RYAN V. BESHK

Supreme Court of Illinois.
339 Ill. 45, 170 N.E. 699 (1930).

EDMUNDS, Commissioner. On November 2, 1927, Delia Ryan filed an amended and supplemental bill to construe the will of her deceased husband, Edward J. Ryan. The case is here on appeal by certain parties whose claims [p*479] to testamentary interest by way of remainder were not sustained by the resulting decree.

In the first paragraph of the will, which was probated on June 18, 1917, the testator directed his executrix, Delia Ryan, (complainant below and appellee here,) to pay his just debts and funeral expenses. In the second paragraph the testator devised to Delia Ryan "during the term of her natural life, providing she shall not marry again," certain premises therein legally described and stated to be otherwise known as 5057 West Chicago avenue, Chicago, Cook county, Illinois. . . . The fourth paragraph was as follows: "Upon the death or marriage of my beloved wife, Delia Ryan, I hereby give, devise and bequeath to my brother James P. Ryan, my brother Michael T. Ryan and my sister Margaret Byrne, and my niece Helen Ryan, daughter of Daniel Ryan, deceased brother, if they be living at the death or marriage of my wife, or in the event of the death of all or any of said persons mentioned I give and bequeath his or her part or share intended for him or her who has died before the death or marriage of my said wife, Delia Ryan, to his or her executor or administrator to be applied by such as if the same had formed part of the estate of such person or legatee at his or her decease, the following described property, to-wit, [describing the property known as 5057 West Chicago avenue,] together with all buildings and appurtenances and hereditaments thereto appertaining to be held by them, their heirs and assigns, executors and administrators forever, share and share alike." The fifth paragraph was as follows: "To my wife, Delia Ryan, in addition to whatever I may have given or may hereafter give to her in my lifetime I give, devise and bequeath all the rest, residue and remainder of my estate and property, both real, personal and mixed, not heretofore otherwise disposed of." . . . In the last paragraph of the will the testator named Delia Ryan executrix thereof, without bond.

The decree entered, after hearing by the chancellor, finds, among other things, that the will was duly probated and the estate duly administered; that Delia Ryan was duly discharged as executrix on September 28, 1918; that she has not remarried; that Michael T. Ryan, James P. Ryan, Margaret Byrne and Helen Ryan survived the testator; that Michael T. Ryan died testate on January 22, 1923, and that his will was probated in Dubuque county, Iowa; that Margaret Byrne died intestate on April 22, 1923, leaving sons and daughters her surviving; that Helen Ryan has intermarried with Frank Beshk; . . . that there is a controversy as to the construction of the will and that judicial construction thereof is necessary; and that the court has jurisdiction of the subject matter and necessary parties. The decree then sets forth as the true construction of the will that it devises to Delia Ryan for life, provided she does not remarry, the premises at 5057 West Chicago avenue . . .; that it devises the remainder of the premises "in fourths, one-fourth to said James P. Ryan, if he is living at the time of the re-marriage or death of said Delia Ryan; one-fourth to said Michael T. Ryan, if he is living at the time of the re-marriage or death of said Delia Ryan; one-fourth to said Margaret Byrne, if she is living at the time of the re-marriage or death of said Delia Ryan; and one-fourth to said Helen Ryan, if she is living at the time of the re-marriage or death of said Delia Ryan; and begins provisions for the devise of each of said fourths of said remainder in trust, to be effective as to each fourth of said remainder upon failure of the contingency upon which that fourth is first devised as aforesaid, but said testator neither names or indicates in his said will any beneficiary of any such fourth so devised in trust, further than to say that in each such case that fourth shall be applied by the trustee thereof as if it had been part of the estate of [p*480] that contingent remainderman at the time of that contingent remainderman's death, and that said testator gives, devises and bequeaths all of the rest, residue and remainder of his estate and property to the said Delia Ryan." The decree continues: "And it is therefore

ordered, adjudged and decreed by the court that each and every of the said four attempted devises in trust is void for uncertainty as to the beneficiary or beneficiaries of such devise in trust, and, further, that each and every of said attempted devises in trust is in conflict with the rule against perpetuities, and therefore is void for remoteness." The decree then provides that upon the death of Michael T. Ryan and Margaret Byrne their interests became the property of Delia Ryan under the residuary clause of the will, and that if James P. Ryan or Helen Ryan Beshk die before Delia Ryan re-marries or dies, their interests will likewise pass to Delia Ryan under the residuary clause. As to the $2000 indebtedness yet remaining on the premises, the decree orders it to be paid "by all of those persons who acquire any interest" in the premises under the will and in direct proportion to the interests thus acquired.

Appellants assert that the intention and plan of the testator as shown by the will was to devise vested remainders in fee to the four parties named as devisees in paragraph 4, subject to a life estate in Delia Ryan, terminable upon her marriage. If this position be well taken, the decree is, of course, improper.

It was appropriately said in *Golladay* v. *Knock*, 235 Ill. 412, that "while the difference between a vested and a contingent remainder is clear enough under the definitions as given by the authorities, still it is not always an easy matter to determine whether a particular instrument creates a vested or a contingent remainder." Such determination is, in any case, facilitated by having in mind the basic difference between these two classes of remainders and the general rule which governs their creation. . . .

The remainders in the present case were created by paragraph 4 of the will. By that paragraph, upon the death or re-marriage of Delia Ryan the property is devised to four named parties, "if they be living at the death or marriage of my wife," with an alternative provision if they are not then living. Giving due effect to this language, . . . the remainders here are clearly contingent, because by no possibility whatever could the condition upon which they are limited be met until after the termination of Delia Ryan's life estate. Survivorship after the death or re-marriage of Delia Ryan is as clearly a condition precedent as though express words of survivorship had been employed.

The question of remainders conditioned upon survivorship is discussed by Gray in "The Rule against Perpetuities." The author suggests that there are reasons why such remainders should always be held contingent, and, on the other hand, that there are reasons why they should always be held to be vested. . . . "Neither of these views is that of the common law. Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of or into the gift to the remainderman then the remainder is contingent, but if, after words giving a vested interest, a clause is added divesting it the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death; but on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent." (Gray's Rule against Perpetuities,--3d ed.--§§ 104–108.) . . . That this is the law in Illinois is established by many decisions. [Citations omitted.] [p*481]

Appellants urge that much allowance should be made for the inability and failure of the testator, through ignorance and carelessness, to express his real meaning by the correct use of language, and that when the whole scope of the will is considered the remainders must be held to have been vested in fee. However, the intention which is to be sought for in the construction of a will is not what may by inference be presumed to have been in the mind of the testator, but that which is expressed by the language of the will. [Citations omitted.] Whether a remainder is vested or contingent depends, as stated in the words of Professor Gray above quoted, upon the language employed in creating it. . . . The language employed in paragraph 4 clearly purports to set up for certain individuals certain remainders. The testator then proceeds farther and by appropriate

disjunctive language purports to set up certain alternative remainders in the event that all or any of the remainders in the first group should fail. The language employed to set up the first group of remainders is both appropriate and effective for that purpose and by settled authority the remainders which it creates are contingent ones. The focal point of all provisions of the paragraph is, as a matter of fact, found in the words, "if they be living at the death or marriage of my wife." To hold that remainders arising out of this paragraph are vested would involve disregarding the plain meaning of these words. The death of Michael T. Ryan and Margaret Byrne has rendered impossible a compliance with the condition precedent in the devise of the contingent remainders to them. The estates of James P. Ryan and Helen Ryan Beshk will become vested only if they survive the death or re-marriage of Delia Ryan.

