that when my said son shall arrive at the age of thirty-five years that my said trustees shall pay over to my said son out of the trust funds other than the bank stock the further sum of ten thousand dollars either in cash or good securities as he may prefer, and I further direct that the trust shall continue as before as to the remainder of the trust funds on the same terms and conditions for a further term of ten years, my said trustees paying over to my said son once a year the balance of the net income derived from interest and dividents, after paying the little annuities taxes and expenses of the trust, and I further will and direct that when my said son, John Thomas Ready, shall have arrived at the age of forty-five years that my said trustees or the survivor of said trustees if one should be dead at the time shall make a full and complete settlement with the court or my said son, John Thomas Ready, and turn over to him all the trust funds of whatever kind then in their possession, and on the doing of which the said trust shall cease and terminate."

Provision is then made that in case of the son's death that part of the trust estate then in existence shall pass to certain nephews and nieces.

The father died in April, 1912, less than a year after the will was executed. The will has since been duly admitted to probate. [*463] The $10,000 installment due upon the son's attaining the age of 25 years was paid, and the net income has also been paid annually to him down to the time of the filing of the petition in bankruptcy. It is stipulated that the value of the trust estate is now about $25,000.

The petition in bankruptcy was filed May 10, 1922. The bankrupt became 35 years of age on December 7, 1924, and by the terms of the trust was on that date entitled to receive the second installment of $10,000, but it has been withheld to await the result of this litigation.

The trustee in bankruptcy insists that by the terms of the trust the bankrupt at the time he filed his petition in bankruptcy held an unrestricted equitable estate or interest in the payments thereafter to accrue to him under the terms of his father's will.The bankrupt contends that, when all the provisions of the will are read in the light of the circumstances under which it was made, it is manifest that the testator intended to impose upon the beneficiary's interest a restriction, namely, that the beneficiary should not have power to incumber or alienate the same, or to anticipate the payments, and that his interest should not be subject to the claims of his creditors. Such is the issue.

A trust subject to the restrictions above specified has for historice reasons obtained the name of a "spendthrift trust." That term, however, is purely descriptive. Whenever the intent of the testator to impose the restrictions exists, it is the duty of courts to respect the limitations, regardless of the habits of the beneficiary.In short, to create a spendthrift trust, it is no longer necessary that the beneficiary be a spendthrift.

The power of a testator to provide by a trust for the future welfare of a beneficiary, and yet place the interest granted beyond his poer to alienate or incumber, or his creditors to seize, has been a matter of slow growth. It first appeared in settlements for married women, for the purpose of placing the wife's separate estate beyond her own power and beyond that of her husband. After much hesitation in the English courts, and by the aid of some statutory provisions, the rights of a married woman in her separate estate were finally fully safeguarded. Those courts, however, have steadfastly refused to grant the same immunity to the interest of the beneficiary in a trust. The question was finally put to rest in 1811, in the case of Brandon v. Robinson, 18 Vezey, 429. The only way under the English decisions that a trust can be saved is to terminate it, in case restrictions are violated. It became the settled doctrine of those courts, as stated by Gray in his Restraints on

Alienation, that "whatever a man can demand from his trustees, that his creditors can demand from him."

At a comparatively recent date American courts adopted a more liberal rule, enabling the testator to protect his gift until it is actually paid over to the beneficiary. The leading authority, Nichols v. Eaton, 91 U.S. 716, 23 L. Ed. 254, was decided in 1875. This was followed by the Supreme Judicial Court of Massachusetts in Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504, in 1882, and by the Supreme Court of Missouri in 1888, in Lampert v. Haydel, 96 Mo. 439, 9 S.W. 780, 2 L.R.A. 113, 9 Am. St. Rep. 358. In this brief period since 1875 the rule has become firmly established in the great majority of American courts, and has been applied with increasing liberality of interpretation. This rule and its grounds are stated by the Supreme Court in Nichols v. Eaton, as follows:

"The doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. * * *

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

See, also, Shelton v. King, 229 U.S. 90, 96, et seq., 33 S. Ct. 686, 57 L. Ed. 1086.

As against the trustee under the trust, the rights of the beneficiary are the same whether the trust imposes restrictions or fails to do so. The restriction affects only the power of the beneficiary and his creditors. Under the English rule the right of alienation [*464] and liability for debts is deduced as an inevitable incident of ownership legal or equitable, and regardless of the testator's intent. The American rule refuses to make that deduction and renders the intent of the testator superior to the claims of creditors or the power of the beneficiary.

Whether the American rule shall be applied to equitable interests under a trust is a local rule of property binding on federal courts. Allen, Trustee, v. Tate (C.C.A.) 6 F.(2d) 139, filed May 12, 1925. But the interpretation of particular wills, to determine whether they create a case within the rule, turns on questions of fact, and decisions on such questions can only bind by force of analogy. Such is the case, at least, until the decisions are so clear as to convert the question of fact into a rule of law. The decisions of the Supreme Court of Missouri are not entirely harmonious. Kingman v. Winchell, 20 S.W. 296 (not reported in the official reports of the state), adopts a strict construction confining the court narrowly to the language of the will in discovering the testator's intent. The recent case of Highbee v. Brockenbrough (Mo. Sup.) 191 S.W. 994, adopts a much more liberal view, and safeguarded a trust which contained no express restrictions. Because of this state of the Missouri cases, we have felt called upon to consider the decisions in other jurisdictions.

It is now well established that no particular form of words is necessary to create the restriction. Nor is it necessary that the restriction be expressed directly in the language of the will. On the other hand, courts look at all of the provisions of the will, and the circumstances under which it was made, including the condition of the beneficiary, and, if the intent to restrict is reasonably plain from a consideration of all

these features, courts will give effect to that intent. Berry v. Dunham, 202 Mass. 133, 88 N.E. 904; Bennett v. Bennett, 217 Ill. 434, 75 N.E. 339, 4 L.R.A. (N.S.) 470; Wallace v. Foxwell, 250 Ill. 616, 95 N.E. 985, 50 L.R.A. (N.S.) 632; Stambaugh's Estate, 135 Pa. 585, 19 A. 1058; Everitt v. Haskins, 102 Kan. 546, 171 P. 632; Barnes v. Dow, 59 Vt. 530, 10 A. 258; Roberts v. Stevens, 84 Me. 325, 24 A. 873, 17 L.R.A. 266; Patten v. Herring, 9 Tex. Civ. App. 640, 29 S.W. 388; Seymour v. McAvoy, 121 Cal. 438, 53 P. 946, 41 L.R.A. 544; Mattison v. Mattison, 53 Or. 254, 100 P. 4, 133 Am. St. Rep. 829, 18 Ann. Cas. 218.

The Supreme Court of Missouri has stated the rule as follows:

Wills "are to be construed as a whole; liberally construed; construed with reference to the intention of the testator; and unless that intention if carried out will violate some positive rule of law, or subvert some rule of public policy, such intention must be allowed to control, and be effectuated by the courts. And in construing wills which create trusts, the same liberality of construction as to such trusts prevails." Partridge v. Cavender, 96 Mo. 456, 9 S.W. 786; Higbeen v. Brockenbrough (Mo. Sup.) 191 S.W. 994, 995.

In the following cases the courts have held that the fact of placing property in the hands of a trustee evidences an intent on the part of the testator to put it beyond the power of the beneficiary to alienate, or his creditors to seize. Everitt v. Haskins, 102 Kan. 546, 171 P. 632; Bennett v. Bennett, 217 Ill. 434, 75 N.E. 339, 4 L.R.A. (N.S.) 470; Leary v. Kerber, 255 Ill. 433, 99 N.E. 662; Stambaugh's Estate, 135 Pa. 585, 19 A. 1058; Higbee v. Brockenbrough (Mo. Sup.) 191 S.W. 994; Wallace v. Foxwell, 250 Ill. 616, 95 N.E. 985, 50 L.R.A. (N.S.) 632, 642; Leigh v. Harrison, 69 Miss. 923, 11 So. 604, 18 L.R.A. 49.

The reason why this consideration has not been more frequently emphasized by our courts is probably historic. The American doctrine was developed as a limitation upon the previous law.Under the old rule the courts had

resolutely held that the interest of the beneficiary under such a trust was a vested interest, and as such was necessarily subject to disposition by its owner, and to seizure by his creditors. The trust itself was no protection against these consequences. American courts, in order to establish the more liberal rule, had to go beyond the fact of the trust. Their attention was wholly withdrawn from the mere creation of the trust to some additional fact upon which they could seize as a basis for upholding the restriction. As in the case of the separate estate of married women, the restriction was at first sustained upon express language in the trust declaring that the interests of the beneficiary should not be alienated or incumbered by him, or seized by his creditors. In the early cases this was the sole basis of the American rule. Later the rule was extended, so that no particular words were necessary.The intent of the testator, however manifested, became the sole ground of judicial decision. If the courts at the beginning had considered themselves at liberty to be guided wholly by the intent of the creator of the trust, it seems reasonable to believe that [*465] much greater weight would have been attached to the mere fact of the creation of the trust, as evidencing an intent to impose the restriction.

It is manifest that, if the interest of the beneficiary in a trust is as fully subject to his disposal, and to seizure by his creditors, as it would have been if willed directly to him, then such a trust, instead of being a safeguard for the protection of the beneficiary, becomes a means for the improvident dissipation of the subject-matter of the trust; for it is a matter of common knowledge that the sale or incumbrance of such an interest is always made upon the most onerous terms, and that credit extended to such a beneficiary on the faith of his interest always takes heavy toll on account of the hazard. The present case goes even further, for counsel for the trustee in bankruptcy stated in argument that it was his intent to sell the interests of the bankrupt under the trust. It is manifest that, in so far as those interests are future, the contingencies that surround

them would cause them to be sold at a ruinous sacrifice. The result would be small benefit to the creditors, and disastrous loss to the beneficiary. Such considerations as these give an impressive force to the placing of the property in trust, as evidencing the intent of the testator to put it beyond the reach of such sacrifice and waste.

Equitable trust interests, restricted as to creditors, do not pass to trustees in bankruptcy, though assignable by the beneficiary. This results from the fact that an estate put in trust, and expressly restricted as to creditors, sufficiently evidences an intent by the testator to impose a restriction also upon the beneficiary's power to alienate or encumber. Boston Safe Deposit Co. v. Luke, 220 Mass. 484, 108 N.E. 64, L.R.A. 1917A, 988; Id., 240 U.S. 427, 36 S. Ct. 391, 60 L. Ed. 723, Ann. Cas. 1918D, 90; Hull v. Palmer, 213 N.Y. 315, 107 N.E. 653; Id., 245 U.S. 312, 38 S. Ct. 103, 62 L. Ed. 312.

The converse of this is also true. A restriction as to the beneficiary's power to alienate will protect a trust as against creditors. Roberts v. Stevens, 84 Me. 325, 24 A. 873, 17 L.R.A. 266; Partridge v. Cavender, 96 Mo. 452, 9 S.W. 785. These cases also show unmistakably that courts no longer consider ancient phrases necessary to safeguard trust estates.

Turning, now, to the will which is here under consideration, there is but a single item in its language which expresses an intent of the testator to impose restrictions upon the beneficiary's interest. That is found in the use of the word "direct," as to the income accruing between the beneficiary's twenty-fifth and thirty-fifth year. The will requires this income to be paid by the trustees to the beneficiary "direct." This fairly imports that such payments were not to be made to alienees or to creditors.This language, however, is n ot used with respect to the payment of any other income, or to the payments out of the capital of the trust.

Looking to the circumstances, and to all the provisions of the will, we find further ground in support of the restriction.

The testator bequeathed directly to his son a large part of his estate. As to that bequest the property was placed under the son's absolute control, and, of course, was subject to the claims of his creditors. If it was the intent of the testator that the property covered by the trust should be subject to the same liability, what possible object was there in creating the trust? The only result of such an act would be to waste the trust property. The trust would not control the son or his creditors, but would place the property in such a position that any disposition of it by the one or the other would be attended with serious loss. These considerations, in our judgment, furnish a persuasive reason for holding that the testator intended by the trust to place the property beyond the power of his son to alienate or his creditors to seize.

When the will was made the son was only 21 years of age. It was impossible at that time for the testator to forecast the son's ability to safeguard property interests. He turned over to the unrestricted ownership of the youth a large part of his estate. What was his object in creating the trust? We can find no answer, but a purpose (1) to establish a fund whose income would make sure to his child the common necessaries of life; and (2) to withhold the capital of the trust until his son should reach such years of discretion that he would be likely to safeguard his own interest. The fact that the payments out of the principal were to be made gradually at widely separated periods, so that the son might profit by experience and by the ripening judgment which age usually brings, gives support to the inference that it was the father's intent to place the property beyond the son's power until it was actually paid over to him by the trustees. Any other interpretation robs the creation of the trust of any sensible or rational purpose.

[*466] To the mind of laymen, property whose legal title is placed in the hands of trustees is wholly beyond the reach of the beneficiary. They know nothing of so-called equitable estates. To them the trust has no object but to put

the property beyond the power of the beneficiary and his creditors.

The will was carelessly drawn. A skillful draftsman would have placed the question here involved beyond the reach of cavil.But, as Chief Justice Paxson said in Stambaugh's Estate, 135 Pa. 585, 19 A. 1058, the intent of the testator "ought not to be defeated because his conveyancer blumdered."

The decision of the trial court is in harmony with the fundamentals of the American rule. These are that the testator, as owner of his property, has a right to bestow it with such restrictions as he sees fit to impose, and that his intent cannot be subordinated to the power of the beneficiary or of his creditors.

It is elementary law, based on repeated decisions of this court and other courts of appeal, that the decree in this case could not properly be reviewed by a petition to revise. That petition will therefore be dismissed.

The decree is affirmed.

In Re: Cheryl A. Reagan, Debtor; FREDERICK S. WETZEL, III, Trustee and G. LATTA BACHELOR, III, successor Personal Representative of the ESTATE OF RONALD E. REAGAN, DECEASED, APPELLANTS v. REGIONS BANK and CHERYL A. REAGAN, APPELLEES. United States District Court for the Western District of Arkansas, Hot Springs Division 433 B.R. 263, April 15, 2010, Filed

OPINION BY: DAWSON

[*265] This is a bankruptcy appeal. On July 21, 2009, the Honorable Ben T. Barry, United States Bankruptcy Judge, Western District of Arkansas, entered final judgment in the adversary proceeding styled Regions Bank v. Wetzel, et al., USBC AP No. 6:08-ap-07158 (Bankr. W.D. Ark). We have jurisdiction pursuant to 28 U.S.C. § 158, and for reasons reflected herein, the judgment is AFFIRMED.