So far as the alternative provision of paragraph 4 is concerned, as suggested by appellants, it appears from the language employed that it was the testator's intention to set up trusts under which the executor or administrator, as the case might be, of any deceased devisee, might take title in fee and apply the estate as if it were a part of the estate of such devisee. This being so, the remainders which it was thus attempted to create are governed by the decision in *Johnson* v. *Preston*, 226 Ill. 447. In that case the testatrix devised to a named executor certain real estate to hold for the period of twenty-five years from the date of probate of the will for the use and benefit of named grand-sons, the fee to vest in said grand-sons or their heirs absolutely at the end of such twenty-five-year period. The court said: "It is clear from the language of the will itself, that whatever interest the executor took under it could not vest in him until the probate of the will, and while this event would, in the ordinary and usual course of events, probably occur within a few months, or, at most, a few years, after the death of the testatrix, yet it cannot be said that it is a condition that must inevitably happen within twenty-one years from the death of the testatrix. Since a bare possibility that the condition upon which the estate is to vest may not happen within the prescribed limits is all that is necessary to bring the devise in conflict with the rule, we see no escape from the conclusion that the devise to the executor offends the rule against perpetuities and is therefore void." In commenting upon this case in *Barrett* v. *Barrett*, 255 Ill. 332, this court said: "The court held that the devise to the executor to hold for twenty-five years from the date of the probate of the will introduced a certain contingency and violated the rule against perpetuities, and that therefore the entire devise to the executor of the real estate was void. . . . The entire trust was held void and the estate intestate." In the present case there are not, and by the very nature of the case there cannot be, named trustees, and there is the same possibility that letters testamentary, under which trustees would qualify by description as executors or administrators, [p*482] as the case might be, would not issue within the period of twenty-one years from the death of those designated as devisees by paragraph 4.

The decree is proper in holding that upon failure of the contingency as to any fourth of the remainder created by paragraph 4 of the will that fourth falls into the residue and passes to Delia Ryan by virtue of the residuary clause. . . .

The decree of the circuit court of Cook county is affirmed.

MR. CHIEF JUSTICE FARMER, dissenting.

Questions

How could the testator have drafted his will to achieve the result he desired without having it invalidated by the rule announced in the principal case? To answer that question, you will have to ask yourself what interests were held void for remoteness and why. Does the condition of survivorship imposed on the contingent remaindermen affect the outcome of the case? Suppose the interests created were vested subject to complete defeasance by failure to survive the wife; would the outcome change? If that wouldn't change the outcome, can you think of any other device which would?

Notes on Perpetuities and Trusts

The trust of personal property (usually securities of one sort or another) is the modern equivalent of the term of years and the entailed estate which was used in *The Duke of Norfolk's Case*. By this device a man of some wealth can provide for and dictate to a number of generations of his descendants, can have his estate professionally managed, and frequently decrease his tax burden. A complete coverage of the topic of the relationship of the Rule to trusts must await other courses. *See generally* 1A A. SCOTT & W. FRATCHER, TRUSTS §§ 62.10–62.11 (4th ed. 1987). Because of the practical importance of the topic to our examination of restraints on alienation, we give a few principles here.

1. The Rule is not applied in the same way to charitable trusts, business trusts (the so-called "Massachusetts trust," an entity similar to a corporation), and family trusts. What follows concerns only the last mentioned.

2. During the period in which a trust is revocable by the settlor or destructible by someone other than the settlor, it is not subject to the Rule no matter how long it may or does last. *See* RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.2 comment *b* (1983). (Do you see how a suspension of alienation rather than a notion of vesting is at work here?)

3. If the interest of the beneficiaries vests within the period of the Rule, the interest of the beneficiaries is generally not subject to the Rule no matter how long the trust may or does last. The reason generally stated for this holding is that the *cestui* or *cestuis* may destroy the trust if they wish to. RESTATEMENT (SECOND), *supra*, § 2.1. Suppose, however, that the trust is an indestructible trust (such trusts are sometimes called "Claflin" trusts from Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889)). The general rule seems to be that the feature of indestructibility may last no longer than the perpetuities period. RESTATEMENT (SECOND), *supra*, § 2.1 comment *a*; Throm Estate (No. 2), 378 Pa. 163, 106 A.2d 815 (1954).

4. An accumulation, i.e., an instruction to the trustees to re-invest the income for a period and then pay over the total amount, may last for no longer than the perpetuities period. RESTATEMENT (SECOND), *supra*, § 2.2(1). The courts [p*483] are hostile to such accumulations since a relatively small principal can by the magic of compound interest be converted into a gigantic amount if the measuring lives are carefully chosen. Nonetheless it has been left to the legislatures to make any change in the period. About one-third of the states have "Thellusson acts" (named after the leading case, Thellusson v. Woodford, 11 Ves. Jun. 112, 32 Eng. Rep. 1030 (H.L. 1805)), and these acts usually attempt to limit an accumulation to a maximum of 21 years.

5. Spendthrift trusts have been treated, *supra*, p. S232, as a variety of restraint on alienation. In the light of the fact that spendthrift provisions have only barely managed to avoid condemnation as direct restraints on alienation, it may surprise you to learn that there is no clear authority subjecting spendthrift provisions to the period of the Rule. What arguments can you think of for exempting spendthrift provisions from the Rule? For not so exempting? How do you come out?

6. As a result of considerable pressure from the banking industry a number of states have within the last ten years enacted laws exempting trusts from the Rule or enacting a perpetuties period for trusts of 500 or 1000 years. A recent count brings us up to 29 states. These statutes have produced a considerable amount of academic criticism. For a good discussion of the issues, see http://www.michiganlawreview.org/assets/fi/109/waggoner.pdf (last visited 3/3/2011). Their attraction depends on what can only be regarded as loophole in the current federal estate and gift tax code. That loophole is unlikely to survive when Congress finally gets around to reforming the code, and it is likely that it will impose such heavy taxation on these trusts that they will disappear. The result will be headaches in those states that passed these statutes for years to come.

Note on the Consequences of Invalidating an Interest Under the Rule Against Perpetuities

Generally speaking, when an interest is held void for remoteness at common law, the entire interest is invalid *ab initio*. Further, as a general rule, when an interest is held void under the Rule, the other provisions of the will or deed creating that void interest take effect as if the void provision were struck out. Landram v. Jordan, 203 U.S. 56 (1906). But if the court determines that the testator would not have wanted the other provisions of his will to stand without the voided provision, it will avoid the entire instrument on the theory that the dispositive scheme is entire and thus entirely void for remoteness. This is sometimes called the doctrine of "infectious invalidity." *See In re* Richards' Estate, 283 Mich. 485, 278 N.W. 657 (1938).

If the void interest is to follow a life estate or a determinable fee, the preceding estate is generally unaffected by the failure of the succeeding interest, since the preceding interest terminates by its own terms, not by reason of the succeeding estate. American Security & Trust Co. v. Cramer, 175 F. Supp. 367, 374 (D. D.C. 1959); Donehue v. Nilges, 364 Mo. 705, 266 S.W.2d 553 (1954). *But see* Maher v. Maher, 139 F. Supp. 294 (E.D. Ky. 1956), *noted in* 9 Okla. L. Rev. 440 (1956). If the void interest follows a fee simple on a condition subsequent, then the preceding interest is generally enlarged into a fee simple by the avoiding of the future interest.