A. Background

Ronald E. Reagan died February 1, 2000, leaving an estate valued at $ 19,936,612.00. Prior thereto, Mr. Reagan executed a valid will that, inter alia, created a spendthrift trust naming Mr. Reagan's wife, Cheryl, as its beneficiary. The spendthrift provision stated:

Except as otherwise provided herein, all payments of principal and income payable, or to become payable, to the beneficiary of any trust created hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any said beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of my Executor or Trustee, be liable for, or subject to, the debts, contracts, obligations, liabilities or torts of any beneficiary.

Under the terms of the trust,

Commencing with the date of my death, my Trustee shall pay to or apply for the benefit of my said wife during her lifetime all the net income from [the spendthrift trust] in convenient installments but no less frequently than quarter-annually.

The will also appointed Mrs. Reagan to serve as executrix, and in that capacity, directed her to fund the trust by distributing the decedent's stock in the Chem-Fab Corporation ("Chem-Fab"), less certain deductions, to the trustee, designated as Arkansas Bank & Trust of Hot Springs, Arkansas.

Contrary to the instructions set forth in the will, Mrs. Reagan failed to fund the trust. Rather, she utilized the proceeds from the sale of the Chem-Fab stock to finance a series of business ventures that ultimately proved unsuccessful. On April 23, 2004, the Circuit Court of Garland County, Arkansas ("probate court"), ruling on an ex parte petition by Rex Reagan, one of Mr. Reagan's sons and beneficiaries, froze the assets of Mr. Reagan's estate. This relief was made permanent on May 11, 2004.

Mrs. Reagan filed a Chapter 11 bankruptcy petition on November 17, 2004. In June 2006, Latta Bachelor was appointed successor personal representative of Mr. [*266]

Reagan's estate. On April 17, 2007, the bankruptcy court granted relief from the bankruptcy stay to Mr. Reagan's estate, enabling administration of the estate in the probate court. The probate court authorized the funding of the spendthrift trust on January 15, 2008, utilizing the proceeds from certain investments in the amount of $ 2,400,000.00. Regions Bank was appointed trustee.

On September 23, 2008, as the trust began to generate income, Regions Bank filed an interpleader action in the bankruptcy court; Mr. Reagan's estate intervened. Regions Bank requested that the bankruptcy court determine whether the bankruptcy estate or Mrs. Reagan was entitled to the present and future income from the spendthrift trust. The court determined both the present and future income to be payable to Mrs. Reagan.

B. Standard of Review

The United States District Court functions as an appellate court in reviewing decisions of the United States Bankruptcy Court. See Fed. R. Bankr. P. 8013. Conclusions of law are reviewed de novo, while factual findings will not be set aside unless "clearly erroneous." Id.; In re Muncrief, 900 F.2d 1220, 1224 (8th Cir. 1990). "A finding is 'clearly erroneous' when, although there is evidence to support it, the court reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re U.S.A. Inns of Eureka Springs, Arkansas, Inc., 151 B.R. 492, 494 (W.D. Ark. 1993).

C. Discussion

Frederick Wetzel, trustee of Cheryl Reagan's bankruptcy estate, and Latta Bachelor, personal representative of the estate of Ronald Reagan, appeal the order of the bankruptcy court determining that Mrs. Reagan is entitled to the present and future income from the spendthrift trust established by the will of Mr. Reagan. Thus, this Court must address two issues: (1) whether the bankruptcy court's determination that income from the spendthrift trust was not unreasonably withheld from Mrs. Reagan is clearly erroneous; and (2) whether the bankruptcy court properly

determined that prospectively earned income from the spendthrift trust is not property of the bankruptcy estate.

The property that comprises the bankruptcy estate is defined in the bankruptcy code. It provides in relevant part that the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement" of the bankruptcy case. 11 U.S.C. § 541(a)(1). This definition is subject to exceptions. Of particular relevance, a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). In the present case, it is undisputed that the "restriction on the transfer" language of this exception is a reference to an interest in a spendthrift trust and that the "applicable nonbankruptcy law" is that of Arkansas.

Pursuant to Arkansas law, a trust beneficiary has an equitable interest in trust property. Adamson v. Sims, 85 Ark.App. 278, 283, 151 S.W.3d 23, 26 (2004); In re Smith, 189 B.R. 8, 10 (N.D. Ill. 1995) ("A beneficial interest in a trust is an equitable interest under § 541(a)(1)."). Therefore, as a threshold matter, a debtor's interest in a trust meets the requirements of section 541(a) (1), and but for an applicable exception, here section 541(c)(2), the debtor's interest would be included in a bankruptcy estate. In re Vogel, 16 B.R. 670, 672 (Bankr. S.D. Fla. 1981). For this reason, Appellants present arguments concerning [*267] the alleged inapplicability of section 541(c) (2).

Appellants contend that Regions Bank unreasonably withheld trust distributions from Mrs. Reagan, and therefore, the distributions are not entitled to spendthrift protection under Arkansas law. The Arkansas trust code provides:

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the

distribution to the beneficiary within a reasonable time after the designated distribution date.

Ark. Code Ann. § 28-73-506. Under this section, if a trustee fails to make a timely distribution from the spendthrift trust, the distribution, even while under the control of the trustee, can be reached by creditors. Thus, because there is no enforceable "restriction on the transfer" of the trust distribution under Arkansas law, section 541(c)(2) would be inapplicable, and the untimely distribution could be included in the bankruptcy estate.

The Arkansas trust code does not define the term "reasonable time." However, pursuant to the uniform comments, "[t]he question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust." Ark. Code Ann. § 28-73-904. The evidence presented to the bankruptcy court reflects that the probate court entered an order directing the funding of the trust on January 15, 2008. Subsequently, Mr. Bachelor, as successor personal representative, initiated the process of transferring assets from Mr. Reagan's estate to Regions Bank. At least as late as September 8, 2008, Regions Bank continued the process of finalizing its documentation relating to trust assets. Regions Bank filed its interpleader action September 23, 2008.

It is undisputed that the trust earned income between January and September 2008. According to Mr. Reagan's will, the trustee was required to make net income distributions "no less frequently than quarter-annually." It is undisputed that these distributions were not made. However, as the bankruptcy court noted, the failure of Regions Bank to make said distributions must be evaluated against the backdrop of the multi-year bankruptcy proceeding of Mrs. Reagan, with multiple counsel and more than one thousand filings, and the difficulty faced by Regions Bank in acquiring and finalizing the assets of the trust. Whether Regions Bank acted in a "reasonable time" is a factual determination to be reviewed by this Court for whether it is "clearly erroneous." In re U.S.A. Inns of

Eureka Springs, 151 B.R. at 494. Based on the broader context of this case, the bankruptcy court's determination was not clearly erroneous and is therefore affirmed. This Court further affirms the bankruptcy court's finding that any attempt to retroactively determine the earnings of the trust, had it been funded in February 2000 as directed by Mr. Reagan's will, would be speculative; these hypothetical earnings were not unreasonably withheld from Mrs. Reagan. Therefore, the ability of creditors to reach withheld spendthrift-trust income pursuant to Ark. Code Ann. § 28-73-506 does not render 11 U.S.C. § 541(c)(2) inapplicable in the present case.

Appellant Bachelor further contends that the bankruptcy court erred in its determination that prospectively earned income from the spendthrift trust is not property of a bankruptcy estate. His key argument concerns the interpretation to be given to the decision of the United States Supreme Court in Patterson v. Shumate, [*268] 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992). He states that the case stands for the proposition that the protection afforded to an interest in a spendthrift trust must be the same in bankruptcy as that afforded outside of bankruptcy. Under this logic, because outside of bankruptcy, a creditor can execute on income paid from a spendthrift trust at the moment it is received by the debtor, the same creditors' rights must exist inside bankruptcy. In other words, because under Arkansas law income distributions are not protected once distributed by the trustee, the income must be included in the bankruptcy estate. Ark. Code Ann. § 28-73-502 (stating that a creditor "may not reach the interest or a distribution by the trustee before its receipt by the beneficiary") (emphasis added).

The scope of the bankruptcy estate is defined by 11 U.S.C. § 541. "The relevant moment for determining whether property constitutes the bankruptcy estate is 'as of the commencement of the case.'" In re Nelson, 322 F.3d 541, 544 (8th Cir. 2003) (quoting 11 U.S.C. § 541(a) (1)). With this baseline rule in mind, the Court must turn to two

potential statutory bases for inclusion of post-commencement trust income. First, certain property acquired within 180 days of the filing of the bankruptcy petition can be included in the estate. 11 U.S.C. § 541(a)(5). Second, the proceeds and profits of property of the bankruptcy estate are included. 11 U.S.C. § 541(a)(6).

Evaluating these bases, it is undisputed that Mrs. Reagan filed her bankruptcy petition on November 17, 2004, and that the spendthrift trust created by Mr. Reagan's will did not produce income until sometime in 2008. As this Court has determined, it would be speculative to attempt to retroactively determine what the trust earnings might have been in 2004, immediately following Mrs. Reagan's bankruptcy filing. As a result, because they cannot be computed, none of the distributions could have been acquired within 180 days of Mrs. Reagan's Chapter 11 filing, and section 541(a)(5) is therefore inapplicable. Further, having already found that the spendthrift interest is excluded from the bankruptcy estate, the distributions from the trust cannot be considered proceeds or profits of estate property, and as a result, section 541(a)(6) does not apply. In re Moses, 167 F.3d 470, 473 (9th Cir. 1999) (holding spendthrift trust excludes trust corpus). Therefore, Appellant Bachelor has provided no statutory basis for inclusion of the spendthrift distributions in the bankruptcy estate.

In the absence of a statutory basis for including the distributions, Appellant Bachelor contends that the decision of the bankruptcy court that future income distributions be made to Mrs. Reagan is contrary to the precedent of the Supreme Court as announced in Patterson v. Shumate. In Patterson, the Court held that the antialienation provision in a qualified ERISA plan was a restriction on transfer enforceable pursuant to section 541(c)(2) and therefore properly excluded from the bankruptcy estate. 504 U.S. at 760. In so holding, the Supreme Court stated that its decision "ensures that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status." Id.

at 764. Appellant Bachelor interprets the Court's statement as a bright line rule that requires uniformity of creditors' rights irrespective of bankruptcy status when section 541(c) (2) is the basis for property exclusion.

Appellant Bachelor's argument is misplaced for three reasons. First, as a matter of statutory construction and as stated, he has provided no basis under section 541 for including the trust distributions. Section 541(c) (2) [*269] speaks only in terms of interests; a beneficiary of a spendthrift trust has a beneficial interest in trust income. Medical Park Hosp. v. Bancorp South Bank of Hope, 357 Ark. 316, 327-28, 166 S.W.3d 19, 26 (2004). Utilizing section 541(c) (2) to exclude an interest while including the income stream that represents the beneficial interest is a strained interpretation at best. Second, the bankruptcy court made no determination regarding the rights of creditors to the spendthrift income; it only held that the income was not part of the bankruptcy estate. The issue of whether Appellant Bachelor may be entitled to additional relief, so as to permit access to the income from the trust, was not before the bankruptcy court. Finally, even granting credence to Bachelor's uniformity argument, Arkansas law provides that a creditor may not attempt to reach the distribution "before its receipt by the beneficiary." Ark. Code Ann. § 28-73-502 (emphasis added). However, contrary to the terms of the statute, Bachelor attempts to prevent receipt. Therefore, on the issue of whether prospectively earned income from the spendthrift trust is payable to Mrs. Reagan, this Court affirms the statutory interpretation of the bankruptcy court.

D. Conclusion

For reasons recited herein, we find that the bankruptcy court's determination regarding income distributions was not clearly erroneous and that the bankruptcy court properly determined that prospectively earned income from a spendthrift trust is not property of a bankruptcy estate. Accordingly, the judgment of the bankruptcy court is affirmed.

The SYMPHONY SPACE, Inc., Respondent, v. PERGOLA PROPERTIES, Inc., et al., Appellants. Court of Appeals of New York 88 N.Y.2d 466; 669 N.E.2d 799, June 13, 1996, Decided

OPINION BY: KAYE

[*471] This case presents the novel question whether options to purchase commercial property are exempt from the prohibition against remote vesting embodied in New York's Rule against Perpetuities (EPTL 9-1.1 [b]). Because an exception for commercial options finds no support in our law, we decline to exempt all commercial option agreements from the statutory Rule against Perpetuities.

Here, we agree with the trial court and Appellate Division that the option defendants seek to enforce violates the statutory prohibition against remote vesting and is therefore unenforceable.

I. FACTS

The subject of this proceeding is a two-story building situated on the Broadway block between 94th and 95th Streets on Manhattan's Upper West Side. In 1978, Broadwest Realty Corporation owned this building, which housed a theater and commercial space. Broadwest had been unable to secure a permanent tenant for the theater—approximately 58% of the total square footage of the building's floor space (see, Matter of Symphony Space v Tishelman, 60 N.Y.2d 33, 35, n 1, 466 N.Y.S.2d 677, 453 N.E.2d 1094). Broadwest also owned two adjacent properties, Pomander Walk (a residential complex) and the Healy Building (a commercial building). Broadwest had been operating its properties at a net loss.

Plaintiff Symphony Space, Inc., a not-for-profit entity devoted to the arts, had previously rented the theater for several one-night engagements. In 1978, Symphony and Broadwest engaged in a transaction whereby Broadwest sold the entire building to Symphony for the below-market price of $ 10,010 and leased back the income-producing

commercial property, excluding the theater, for $ 1 per year. Broadwest maintained liability for the existing $ 243,000 mortgage on the property as well as certain maintenance obligations. As a condition of the sale, Symphony, for consideration of $ 10, also granted Broadwest an option to repurchase the entire building. Notably, the transaction did not involve Pomander Walk or the Healy Building.

The purpose of this arrangement was to enable Symphony, as a not-for-profit corporation, to seek a property tax exemption for the entire building—which constituted a single tax parcel—predicated on its use of the theater. The sale-and-leaseback would thereby reduce Broadwest's real estate taxes [*472] by $ 30,000 per year, while permitting Broadwest to retain the rental income from the leased commercial space in the building, which the trial court found produced $ 140,000 annually. The arrangement also furthered Broadwest's goal of selling all the properties, by allowing Broadwest to postpone any sale until property values in the area increased and until the commercial leases expired. Symphony, in turn, would have use of the theater at minimal cost, once it received a tax exemption.