As to void preceding interests, it is likely that holding a preceding interest void for remoteness also voids later interests. *See, e.g.*, Sandford's Adm'r v. Sandford, 230 Ky. 429, 438, 20 S.W.2d 83, 88 (1929). But this is not an ineluctable conclusion. Suppose, for example, that a life estate to a person living at the testator's death is to follow an interest held void. A strong argument can be made that the interest should be good. *See* 6 A.L.P. § 24.51; RESTATEMENT OF PROPERTY § 403 comment *f* (1944); *cf.* Perpetuities Reform Act 1964, c. 55, § 6. Or suppose there is a remainder to a charitable corporation (generally exempt from the operation of the rule) after a life estate held void for remoteness. Should it be upheld? *In re* Allan's Will Trusts, [1958] 1 All E.R. 401 (Ch.), upholds the interest. [p*484]

2. Reform and the Future of the Rule

Debate over whether the Rule should be abolished has raged on in the pages of treatises and law reviews for decades. The reform movement has gained impetus with the adoption by the American Law Institute in RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS §§ 1.4, 1.5 (1983) of the so-called "wait-and-see" approach coupled with the use of "cy pres" for saving interests which are otherwise void, and the promulgation in 1986 of the Uniform Statutory Rule Against Perpetuities by the National Conference of Commissioners on Uniform State Laws, which is similar in basic approach. While a number of states had made significant changes in the Rule through judicial decision or legislation before the appearance of the *Restatement (Second)* and the Uniform Act, more have now done so. In this section we will introduce you to these proposed reforms and the controversy which they continue to engender.

There are among the Rule's critics some who would urge that it simply be abolished. For example, after noting that "[e]ither the restriction is sufficiently well known by lawyers that it can be fully evaded, or it turns out to be a gratuitous trap against the unknowing and the unwary, which causes an enormous amount of trouble to evade," one commentator concludes that the Rule confers little or no social benefit, imposes substantial drafting, administrative, litigation and uncertainty costs, and is therefore in cost-benefit terms unwise. Epstein, *Comments in Time, Property Rights, and the Common Law—A Roundtable Discussion*, 64 WASH. U. L.Q. 793, 857 (1986); Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 710–13 (1986). *Compare* Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 734–737 (1986), arguing that because the value of dead hand control diminishes with time (since people "care more about the near future than the far future") and the costs of such restrictions rise as owners

multiply and administrative costs increase, some form of the Rule is justified in utilitarian terms. Others have argued that public control over the transmission of wealth is better accomplished by the creation of disincentives through the federal estate tax system. *See* Levin & Mulroney, *The Rule Against Perpetuities and the Generation-Skipping Tax: Do We Need Both?*, 35 VILLANOVA L. REV. 333 (1990).

The most commonly voiced criticism of the Rule in its classic form is that in its complexity the Rule unnecessarily frustrates the intentions of those unskilled in its application while sustaining the efforts of those rich and wise enough to employ skilled lawyers who can draft around it. *See, e.g.*, Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS ch. 1, Introductory Note (1983). Most commentators agree that the Rule serves an important social purpose, but have been led by such concerns to propose that the Rule be substantially reformed. There has been no lack of such proposals.

One answer to the concern over the Rule's "traps" is to eliminate those which are most obvious. Some states initially proceeded in this fashion, enacting legislation which deals directly with such issues as the "fertile octogenarian" and the "unborn widow." *See, e.g.*, FLORIDA STAT. ANN. § 689.22(5)(b) (1984) (a reference in a will to an undesignated spouse is presumed to be a person in being on the effective date of the instrument); *id.*, at [p*485] § 689.22(5)(d) (a woman over 65 is presumed to be infertile).[1] This "piecemeal" approach has obvious shortcomings. The focus in recent years has been on broader reforms, and particularly on the "wait-and-see" approach and the reformation of the operative instrument to save otherwise void interests ("cy pres").

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[1] Florida has since enacted the Uniform Statutory Rule Against Perpetuities. FLORIDA STAT. § 689.225 (1989).

Notes and Questions on the **Anderson** *Case*

1. In In the Matter of Anderson's Estate, 541 So. 2d 423 (Miss. 1989), the testator created a twenty-five year trust to provide for the education of his nieces and nephews, who were defined as the "descendants" of his father. At the end of twenty-five years the corpus was to be given to his favorite nephew, or to his heirs, if the nephew precedeceased. The court concluded that interests created in the descendants of testator's father would violate the Rule as classically formulated. It expressed some doubt about the validity of the alternative remainder in the heirs of the nephew, but concluded that it would be a violation of the classical Rule if the heirs of the nephew were determined at the time of the termination of the trust. You should review your understanding of the classical to see why these conclusions were almost certainly correct.

2. The court then applied the "wait-and-see" doctrine to uphold interests which would otherwise violate the Rule. For what are we to wait to see? The court stated that validity of contingent interests under wait-and-see turns on whether contingent interests in fact vest during "the perpetuities period." In some cases the application of this standard is easy. For example, in the classic unborn widow case (*supra*, p. S260), the otherwise void interest is good if the person who actually is the widow was in being when the instrument took effect. But can "wait-and-see" ever be applied to hold valid interests still contingent when the issue is presented in litigation?

3. Counsel in *Anderson* was seeking to upset the will argued that application of the "wait-and-see" doctrine "makes a shambles" of the Rule, tying up property "for an unconscionable period." Counsel's argument probably went as follows. Under the traditional Rule, contingent interests which will not necessarily vest within the perpetuities period are invalid from the outset and do not further restraint alienability. "Wait-and-see" creates a longer period of uncertainty while we wait to see if such interests actually vest within the period. This added uncertainty about the

ultimate ownership of the property makes it less alienable than it would be under the traditional Rule. Counsel would not be alone in making this argument. Critics of "wait-and-see" have repeatedly made the same point. *See, e.g.*, Fetters, *Perpetuities: The Wait-and-See Disaster—A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 CORNELL L. REV. 380, 415 (1975) (the title of this piece itself says something of the character of the controversy). [p*496]

Proponents of "wait-and-see" minimize the uncertainty problem. First, even in its classic form the Rule permits some contingent interests which might not vest until the end of the perpetuities period. Skilled draftsmen are adept at creating such interests. The Rule therefore already tolerates a significant degree of uncertainty about ownership. A marginal addition to uncertainty is a small price to pay for carrying out the grantor's intention as to those interests which actually vest within the period. Those which do not are still invalid. *See, e.g.*, Maudsley, *Perpetuities: Reforming the Common Law Rule-How to Wait and See*, 60 CORNELL L. REV. 355, 364–66 (1975); RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS ch. 1, Introductory Note (1983). Second, interests which satisfy the traditional Rule can still be held valid at the outset, and early litigation can remove some remaining certainty by adjudicating the events required for vesting, particularly if "wait-and-see" is adopted through carefully drafted legislation. *See* Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1769–1773 (1983). Do you find these arguments persuasive?