Thus, on December 1, 1978, Symphony and Broadwest—both sides represented by counsel—executed a contract for sale of the property from Broadwest to Symphony for the purchase price of $ 10,010. The contract specified that $ 10 was to be paid at the closing and $ 10,000 was to be paid by means of a purchase-money mortgage.

The parties also signed several separate documents, each dated December 31, 1978: (1) a deed for the property from Broadwest to Symphony; (2) a lease from Symphony to Broadwest of the entire building except the theater for rent of $ 1 per year and for the term January 1, 1979 to May 31, 2003, unless terminated earlier; (3) a 25-year, $ 10,000 mortgage and mortgage note from Symphony as mortgagor to Broadwest as mortgagee, with full payment due on December 31, 2003; and (4) an option agreement by which

Broadwest obtained from Symphony the exclusive right to repurchase all of the property, including the theater.

It is the option agreement that is at the heart of the present dispute. Section 3 of that agreement provides that Broadwest may exercise its option to purchase the property during any of the following "Exercise Periods":

"(a) at any time after July 1, 1979, so long as the Notice of Election specifies that the Closing is to occur during any of the calendar years 1987, 1993, 1998 and 2003;

"(b) at any time following the maturity of the indebtedness evidenced by the Note and secured by the Mortgage, whether by acceleration or otherwise;

"(c) during the ninety days immediately following any termination of the Lease by the lessor thereof other than for nonpayment of rent or any termination of the Lease by the lessee thereof ...

"(d) during the ninety days immediately following [*473] the thirtieth day after Broadwest shall have sent Symphony a notice specifying a default by Symphony of any of its covenants or obligations under the Mortgage."

Section 1 states that "Broadwest may exercise its option at any time during any Exercise Period." That section further specifies that the notice of election must be sent at least 180 days prior to the closing date if the option is exercised pursuant to section 3 (a) and at least 90 days prior to the closing date if exercised pursuant to any other subdivision.

The following purchase prices of the property, contingent upon the closing date, are set forth in section 4: $ 15,000 if the closing date is on or before December 31, 1987; $ 20,000 if on or before December 31, 1993; $ 24,000 if on or before December 31, 1998; and $ 28,000 if on or before December 31, 2003.

Importantly, the option agreement specifies in section 5 that "Broadwest's right to exercise the option granted hereby is ... unconditional and shall not be in any way affected or impaired by Broadwest's performance or nonperformance, actual or asserted, of any obligation to be performed under the Lease or any other agreement or

instrument by or between Broadwest and Symphony, " other than that Broadwest was required to pay Symphony any unpaid rent on the closing date. Finally, section 6 established that the option constituted "a covenant running with the land, inuring to the benefit of heirs, successors and assigns of Broadwest."

Symphony ultimately obtained a tax exemption for the theater. In the summer of 1981, Broadwest sold and assigned its interest under the lease, option agreement, mortgage and mortgage note, as well as its ownership interest in the contiguous Pomander Walk and Healy Building, to defendants' nominee for $ 4.8 million. The nominee contemporaneously transferred its rights under these agreements to defendants Pergola Properties, Inc., Bradford N. Swett, Casandium Limited and Darenth Consultants as tenants in common.

Subsequently, defendants initiated a cooperative conversion of Pomander Walk, which was designated a landmark in 1982, and the value of the properties increased substantially. An August 1988 appraisal of the entire blockfront, including the Healy Building and the unused air and other development rights available from Pomander Walk, valued the property at $ 27 million assuming the enforceability of the option. By contrast, the value of the leasehold interest plus the Healy Building without the option were appraised at $ 5.5 million.

[*474] Due to Symphony's alleged default on the mortgage note, defendant Swett served Symphony with notice in January 1985 that it was exercising the option on behalf of all defendants. The notice set a closing date of May 6, 1985. Symphony, however, disputed both that it was in default and Swett's authority to exercise the option for all of the defendants. According to Symphony, moreover, it then discovered that the option agreement was possibly invalid. Consequently, in March 1985, Symphony initiated this declaratory judgment action against defendants, arguing that the option agreement violated the New York

statutory prohibition against remote vesting and clogged its equity of redemption under the mortgage.

Defendant Pergola subsequently served Symphony with separate notice of default dated April 4, 1985, informing Symphony that it was exercising the option on behalf of all defendants pursuant to sections 1, 3 (b) and 3 (d) of the option agreement and setting the closing date for July 10, 1985. Pergola further notified Symphony that it was alternatively exercising the option under section 3 (a) of the option agreement, which was not contingent upon Symphony's default, with the closing date scheduled for January 5, 1987. Symphony did not appear for any of the closing dates contained in Swett's or Pergola's notices.

A dispute among the defendants over Swett's authority to serve the initial notice developed into a separate litigation, culminating in the trial court authorizing Pergola to exercise the option on behalf of all defendants. In March 1987, Pergola thus served Symphony with another notice that it was exercising the option pursuant to section 3 (a), with the closing scheduled for September 11, 1987. The trial court's judgment was stayed, however, and Symphony did not appear at the March closing.

Thereafter, the parties cross-moved for summary judgment in the instant declaratory judgment proceeding. The trial court granted Symphony's motion while denying that of defendants. In particular, the court concluded that the Rule against Perpetuities applied to the commercial option contained in the parties' agreement, that the option violated the Rule and that Symphony was entitled to exercise its equitable right to redeem the mortgage. The trial court also dismissed defendants' counterclaim for rescission of the agreements underlying the transaction based on the parties' mutual mistake.

In a comprehensive writing by Justice Ellerin, the Appellate Division likewise determined that the commercial option was [*475] unenforceable under the Rule against Perpetuities and that rescission was inappropriate. The Appellate Division certified the

following question to us: "Was the order of the Supreme Court, as affirmed by this Court, properly made?" We conclude that it was and now affirm.

II. STATUTORY BACKGROUND

The Rule against Perpetuities evolved from judicial efforts during the 17th century to limit control of title to real property by the dead hand of landowners reaching into future generations. Underlying both early and modern rules restricting future dispositions of property is the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time. These rules thus seek "to ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability" (Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d 156, 161, 501 N.Y.S.2d 306, 492 N.E.2d 379, citing De Peyster v Michael, 6 N.Y. 467, 494).

The traditional statement of the common-law Rule against Perpetuities was set forth by Professor John Chipman Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest" (Gray, The Rule Against Perpetuities § 201, at 191 [4th ed 1942]).

In New York, the rules regarding suspension of the power of alienation and remoteness in vesting—the Rule against Perpetuities—have been statutory since 1830. Prior to 1958, the perpetuities period was two lives in being plus actual periods of minority (see, Real Property Law former § 42). Widely criticized as unduly complex and restrictive, the statutory period was revised in 1958 and 1960, restoring the common-law period of lives in being plus 21 years (see, L 1958, ch 153; L 1960, ch 448).