4. The court in *Anderson* noted that in addition to "wait-and-see" Mississippi has modified the Rule in two other significant respects. First, it has abolished the all-or-nothing rule for class gifts. (*See* p. S258 *supra*). Mississippi apparently stands alone in this respect. *See* Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1892 n. 81 (1986). Second, Mississippi courts may validate interests otherwise invalid by implying a savings clause into the operating document, in order to carry out the "dominant intent" of the testator (or grantor). A number of draftsmen employ express savings clauses to assure that the interests created are valid. A typical savings clause provides that in any event, contingent interests shall terminate no later than twenty-one years after the death of the last survivor of a designated group of persons in being when the document becomes operative (taking care, of course, to assure that the group is not too numerous), and shall at that moment go unconditionally to specified takers. *See* Waggoner, *supra* Note 3, at 1724–1726. Implication of such a clause is a form of judicial reformation of the operative document in order to approximate as closely as possible the testator's original intent, given that the intention to make one or more specific gifts cannot be effectuated under the Rule. The power to engage in such reformation under the so-called *cy pres* doctrine has been asserted by a number of courts, either through judicial decision alone or by legislative authorization. This approach has been particularly favored where the Rule could be satisfied by reducing an age contingency to 21 years. *E.g.*, Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891) (gift to the testator's grandchildren when the youngest reached 40 reformed to make it a gift to the grandchildren when the youngest reached 21); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962) (similar reduction from 25 to 21); *cf. In re* Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970) (gift to testator's children and grandchildren reformed to take effect 21 years, rather than 30, after the testator's death, or upon the death of the testator's widow, whichever would come later); Berry v. Union Nat'l Bank, 164 W. Va. 258, 262 S.E.2d 766 (1980) (educational trust for testatrix' nieces and nephews modified from 25 to 21 years' duration); *see also* Atchison v. Englewood, 193 Colo. 367, 568 P.2d 13 (1977), *noted in* 55 DENVER L.J. 97 (1978) (allowing parties to reform a lease and option agreement to avoid violation of the Rule). *Compare* Merrill v. Wimmer, 481 N.E.2d 1294, 1298 n. 2 (Ind. 1985) (trust to terminate when youngest grandchild reached 25 could not be reformed under the principles of *Carter* and *Chun Quan Yee Hop*; unlike those cases the proposed reformation would result in a change of beneficiaries). [p*497]

Further Note on "Wait-and-See"

After considerable controversy, "wait-and-see" was adopted by the American Law Institute as the governing standard with the simple declaration that "a donative transfer of an interest fails, if the interest does not vest within the period of the rule against perpetuities." RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 (1983). Prior to adoption of the *Restatement (Second)*, five states (Kentucky, Ohio, Pennsylvania, Vermont and Washington) had enacted statutes adopting "wait-and-see." *See, e.g.*, the Kentucky statute, which combines "wait-and-see" and *cy pres* as follows:

> In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest.

KY. REV. STAT. ANN. § 381.216 (1972). Four other states (Connecticut, Maine, Maryland and Massachusetts) had enacted more restricted versions of "wait-and-see" applicable only to interests limited to take effect at the termination of one or more life estates. A version of "wait-and-see" also appears in the English Perpetuities and Accumulations Act 1964, c. 55.

While these statutes may provide some support for the position taken in the *Restatement (Second)*, judicial adoption of "wait-and-see" was "virtually non-existent." Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1760 (1983). The Reporter for the *Restatement (Second)* relied upon decisions in but four states in support of "wait-and-see." RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 reporter's note 6 (1983). In Warner v. Whitman, 353 Mass. 468, 233 N.E.2d 14 (1968), the court drew support for its adoption from the policy underlying the state's "wait-and-see" statute, which because it was prospective only was not directly applicable. Two of the remaining decisions involved situations in which vesting had actually occurred by the time suit was brought, and thus did not deal with the case where vesting had not yet occurred but might still occur within the period. Merchants National Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953); Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966). And in Story v. First National Bank and Trust Co., 115 Fla. 436, 156 So. 101 (1934) it was not clear that the court was consciously departing from the traditional rule. *See* Waggoner, *supra*, at 1760 n. 111. Whatever the judicial support for the position taken in the *Restatement (Second)*, there have been judicial decisions since its promulgation that have used the *Restatement* to support judicial adoption of "wait-and-see." *See* Fleet National Bank v. Colt, 529 A.2d 122 (R.I. 1987); Hansen v. Stroecker, 699 P.2d 871 (Alaska 1985). In both of these cases the states had non-retroactive "wait-and-see" statutes which did not cover the interests in question, but the courts applied the doctrine anyway, relying in part on the *Restatement (Second)*. In *Hansen*, the court was writing on a clean slate, having never had the occasion to adopt any form of the Rule.

The promulgation of the Uniform Statutory Rule Against Perpetuities (the "Uniform Act") can be attributed in part to the *Restatement (Second)*, even though it differs significantly. As of this writing, the Uniform Act has been enacted in twenty states, including some states such as Massachusetts which have replaced earlier restricted "wait-and-see" statutes.[1] [p*498]

The Uniform Act, 1(a), provides:

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[1] We have not listed all these states with statutory citations because the list will likely increase as time goes on. The listing of states which have enacted the Uniform Act can be found in UNIFORM LAWS ANNOTATED and its supplements.

A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual alive; or

(2) the interest either vests or terminates within 90 years after its creation.

Section 3 of the Act adopts the *cy pres* doctrine, directing reformation of certain interests which fail to vest within the wait-and-see period.

Under Section 1(a)(1), an interest which must vest within the perpetuities period is valid from the outset. The Rule in its classic form thus may be used to validate an interest. Section 1(a)(2), the Uniform Act's most innovative feature, highlights the issue which has most sharply divided proponents of "wait-and-see." What is the period in which the interest must vest, for which we must wait before an interest is declared invalid? One approach to this waiting period is to measure based on lives in being just as under the classic rule. The interest is valid if it actually vests within 21 years after a life in being. Just as the measuring lives which can be used in applying the classic rule need to be causally connected with vesting of the interest at issue, the same principle holds under this approach for "wait-and-see." *See* Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985). So, for example, in a devise to "those of my grandchildren who attain 25," the testator's children would presumably serve as the critical lives in being. (Recall that a devise to grandchildren who attain 21 is valid because even grandchildren who are not in being will attain 21 within 21 years after the lives of their parents who are). Thus under the causal relationship standard, we would wait to see if all grandchildren who might come into being actually attain 25 within 21 years of the death of their parent, or of any grandchild in being at testator's death. *Id.*, at 1666–67. This causal relationship approach has been incorporated into legislation (see the Kentucky statute set forth *supra*) and has received judicial approval. *See, e.g.*, Fleet National Bank v. Colt, *supra*. Is *Estate of Anderson* instructive on the question?

In applying the classic Rule, lives not connected to vesting will not work as measuring lives to validate contingent interests, as we have seen. But in applying "wait-and-see" there is no logical need to confine measuring lives in this fashion. To return to our devise to grandchildren who attain 25, suppose the testator has two children, *A* and *B*, both of whom die two years after the testator's death. *A* was childless, and *B* is survived by a one-year-old child, C. Suppose further that *C* does attain 25, 24 years after the death of his parent. There is no causally connected life in this illustration which could be used to validate *C*'s interest under "wait-and-see." But *C*'s lawyer now points to Henry Smith, his partner, who was born before the testator died and is still alive today. Clearly Henry could be used as a measuring life for wait-and-see purposes, even though his life is irrelevant in applying the classic Rule. (Do you see why?)

The use of such extraneous lives is clearly without principle, and could involve enormous search and administrative costs. Conversely, the causal relationship principle is somewhat unclear and may involve significant tracing and identification costs over the years of the waiting period. [p*499]

One alternative, adopted in RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.3(2) is to specify measuring lives by category. Section 1.3(2) sets forth a list comprised of the transferor, persons who hold beneficial interests in the property, and the parents and grandparents of such beneficiaries. All such persons alive on the effective date of the instrument are measuring lives. A second alternative, adopted in the Uniform Act, is simply to hold the waiting period open for a set period of years. According to Professor Waggoner, the Reporter for the Uniform Act, ninety years was selected because it approximated in life expectancy terms the average time that would traditionally be allowed using actual measuring lives. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90–Year Waiting Period*, 73 CORNELL L. REV. 157 (1988).

The debate, primarily between Professors Dukeminier and Waggoner, over the appropriate waiting period rages on. Professor Dukeminier has been sharply critical of the Uniform Act (and to a lesser degree the *Restatement (Second)*) on the ground that the use of a ninety-year period, or a list of specified lives, extends the perpetuities period well beyond the period of the Rule in its classic form. Their views are set forth in a lengthy series of articles and replies. *See, e.g.*, Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Waggoner, *Perpetuities: A Perspective on "Wait-and-See"*, 85 COLUM. L. REV. 1714 (1985); Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986); Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 U.C.L.A. L. REV. 1023 (1987); Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 73 CORNELL L. REV. 157 (1988). While the controversy continues, the number of states which have already enacted the Uniform Act clearly indicates the direction the reform movement is taking.

C. THE PROBLEM OF RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER

You will recall (*supra*, p. S230, S258) that rights of entry and possibilities of reverter are generally regarded as vested at the time of creation and thus not subject to the Rule Against Perpetuities. The following materials are designed to illustrate the problems which this doctrine causes.

BROWN V. INDEPENDENT BAPTIST CHURCH OF WOBURN

Supreme Judicial Court of Massachusetts.
325 Mass. 645, 91 N.E.2d 922 (1950).

QUA, C.J. The object of this suit in equity, originally brought in this court, is to determine the ownership of a parcel of land in Woburn and the persons entitled to share in the proceeds of its sale by a receiver.

Sarah Converse died seised of the land on July 19, 1849, leaving a will in which she specifically devised it "to the Independent Baptist Church of Woburn, to be holden and enjoyed by them so long as they shall maintain and promulgate their present religious belief and faith and shall continue a Church; and if the said Church shall be dissolved, or if its religious sentiments shall be changed or abandoned, then my will is that this real estate shall go to my legatees hereinafter named, to be divided in equal portions between them. . . ." Then followed ten money legacies in varying amounts to different named persons, after which there was a residuary [p*500] clause in these words, "The rest and residue of my estate I give and bequeath to my legatees above named, saving and except therefrom the Independent Baptist Church; this devise to take effect from and after the decease of my husband; I do hereby direct and will that he shall have the use and this rest and residue during his life."

. . . The church named by the testatrix ceased to "continue a church" on October 19, 1939.

The parties apparently are in agreement, and the single justice[1] ruled, that the estate of the church in the land was a determinable fee. We concur. [Citations omitted.] The estate was a fee, since it might last forever, but it was not an absolute fee, since it might (and did) "automatically expire upon the occurrence of a stated event." Restatement: Property, § 44. It is also conceded, and was ruled, that the specific executory devise over to the persons "hereinafter named" as legatees was void for remoteness. This conclusion seems to be required by *Proprietors of the*

[1] [A single justice of the Massachusetts court sometimes hears cases as a trial judge before they are heard by the full court. That was done in this case. See Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721, 742 (1952). Ed.]

Church in Brattle Square v. *Grant*, 3 Gray 142, 152, 155–156, First *Universalist Society of North Adams* v. *Boland*, 155 Mass. 171, 173, and *Institution for Savings* v. *Roxbury Home for Aged Women*, 244 Mass. 583, 587. See Restatement: Property, § 44, illustration 20. The reason is stated to be that the determinable fee might not come to an end until long after any life or lives in being and twenty-one years, and in theory at least might never come to an end, and for an indefinite period no clear title to the entire estate could be given.

Since the limitation over failed, it next becomes our duty to consider what became of the possibility of reverter which under our decisions remained after the failure of the limitation. *First Universalist Society of North Adams* v. *Boland*, 155 Mass. 171, 175, *Institution for Savings* v. *Roxbury Home for Aged Women*, 244 Mass. 583, 587. Restatement: Property, § 228, illustration 2, and Appendix to Volume II, at pages 35–36, including note 2. A possibility of reverter seems, by the better authority, to be assignable *inter vivos* [citations omitted], and must be at least as readily devisable as the other similar reversionary interest known as a right of entry for condition broken, which is devisable, though not assignable. [Citations omitted.] It follows that the possibility of reverter passed under the residuary clause of the will to the same persons designated in the invalid executory devise. It is of no consequence that the persons designated in the two provisions were the same. The same result must be reached as if they were different.

The single justice ruled that the residuary clause was void for remoteness, apparently for the same reason that rendered the executory devise void. With this we cannot agree, since we consider it settled that the rule against perpetuities does not apply to reversionary interests of this general type, including possibilities of reverter. *Proprietors of the Church in Brattle Square* v. *Grant*, 3 Gray, 142, 148. *French* v. *Old South Society in Boston*, 106 Mass. 479, 488–489. *Tobey* v. *Moore*, 130 Mass. 448, 450. *First Universalist Society of North Adams* v. *Boland*, 155 Mass. 171, 175–176. Restatement: Property, § 372. Tiffany, Real Property (3d ed.) § 404. See Gray, Rule Against Perpetuities (4th ed.) §§ 41, 312, 313. For a full understanding of the situation here presented it is necessary to keep in mind the fundamental difference in character between the attempted executory devise to the legatees later named in the will and the residuary gift to the same persons. [p*501] The executory devise was in form and substance an attempt to limit or create a new future interest which might not arise or vest in anyone until long after the permissible period. It was obviously not intended to pass such a residuum of the testatrix's existing estate as a possibility of reverter, and indeed if the executory devise had been valid according to its terms the whole estate would have passed from the testatrix and no possibility of reverter could have been left to her or her devisees. The residuary devise, on the other hand, was in terms and purpose exactly adapted to carry any interest which might otherwise remain in the testatrix, whether or not she had it in mind or knew it would exist. [Citations omitted.]

We cannot accept the contention made in behalf of Mrs. Converse's heirs that the words of the residuary clause "saving and except therefrom the Independent Baptist Church" were meant to exclude from the operation of that clause any possible rights in the *land* previously given to the church. We construe these words as intended merely to render the will consistent by excluding the church which also had been "above named" from the list of "*legatees*" who were to take the residue.

The interlocutory decree entered December 16, 1947, is reversed, and a new decree is to be entered providing that the land in question or the proceeds of any sale thereof by the receiver shall go to the persons named as legatees in the will, other than the Independent Baptist Church of Woburn, or their successors in interest. Further proceedings are to be in accord with the new decree. Costs and expenses are to be at the discretion of the single justice.

So ordered.

Notes and Questions

1. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 743–44 (1952), provides some more facts about the principal case: Like many other churches built in the nineteenth century, the Independent Baptist Church found itself in the twentieth century located in the middle of a commercial area. Other churches in the area sold their land and used the proceeds to build in more residential areas. The Independent Baptist Church could not do this and was dissolved in 1939. The land was sold under court order, and a professional genealogist was hired to locate the heirs of the ten long-dead legatees. Of the $34,000 realized from the sale, the genealogist got $1500, the lawyers $9,091.25, and a court-appointed receiver $4,017.60. The remainder was divided into more than 100 shares, the smallest of which was $6.25. The court impounded the shares of the heirs who could not be found.