Formerly, the rule against remote vesting in New York was narrower than the common-law rule, encompassing only particular interests (see, Real Property Law former §§ 46, 50; Buffalo Seminary v McCarthy, 86 A.D.2d 435, 440, 451 N.Y.S.2d 457, affd 58 N.Y.2d 867, 460 N.Y.S.2d 528,

447 N.E.2d 76). A further 1965 amendment enacted a broad prohibition against remote vesting (see, L 1965, ch 670, § 1). This amendment was intended to make clear that the American common-law rule of perpetuities was now fully in force in New York (see, 1965 NY Legis Ann, at 206-207).

[*476] New York's current statutory Rule against Perpetuities is found in EPTL 9-1.1. Subdivision (a) sets forth the suspension of alienation rule and deems void any estate in which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years (see, EPTL 9-1.1 [a] [2]). The prohibition against remote vesting is contained in subdivision (b), which states that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved" (EPTL 9-1.1 [b]). This Court has described subdivision (b) as "a rigid formula that invalidates any interest that may not vest within the prescribed time period" and has "capricious consequences" (Wildenstein & Co. v Wallis, 79 N.Y.2d 641, 647-648, 584 N.Y.S.2d 753, 595 N.E.2d 828). Indeed, these rules are predicated upon the public policy of the State and constitute nonwaivable, legal prohibitions (see, Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d at 161).

In addition to these statutory formulas, New York also retains the more flexible common-law rule against unreasonable restraints on alienation. Unlike the statutory Rule against Perpetuities, which is measured exclusively by the passage of time, the common-law rule evaluates the reasonableness of the restraint based on its duration, purpose and designated method for fixing the purchase price. (See, Wildenstein & Co. v Wallis, 79 N.Y.2d at 648; Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d at 161-162, supra.)

Against this background, we consider the option agreement at issue.

III. VALIDITY OF THE OPTION AGREEMENT

Defendants proffer three grounds for upholding the option: that the statutory prohibition against remote vesting does not apply to commercial options; that the option here cannot be exercised beyond the statutory period; and that this Court should adopt the " wait and see" approach to the Rule against Perpetuities. We consider each in turn.

A. Applicability of the Rule to Commercial Options

Under the common law, options to purchase land are subject to the rule against remote vesting (see, Simes, Future Interests § 132 [2d ed 1966]; Simes and Smith, Future Interests § 1244 [2d ed]; Leach, Perpetuities in a Nutshell, 51 Harv L Rev 638, 660; see also, London & S. W. Ry. Co. v Gomm, 20 Ch. 562). [*477] Such options are specifically enforceable and give the option holder a contingent, equitable interest in the land (Dukeminier, A Modern Guide to Perpetuities, 74 Cal L Rev 1867, 1908; Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv L Rev 721, 736-737). This creates a disincentive for the landowner to develop the property and hinders its alienability, thereby defeating the policy objectives underlying the Rule against Perpetuities (see, Dukeminier, A Modern Guide to Perpetuities, 74 Cal L Rev 1908; 5A Powell, Real Property P 771 [1]).

Typically, however, options to purchase are part of a commercial transaction. For this reason, subjecting them to the Rule against Perpetuities has been deemed "a step of doubtful wisdom" (Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv L Rev 737; see also, Dukeminier, A Modern Guide to Perpetuities, 74 Cal L Rev 1908; Note, Options and the Rule Against Perpetuities, 13 U Fla L Rev 214, 214-215). As one vocal critic, Professor W. Barton Leach, has explained,

"[t]he Rule grew up as a limitation on family dispositions; and the period of lives in being plus twenty-one years is adapted to these gift transactions. The pressures which created the Rule do not exist with reference to arms-length contractual transactions, and neither lives in being nor

twenty-one years are periods which are relevant to business men and their affairs" (Leach, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv L Rev 1318, 1321-1322).

Professor Leach, however, went on to acknowledge that, under common law, "due to an overemphasis on concepts derived from the nineteenth century, we are stuck with the application of the Rule to options to purchase," urging that "this should not be extended to other commercial transactions" (id., at 1322; see also, Simes and Smith, Future Interests § 1244).

It is now settled in New York that, generally, EPTL 9-1.1 (b) applies to options. In Buffalo Seminary v McCarthy (86 A.D.2d 435, 451 N.Y.S.2d 457, supra), the court held that an unlimited option in gross to purchase real property was void under the statutory rule against remote vesting, and we affirmed the Appellate Division decision on the opinion of then- Justice Hancock (58 N.Y.2d 867). Since then, we have reiterated that options in real estate are subject to the statutory rule (see, e.g., Wildenstein & Co. v Wallis, 79 N.Y.2d at 648, supra).

[*478] Although the particular option at issue in Buffalo Seminary was part of a private transaction between neighboring landowners, the reasoning employed in that case establishes that EPTL 9-1.1 (b) applies equally to commercial purchase options. In reaching its conclusion in Buffalo Seminary, the court explained that, prior to 1965, New York's narrow statutory rule against remote vesting did not encompass options (86 A.D.2d at 443). A review of the history of the broad provision enacted in 1965, however, established that the Legislature specifically intended to incorporate the American common-law rules governing perpetuities into the New York statute (id., at 441-442).

Because the common-law rule against remote vesting encompasses purchase options that might vest beyond the permissible period, the court concluded that EPTL 9-1.1 (b) necessarily encompasses such options (id., at 443).

Inasmuch as the common-law prohibition against remote vesting applies to both commercial and noncommercial options, it likewise follows that the Legislature intended EPTL 9-1.1 (b) to apply to commercial purchase options as well.

Consequently, creation of a general exception to EPTL 9-1.1 (b) for all purchase options that are commercial in nature, as advocated by defendants, would remove an entire class of contingent future interests that the Legislature intended the statute to cover. While defendants offer compelling policy reasons—echoing those voiced by Professor Leach—for refusing to apply the traditional rule against remote vesting to these commercial option contracts, such statutory reformation would require legislative action similar to that undertaken by numerous other State lawmakers (see, e.g., Cal Prob Code § 21225; Fla Stat Annot ch 689.225; Ill Stat Annot ch 765, para 305/4).

Our decision in Metropolitan Transp. Auth. v Bruken Realty Corp. (67 N.Y.2d 156, 501 N.Y.S.2d 306, 492 N.E.2d 379, supra) is not to the contrary. In Bruken, we held that EPTL 9-1.1 (b) did not apply to a preemptive right in a "commercial and governmental transaction" that lasted beyond the statutory perpetuities period. In doing so, we explained that, unlike options, preemptive rights (or rights of first refusal) only marginally affect transferability:

"An option grants to the holder the power to compel the owner of property to sell it whether the owner is willing to part with ownership or not. A preemptive right, or right of first refusal, does not [*479] give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method" (id., at 163).

Enforcement of the preemptive right in the context of the governmental and commercial transaction, moreover,

actually encouraged the use and development of the land, outweighing any minor impediment to alienability (id., at 165-166).

Bruken merely recognized that the Legislature did not intend EPTL 9-1.1 (b) to apply to those contingent future interests in real property that encourage the holder to develop the property by insuring an opportunity to benefit from the improvements and to recapture any investment (see Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d at 165; Morrison v Piper, 77 N.Y.2d 165, 170, 565 N.Y.S.2d 444, 566 N.E.2d 643). In these limited circumstances, enforcement would promote the purposes underlying the rule.