2. Why is it that there is a possibility of reverter in the grantor since the executory limitation over failed? Review your understanding of the determinable fee, *supra*, § 2B3. *See* First Universalist Soc'y v. Boland, 155 Mass. 171, 29 N.E. 524 (1892), cited in the principal case.

3. Suppose that Sarah Converse's will had had the words "but if" rather than "so long as." Same result? Why or why not? *See* Proprietors of the Church in Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1865), cited in the principal case (holding no right of entry in the grantor will be implied). *Cf.* United Methodist Church v. Dobbins, 48 A.D.2d 485, 369 N.Y.S.2d 817 (1975) (1862 grant "upon the express condition" that the land be used for church purposes and if not the land "shall then revert back to the farm" of the grantor and "become the property of whoever shall own said farm" held to create a fee on a condition subsequent with an attempt to convey "the right of reacquisition [p*502] to a third party, the attempt being void under N.Y. law at the time of the deed; plaintiff held to have a fee simple absolute).

4. Suppose that Sarah Converse's will had read "to the Independent Baptist Church of Woburn for 999 years so long as they shall maintain [etc.] . . . then to my legatees . . . ." Same result? Why or why not?

5. The rule of the principal case is supported by the great weight of American authority. *E.g.*, City of Klamath Falls v. Bell, 7 Or. App. 330, 490 P.2d 515 (1971) (same operative facts as *Brown* except that the original conveyance was by a corporation to the City for library purposes; upon dissolution of the corporation its assets passed into the hands of the same people who had been granted the invalid executory interest under the original deed). *See* RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 comment *c* and reporter's note 3 (1983); *but cf.* Standard Knitting Mills, Inc. v. Allen, 221 Tenn. 90, 424 S.W.2d 796 (1967) (holding that the creation of an invalid executory interest in the heirs of the grantor if land was not used for park purposes evinced an intent on the grantor's side to part with all interests in the land and therefore no possibility of reverter was retained).

6. Because rights of entry and possibilities of reverter are generally held not to be subject to the Rule, they enjoy something of the status of executory interests prior to the *Duke of Norfolk's Case*. This fact leads to a judicial hostility towards these interests which has substantial ramifications for the substantive law of fees on a condition subsequent and determinable fees. Reconsider the *Storke* case, *supra*, p. S205.

Note on Legislation on Rights of Entry and Possibilities of Reverter

Problems such as those faced by the Independent Baptist Church of Woburn are not uncommon. (Another typical form of nineteenth century grant was to a school district "so long as" the land is used for school purposes. School consolidations have left many school districts with land to which they have dubious title.) Further, title examiners cannot count on the court being so favorable to the current landowner or on the draftsman being so sloppy as the one in

Storke. Legislation in many states has therefore been passed to meet the problem. *See* P. BASYE, CLEARING LAND TITLES § 143 (2d ed. 1970). To a certain extent this legislation must be considered in the context of more general acts designed to "clear titles," i.e., to give greater certainty and hence marketability to land titles generally. While this broader legislation might be considered in a section dealing with restraints on alienation, we have deferred consideration of it until Chapter 5, § 3(B)(2). We consider below only that legislation which deals specifically with rights of entry and possibilities of reverter.

The legislation may be broadly classified into six groups:

(1) One form of statute limits the duration of any possibility of reverter or right of entry, whether created before or after the passage of the act. For example, ILL. REV. STAT. ch. 30, § 37(e) (1989) provides:

> Neither possibilities of reverter nor rights of entry or reentry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than 40 years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than 40 years, it shall be valid for 40 years. [p*503]

(2) Another form of statute is to the same effect, but applies only to interests created after its enactment. *E.g.*, Mass. Ann. Laws ch. 184A, §§ 7, 9. Can you see why such a variation might be employed? (The Massachusetts statute in essence supersedes the *Woburn Baptist Church* case.)

(3) Some states include rights of entry and possibilities of reverter within their Marketable Title Acts. These Acts require that the holder of outstanding interests in a piece of land record every forty years his intention to preserve that interest. *See, e.g.*, MINN. STAT. § 541.023 (1982); *cf*. N.Y. REAL PROP. LAW § 345 (McKinney 1989) (which is limited to rights of entry and possibilities of reverter and requires filing every ten years). On Marketable Title Acts, see DKM3, pp. 621–27.

(4) A fourth form of statute provides that any right of entry or possibility of reverter will be enforceable, after a fixed period of time, only by equitable remedies as if it were a covenant. *See, e.g.*, FLA. STAT. § 689.18 (1989).

(5) Another form of statute voids conditions and restrictions which are nominal or of no substantial value. The most elaborate is N.Y. REAL PROP. ACTS. LAW §§ 1951–55 (McKinney 1979). As to restrictions imposed by "covenant, promises or negative easement" it codifies the equitable doctrine which prevents enforcement of conditions after the limit of their utility. As to restrictions imposed by right of entry or power of termination, those created after the effective date of the act may be enforced only as covenants. As to those created before the enactment, courts are specifically empowered to find the devices were used as land-use restrictions and treat them for practical purposes as covenants. Actions to quiet title or to determine adverse claims are authorized to remove the covenants.

(6) Finally, some states have extended the Rule Against Perpetuities to apply to rights of entry and powers of termination. *See, e.g.*, CONN. GEN. STAT. REV. §§ 45–97 (1983), *discussed in* 30 CONN. B.J. 101–08 (1956).

What arguments can you think of favoring statutes of this general type? Opposing? See Hammond, *Limitations upon Possibilities of Reverter and Rights of Entry*, in CURRENT TRENDS IN STATE LEGISLATION 1953–1954, at 589, 590–92 (1955); Note, *Forfeiture of a Public School: A Need to Control the Defeasible Fee*, 63 WASH. U. L.Q. 109 (1985). What arguments can you think of for and against each of the variations listed above?

Statutory provisions concerning rights of entry and possibilities of reverter have had a mixed reception in the courts. There seems to be no question that the legislature may treat as it will

interests created after the passage of the legislation; the problem arises with retroactive application. In Biltmore Village v. Royal, 71 So. 2d 727 (Fla. 1954), *noted critically in* 55 COLUM. L. REV. 285 (1955), the court invalidated the retroactive application of the Florida statute ((4) *supra*) on the ground that it was an unconstitutional impairment of the obligation of contract. The clause in the statute which authorized a holder of an invalidated interest to preserve it by bringing suit for its establishment or enforcement within one year from the effective date of the act was held not to save the act because such a suit could not be brought by one whose right of entry or reverter had not yet accrued. 71 So. 2d at 728–29. In Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955), *noted in* 54 MICH. L. REV. 863 (1956) and 1956 U. ILL. L. FORUM 297, on the other hand, the court held against charges of unconstitutional retroactive application, deprivation of property without due process of law, and impairment of contract by the Illinois statute ((2) *supra*), that the interests involved (reverters) were mere possibilities, rather than estates, and as [p*504] such subject to the plenary power of the state to modify them as it deemed advisable. The court, further, refused to hold that the legislature had dealt with these interests unreasonably in view of the undeniable public interest in promoting title marketability. A similar statute was upheld on similar grounds in Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904 (1971).

Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), involved the broader question of the constitutionality of Minnesota's Marketable Title Act ((3) *supra*). The issue was raised, however, in the context of an attack on the re-recording requirements of the statute in so far as they applied to rights of entry and possibilities of reverter. The court upheld the statute on the ground that "no one has a vested right in any particular remedy and the legislature may change or modify the existing remedies for the enforcement and protection of the contract rights as long as an adequate remedy remains." *Id*. at 115, 83 N.W.2d at 821. The *Biltmore Village* case was distinguished on the ground that the remedy afforded by the Florida statute was inadequate and the court found that it did not have to confront the issue which had been treated in *Batdorf*. In Board of Educ. v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965), *noted in* 65 COLUM. L. REV. 1272 (1965) and 51 CORNELL L.Q. 402 (1966), on the other hand, the court struck down the provisions of the New York statute ((3) *supra*) apparently on the ground that it required the re-recording of rights of entry and possibilities of reverter prior to the time a right of action had accrued. While the legislature, the court reasoned, might require the recording of an interest if the interest holder wished to prevail over innocent purchasers for value, it could not require such recording simply in the interest of clearing titles. *Biltmore Village* was cited with approval; *Wichelman* was distinguished on the ground that the action was not brought in that case until six years after the right to possession had accrued; and *Batdorf* was not discussed at all.

In Atkinson v. Kish, 420 S.W.2d 104, 109 n. 5 (Ky. 1967), the court noted in passing that Kentucky's recording of intent to preserve provisions could be validly applied retroactively because a right of entry is not a vested right entitled to constitutional protection but "no more than an expectancy," but in Caldwell v. Brown, 553 S.W.2d 692 (Ky. 1977), the same court refused to apply the statute to a possibility of reverter which had fallen in prior to the passage of the statute, even though suit was not brought until after the re-recording period had passed without any re-recording having been made. In Town of Brookline v. Carey, 355 Mass. 424, 245 N.E.2d 446 (1969), the court upheld a Massachusetts statute which required the recording of rights of entry and possibilities of reverter or, if the triggering event had already occurred, entry thereunder, within approximately 7½ years of the date of the statute. The court said that the statute contained elements of both a recording act and a statute of limitations. Neither *Atkinson* nor *Carey* discusses the previous cases, and the fact situations in both cases involved interests which had accrued by breach of the condition or occurrence of the limiting event, long before the passage of the act. In Chicago & N.W. Ry. Co. v. City of Osage, 176 N.W.2d 788 (Iowa 1970), however, the court allowed the railroad to quiet title in itself because the city had failed to record its reverter under

newly passed provisions of Iowa's Marketable Title Act in 1965, the limiting event not having occurred until 1967. There was no discussion of the constitutional issue. Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa) (5–3), *cert. denied*, 423 U.S. 830 (1975), which also involved a limiting event which had occurred after the re-recording period had passed, does contain a full-scale discussion of the constitutional issue. The statute was sustained, over a vigorous dissent. *Wichelman* and *Batdorf* were [p*505] approved; *Biltmore* and *Miles* were disapproved. The court was obviously impressed with the need for reducing transactions costs in land transfers, and noted that the statute did not eliminate any rights but simply conditioned their exercise on filing a notice within the statutory period.

HAMM v. HAZELWOOOD

Supreme Court of Virginia

292 Va. 153, 787 S.E.2d 144 (2016)

KELSEY, J., delivered the opinion of the court.

The circuit court declared void a provision in a real property deed that sought to create a contingent reversionary interest in the grantor and her heirs. The beneficiary of that interest, Edward L. Hamm, Jr., argues on appeal that the provision, known as a possibility of reverter at common law, lawfully vested him with the reversionary interest. We agree and, thus, reverse the court's holding to the contrary.

I.

In 1989, Dorothy Bigelow Hamm executed and recorded a deed of gift transferring her one-half interest in a parcel of property to her sister, Melba Bigelow Clarke.[2] Dorothy's husband joined in the conveyance. The deed of gift reserved a life estate for Dorothy for the duration of her life. She died in 2004, thereby extinguishing the life estate. In her will, Dorothy left any interest she had in the property to her son, Edward. Melba had children, including a son, Reginald Wayne Clarke, at the time of Dorothy's deed of gift. In the deed of gift, Dorothy included a provision that specifically mentioned Reginald:

The PROPERTY hereby conveyed shall AUTOMATICALLY REVERT to Dorothy Bigelow Hamm, one of the parties of the first part, in the event Reginald Wayne Clarke, son of the party of the second part, ever acquires any interest therein by grant, inheritance or otherwise or is otherwise permitted to occupy, even temporarily, any portion of said property. J.A. [i.e., the Joint Appendix of the record below that the parties submitted] at 7.[3] Nothing in the record explains Dorothy's reasons for including this provision in the deed.

Melba died intestate in 2012, eight years after her sister.[4] Melba's heirs included six children, including Reginald, and her three grandchildren. The administrator of Melba's estate, Charles W.

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[2] This case involves several individuals with the same last names. For the sake of clarity, and despite the informality of doing so, we will identify individuals in full and thereafter refer to them only by their first names.

[3] The only condition subsequent upon which Edward relied in the circuit court was the portion of the possibility-of-reverter clause forbidding Reginald from "ever acquir[ing] any interest" in the property. J.A. at 7; see also id. at 13–14. We limit our analysis, therefore, to this aspect of the clause and offer no opinion on the enforceability of the additional condition forbidding Reginald from being "permitted to occupy, even temporarily, any portion of said property." Id. at 7.

[4] Shortly after Melba's death, Reginald admitted a will to probate. See id. at 27–28. Two of his siblings filed suit to challenge the will proffered by Reginald, claiming it was not in fact their mother's last will and testament. In a consent order, the circuit court vacated its earlier order admitting the will to probate. Id.

Deeming the proffered will to have "no force and effect whatsoever," the court vacated an order appointing another son of Melba, Victor Dale Clarke, as administrator and appointed Charles Hazelwood,

Hazelwood, Jr., filed a petition for aid and direction seeking a judicial order declaring that the possibility-of-reverter provision in the deed was void as an impermissible restraint on alienation. Edward countered that the provision was a lawful possibility of reverter limited in scope and in time to the life of a single person, Reginald. Id. at 54–55. Rejecting Edward's view, the circuit court held that "the possibility of reverter contained in the Deed of Gift is void and unenforceable under Virginia law" and, thus, would be "hereby stricken from the conveyance." Id. at 34.

II.

On appeal, Edward argues that nothing in either Virginia law or any background principle of English common law forbids a landowner from conveying property subject to this type of contingent reversionary interest. We agree.

A.

The first premise of property law is that a lawful owner, as a general rule, has the power to convey his real property to whomever he wishes under whatever conditions they agree to. "The exclusive right of using and transferring property," Chancellor Kent explained, "follows as a natural consequence, from the perception and admission of the right itself." 2 James Kent, Commentaries on American Law 257–58 (1827). At common law, a lawful owner's right to property "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 William Blackstone, Commentaries *138; see Restatement (Second) of Property: Donative Transfers div. 1, pt. 2, intro. note (1992) ("The power of the current holder of property to alienate cannot be plenary unless he can hamper the power of future holders to alienate it, either directly or indirectly.").

When a deed of conveyance uses no "words of limitation," Virginia law treats it as a transfer of a fee simple interest "unless a contrary intention shall appear." Code § 55–11. Such "contrary intention," id., could include an express reservation of a contingent reversionary interest. The grantor's right to impose such a condition, however, is not absolute. Centuries of common-law jurisprudence have marked off the legal boundaries of this presumptive right.