Bruken, then, did not create a sweeping exception to EPTL 9-1.1 (b) for commercial purchase options. Indeed, we have since emphasized that options to purchase are to be treated differently than preemptive rights, underscoring that preemptive rights impede alienability only minimally whereas purchase options vest substantial control over the transferability of property in the option holder (see, Wildenstein & Co. v Wallis, 79 N.Y.2d at 648, supra; Morrison v Piper, 77 N.Y.2d at 169-170, supra). We have also clarified that even preemptive rights are ordinarily subject to the statutory rule against remote vesting (see, Morrison v Piper, 77 N.Y.2d 165, 565 N.Y.S.2d 444, 566 N.E.2d 643, supra). Only where the right arises in a governmental or commercial agreement is the minor restraint on transferability created by the preemptive right offset by the holder's incentive to improve the property.

Here, the option agreement creates precisely the sort of control over future disposition of the property that we have previously associated with purchase options and that the common-law rule against remote vesting—and thus EPTL 9-1.1 (b)—seeks to prevent. As the Appellate Division explained, the option grants its holder absolute power to purchase the property at the holder's whim and at a token price set far below market value. This Sword of Damocles necessarily discourages the property owner from investing

in improvements to the property. Furthermore, the option's existence significantly impedes the owner's ability to sell the property to a third party, as a practical matter rendering it inalienable.

[*480] That defendants, the holder of this option, are also the lessees of a portion of the premises does not lead to a different conclusion here.

Generally, an option to purchase land that originates in one of the lease provisions, is not exercisable after lease expiration, and is incapable of separation from the lease is valid even though the holder's interest may vest beyond the perpetuities period (see, Berg, Long-Term Options and the Rule Against Perpetuities, 37 Cal L Rev 1, 21; Leach, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv L Rev 1320; Simes and Smith, Future Interests § 1244). Such options—known as options "appendant" or "appurtenant" to leases—encourage the possessory holder to invest in maintaining and developing the property by guaranteeing the option holder the ultimate benefit of any such investment. Options appurtenant thus further the policy objectives underlying the rule against remote vesting and are not contemplated by EPTL 9-1.1 (b) (see, Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d at 165, supra; see also, Buffalo Seminary v McCarthy, 86 A.D.2d at 441, n 5, supra).

To be sure, the option here arose within a larger transaction that included a lease. Nevertheless, not all of the property subject to the purchase option here is even occupied by defendants. The option encompasses the entire building—both the commercial space and the theater—yet defendants are leasing only the commercial space. With regard to the theater space, a disincentive exists for Symphony to improve the property, since it will eventually be claimed by the option holder at the predetermined purchase price.

Furthermore, the option is not contained in the lease itself, but in a separate agreement. Indeed, section 5 of the option agreement specifies that the right to exercise the option is wholly independent from the lease, stating that it "shall not

be in any way affected or impaired by ... performance or nonperformance, actual or asserted, of any obligation to be performed under the Lease or any other agreement." The duration of the option, moreover, exceeds the term of the lease. Consequently, defendants could compel Symphony to sell them the property even after they have ceased possession as lessee.

Put simply, the option here cannot qualify as an option appurtenant and significantly deters development of the property. If the option is exercisable beyond the statutory perpetuities period, refusing to enforce it would thus further the [*481] purpose and rationale underlying the statutory prohibition against remote vesting.

B. Duration of the Option Agreement

1. Duration Under Section 3 (a) of the Agreement

Defendants alternatively claim that section 3 (a) of the agreement does not permit exercise of the option after expiration of the statutory perpetuities period. According to defendants, only the possible closing dates fall outside the permissible time frame.

Where, as here, the parties to a transaction are corporations and no measuring lives are stated in the instruments, the perpetuities period is simply 21 years (see, Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d at 161, supra). Section 1 of the parties' agreement allows the option holder to exercise the option "at any time during any Exercise Period" set forth in section three. Section 3 (a), moreover, expressly provides that the option may be exercised "at any time after July 1, 1979," so long as the closing date is scheduled during 1987, 1993, 1998 or 2003. Even factoring in the requisite notice, then, the option could potentially be exercised as late as July 2003—more than 24 years after its creation in December 1978. Defendants' contention that section 3 (a) does not permit exercise of the option beyond the 21-year period is thus contradicted by the plain language of the instrument.

Nor can EPTL 9-1.3—the "saving statute"—be invoked to shorten the duration of the exercise period under section 3

(a) of the agreement. That statute mandates that, "[u]nless a contrary intention appears," certain rules of construction govern with respect to any matter affecting the Rule against Perpetuities (EPTL 9-1.3 [a]). The specified canons of construction include that "[i]t shall be presumed that the creator intended the estate to be valid" (EPTL 9-1.3 [b]) and " [w]here the duration or vesting of an estate is contingent upon ... the occurrence of any specified contingency, it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate" (EPTL 9-1.3 [d]).

By presuming that the creator intended the estate to be valid, the statute seeks to avoid annulling dispositions due to inadvertent violations of the Rule against Perpetuities. The provisions of EPTL 9-1.3, however, are merely rules of construction. [*482] While the statute obligates reviewing courts, where possible, to avoid constructions that frustrate the parties' intended purposes (see, Morrison v Piper, 77 N.Y.2d 165, 173-174, 565 N.Y.S.2d 444, 566 N.E.2d 643, supra), it does not authorize courts to rewrite instruments that unequivocally allow interests to vest outside the perpetuities period (compare, EPTL 9-1.2 [reducing age contingency to 21 years, where interest is invalid because contingent on a person reaching an age in excess of 21 years]).

Indeed, by their terms, the rules of construction in EPTL 9-1.3 apply only if "a contrary intention" does not appear in the instrument. Thus, as the Practice Commentary explains, "[t]he court cannot validate an unambiguous disposition on the basis of the grantor's probable intent, but where construction is needed [subd (b)] will be useful in helping to establish the creator's intent" (Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 9-1.3, at 543).

For example, where a deed contains contradictory phrases, one of which is valid under the Rule (see, Morrison v Piper, 77 N.Y.2d 165, 173-174, 565 N.Y.S.2d 444, 566 N.E.2d

643, supra), or where one of two possible interpretations of a term in an agreement would comply with the Rule (see, Payne v Palisades Interstate Park Commn., 204 A.D.2d 787, 611 N.Y.S.2d 699), the court will adopt the construction validating the disposition (see also, Restatement of Property § 375 [1944]). By contrast, an option containing no limitation in duration demonstrates the parties' intent that it last indefinitely, and EPTL 9-1.3 does not permit "an extensive rewriting of the option agreement ... so as to make it conform to the permissible period" (see, Buffalo Seminary v McCarthy, 86 A.D.2d at 446, supra).

The unambiguous language of the agreement here expresses the parties' intent that the option be exercisable "at any time" during a 24-year period pursuant to section 3 (a). The section thus does not permit a construction that the parties intended the option to last only 21 years.

Given the contrary intention manifested in the instrument itself, the saving statute is simply inapplicable.

2. Duration Under Sections 3 (b)-(d) of the Agreement

Section 3 (b), (c) and (d) of the agreement also allow the option to be exercised after the 21-year perpetuities period, which would expire in December 1999.

Section 3 (b) authorizes the option to be exercised "at any time" following the maturity of the mortgage note. The only [*483] limit on duration is found in section 4, which designates December 31, 2003, to be the latest possible closing date. The option could thus be exercised until October 2003 pursuant to section 3 (b).

Section 3 (c) and (d) each permits exercise of the option for a defined period following a specified contingency. Section 3 (c) is contingent upon termination of the lease; section 3 (d) is contingent upon Symphony's default on the mortgage. Neither the lease nor the mortgage, however, expires until a date in 2003. The lease could therefore be terminated, or Symphony could default on the mortgage, some time prior to 2003 but after the 21-year period lapses in December

1999. Defendants, in turn, could potentially exercise the option during this interval.

Defendants urge that, under EPTL 9-1.3 (b), (d), we must presume the parties expected these contingencies to occur, if at all, within the 21-year period. A contrary intention, however, appears in the agreement itself. By specifying in section 4 that the closing date could be scheduled as late as December 31, 2003, the parties manifested their expectation that the contingency might occur and the option might be exercised as late as October 2003, well beyond December 1999.

Again, EPTL 9-1.3 (b), (d) cannot "save" these provisions.

C. "Wait and See" Approach

Defendants next urge that we adopt the "wait and see" approach to the Rule against Perpetuities: an interest is valid if it actually vests during the perpetuities period, irrespective of what might have happened (see, Dukeminier, A Modern Guide to Perpetuities, 74 Cal L Rev 1867, 1880). The option here would survive under the "wait and see" approach since it was exercised by 1987, well within the 21-year limitation.

This Court, however, has long refused to "wait and see" whether a perpetuities violation in fact occurs. As explained in Matter of Fischer (307 N.Y. 149, 157), "[i]t is settled beyond dispute that in determining whether a will has illegally suspended the power of alienation, the courts will look to what might have happened under the terms of the will rather than to what has actually happened since the death of the testator" (see also, Matter of Roe, 281 N.Y. 541, 547-548).

The very language of EPTL 9-1.1, moreover, precludes us from determining the validity of an interest based upon what actually occurs during the perpetuities period. Under the statutory rule against remote vesting, an interest is invalid "unless it must vest, if at all, not later than twenty-one years after one [*484] or more lives in being" (EPTL 9-1.1 [b] [emphasis added]). That is, an interest is void from the outset if it may vest too remotely (see, Turano, Practice

Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 9-1.1, at 481; see also, Metropolitan Transp. Auth. v Bruken Realty Corp., 67 N.Y.2d at 163, supra ["(t)he validity of the provision must be judged by the circumstances existing at the time of the grant"]). Because the option here could have vested after expiration of the 21-year perpetuities period, it offends the Rule.

We note that the desirability of the "wait and see" doctrine has been widely debated (see, 5A Powell, Real Property P 827F [1], [3]; see also, Waggoner, Perpetuity Reform, 81 Mich L Rev 1718 [describing "wait and see" as "(t)he most controversial of the reform methods"]). Its incorporation into EPTL 9-1.1, in any event, must be accomplished by the Legislature, not the courts.

We therefore conclude that the option agreement is invalid under EPTL 9-1.1 (b). In light of this conclusion, we need not decide whether the option violated Symphony's equitable right to redeem the mortgage.

IV. REMEDY

As a final matter, defendants argue that, if the option fails, the contract of sale conveying the property from Broadwest to Symphony should be rescinded due to the mutual mistake of the parties. We conclude that rescission is inappropriate and therefore do not pass upon whether Broadwest's claim for rescission was properly assigned to defendant Pergola.

A contract entered into under mutual mistake of fact is generally subject to rescission (see, Matter of Gould v Board of Educ., 81 N.Y.2d 446, 453, 599 N.Y.S.2d 787, 616 N.E.2d 142). CPLR 3005 provides that when relief against mistake is sought, it shall not be denied merely because the mistake is one of law rather than fact. Relying on this provision, defendants maintain that neither Symphony nor Broadwest realized that the option violated the Rule against Perpetuities at the time they entered into the agreement and that both parties intended the option to be enforceable.

CPLR 3005, however, does not equate all mistakes of law with mistakes of fact (see, Mercury Mach. Importing Corp. v City of New York, 3 N.Y.2d 418, 427, 165 N.Y.S.2d 517, 144 N.E.2d 400). Rather, the provision [*485] "removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact" (id.). Indeed, this Court has held that the predecessor statute, Civil Practice Act § 112-f, did not mandate the court to grant relief where taxes had been paid on the assumption that a taxing statute subsequently found to be unconstitutional was valid (id.). Likewise, CPLR 3005 "does not permit a mere misreading of the law by any party to cancel an agreement" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3005, at 621).

Here, the parties' mistake amounts to nothing more than a misunderstanding as to the applicable law, and CPLR 3005 does not direct undoing of the transaction (cf., Gimbel Bros. v Brook Shopping Ctrs., 118 A.D.2d 532, 499 N.Y.S.2d 435 [lack of diligence in determining legal obligations under contract did not entitle party to restitution on the ground that it acted under a mistake of law]).

The remedy of rescission, moreover, lies in equity and is a matter of discretion (Rudman v Cowles Communications, 30 N.Y.2d 1, 13, 330 N.Y.S.2d 33, 280 N.E.2d 867). Defendants' plea that the unenforceability of the option is contrary to the intent of the original parties ignores that the effect of the Rule against Perpetuities—which is a statutory prohibition, not a rule of construction—is always to defeat the intent of parties who create a remotely vesting interest. As explained by the Appellate Division, there is "an irreconcilable conflict in applying a remedy which is designed to void a transaction because it fails to carry out the parties' true intent to a transaction in which the mistake made by the parties was the application of the Rule against Perpetuities, the purpose of which is to defeat the intent of the parties" (214 A.D.2d 66, 80).

The Rule against Perpetuities reflects the public policy of the State. Granting the relief requested by defendants would thus be contrary to public policy, since it would lead to the same result as enforcing the option and tend to compel performance of contracts violative of the Rule. Similarly, damages are not recoverable where options to acquire real property violate the Rule against Perpetuities, since that would amount to giving effect to the option (see, 5A Powell, Real Property P 771 [3]).

Accordingly, the order of the Appellate Division should be [*486] affirmed, with costs, and the certified question answered in the affirmative.

III. LOS DERECHOS NO POSESORIOS

A. LOS *EASEMENTS*

LA CREACIÓN DE *EASEMENTS*

DONALD E. WILLARD et al., Plaintiffs and Respondents, v. FIRST CHURCH OF CHRIST, SCIENTIST, PACIFICA, CALIFORNIA, Defendant and Appellant. Supreme Court of California 7 Cal. 3d 473; 498 P.2d 987, July 11, 1972

OPINION BY: PETERS

[*474] In this case we are called upon to decide whether a grantor may, in deeding real property to one person, effectively reserve an interest [*475] in the property to another. We hold that in this case such a reservation vests the interest in the third party.

Plaintiffs Donald E. and Jennie C. Willard filed an action to quiet title to a lot in Pacifica against the First Church of Christ, Scientist (the church). After a trial, judgment was entered quieting the Willards' title. The church has appealed.

Genevieve McGuigan owned two abutting lots in Pacifica known as lots 19 and 20. There was a building on lot 19, and lot 20 was vacant. McGuigan was a member of the church, which was located across the street from her lots, and she permitted it to use lot 20 for parking during