Perhaps the best-known boundary is the historic maxim against unreasonable restraints on alienation. In the late 1400s, Judge Littleton declared void as "against reason" conveyance conditions that denied a grantee the power to "alien" the property conveyed "to any person." Thomas Littleton, Littleton's Tenures, § 360 (Eugene Wambaugh ed., 1903). Lord Coke confirmed this view, stating that under English common law such conditions are "repugnant and against law." Coke upon Littleton § 206b (Thomas Coventry ed., 1830); see also id. § 223a (noting that if a condition "ousts not the feoffee of his power to alien the land whereof the feoffment is made ... there is no repugnancy to the estate").

This prohibition, however, did not apply to a condition against alienating to a particular person, "naming his name, or to any of his heirs, or of the issues" of such person, because such a condition "do[es] not take away *all* power of alienation from the feoffee." Id. (emphasis added). "Similar statements may be found in Year Book cases dating from the 15th century." Restatement (Second) of Property: Donative Transfers div. 1, pt. 2, intro. note (citing J. Gray, Restraints on Alienation § 18 (2d ed. 1895)).

Most modern courts continue to hold to the ancient view that "a condition in restraint of alienation general as to time and person is void." 3 Thompson on Real Property § 29.05, at 793 (David Thomas ed., 3d ed. 2012); see also 10 Powell on Real Property § 77.02, at 77–7 (Michael

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an "independent third-party," to serve as an administrator d.b.n. of Melba's estate. Id.; see Black's Law Dictionary 54 (10th ed. 2014) (defining "administrator de bonis non" as one "appointed by the court to settle the remainder of an intestate estate not settled by an earlier administrator or executor").

Wolf ed., 2016); 1 Raleigh C. Minor, The Law of Real Property § 579, at 658–59 (1908). We, too, follow this common-law principle and have applied it in various contexts. See, e.g., Edwards v. Bradley, 227 Va. 224, 228, 315 S.E.2d 196, 198 (1984) ("[A] condition totally prohibiting the alienation of a vested fee simple estate or requiring a forfeiture upon alienation is void.").[5]

We are unaware of precedent, however, holding that all lesser forms of restraint—no matter their scope or duration—are per se repugnant. To the contrary, courts generally uphold conditions that affect later alienation rights if, "under all the circumstances of the case, the restraint is found to be reasonable." Restatement (Second) of Property: Donative Transfers § 4.2;[6] see also 4 Restatement (First) of Property § 406 (1944); accord Carneal v. Kendig, 196 Va. 605, 609–10, 85 S.E.2d 235, 237 (1955) ("It is frequently said that a reasonable restraint on alienation is valid." (quoting 1 Raleigh C. Minor & Frederick D.G. Ribble, The Law of Real Property § 555, at 723 (2d ed. 1928)).[7]

Among the circumstances determining reasonableness is whether the restraint on alienation is "limited in duration" and "limited as to the number of persons to whom transfer is prohibited." Restatement (Second) of Property: Donative Transfers § 4.2. The power of alienation, as a general rule, "may be restricted to a limited extent; for instance, as to certain designated persons, or, it is said, for a reasonable time (though the latter proposition is disputed by some)." Camp v. Cleary, 76 Va. 140, 143 (1882) (citation omitted).

B.

The administrator contends the contested provision in Dorothy's deed of gift should be analogized to a will provision we rejected in Dunlop v. Dunlop's Ex'rs, 144 Va. 297, 132 S.E. 351 (1926). In that case, we held that there was "no question" the will devised an "absolute fee simple" interest in real property to the testator's son, "vesting in him complete ownership." Id. at 303, 132 S.E. at 352–53. Another provision of the will stated that if the son sold the father's business as an entirety (which included all of the inherited property), the son would forfeit three-fourths of his inheritance. Id. at 304, 132 S.E. at 353. The forfeiture provision thus punished the son if he sold the inherited property to anyone at any time.

For several reasons, we find the analogy to Dunlop unpersuasive.

1.

Dorothy's deed of gift did not—like the will in Dunlop—clearly convey an "absolute fee simple" interest in real property to Melba, thereby "vesting in [her] complete ownership." Id. at 303, 132 S.E. at 353. The conveyance clause in the deed of gift nowhere mentioned "absolute fee simple," id. the traditional phrase "to A and his heirs," or any other "words importing that [the grantee] is given the absolute title," Southworth v. Sullivan, 162 Va. 325, 332, 173 S.E. 524, 526

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[5] See also Carson v. Simmons, 198 Va. 854, 858, 96 S.E.2d 800, 803 (1957) (noting the "well known doctrine" that "neither a testator in a will nor a grantor in a deed" could give a fee simple "and endeavor to impose upon the donee any condition incompatible with the usual and necessary incidents accompanying a fee simple estate," including "the complete right of alienation, without let or hindrance" (citation omitted)); Carneal v. Kendig, 196 Va. 605, 609, 85 S.E.2d 235, 237 (1955) ("[A] condition against all alienation is void, because repugnant to the estate devised." (citation omitted)); Camp v. Cleary, 76 Va. 140, 143 (1882) ("[A]n absolute and unqualified restraint as to estates generally, whether legal or equitable, is inadmissible.").

[6] This reasonableness principle, "to the extent that [it] permit[s] restraints on alienation, [is] equally permissive in regard to non-donative transfers." Restatement (Second) of Property: Donative Transfers div. 1, pt. 2, intro. note.

[7] See also 2 John B. Minor, Institutes of Common and Statute Law 250 (2d ed. 1877); Coke upon Littleton § 223a–b.

(1934). In real property law, such descriptions are foundational in determining the grantor's intent to convey fee simple absolute title. See generally 9 Thompson, supra, § 82.13(a)(4), at 704–05.

Instead, the conveyance clause said only that Melba received the property "as and for her sole and separate equitable estate." J.A. at 6. The subsequent habendum clause clarified this phrase, stating that Melba was "TO HAVE AND TO HOLD" the property "for her sole and separate equitable estate, free from the control and marital rights of her present or any future husband and free from any curtesy rights or inchoate curtesy rights of the present husband or any future husband." Id. at 8. Melba was to have "full right and complete authority ... to alien, convey, encumber ... without necessity of joinder by or with her husband." Id.

These provisions make clear that the conveyance was to be free of any claim of right, including dower rights, from Melba's husband—which were standard provisions in some deeds prior to the statutory abolishment of dower and curtesy interests in 1991. See Code § 64.2–301 (abolishing dower and curtesy interests vested after January 1, 1991). But these provisions, whether read separately or together, do not purport to make the conveyance a wholly unconditional transfer of a fee simple absolute. Nor do these clauses directly or indirectly contradict the possibility-of-reverter provision in the deed of gift declaring that the "PROPERTY hereby conveyed shall AUTOMATICALLY REVERT" upon the happening of the condition subsequent. J.A. at 7.

In Virginia, "all rules of construction have but one object, and that is to ascertain the intent of the parties to the instrument to be construed, and that intent when ascertained, if it controverts no rule of law or of public policy, becomes the law of the case, and full effect must be given to it." Morris v. Bernard, 114 Va. 630, 634, 77 S.E. 458, 460 (1913). From this perspective, all clauses of Dorothy's deed of gift point to a single conclusion: She intended to convey a fee simple defeasible upon a condition subsequent not a fee simple absolute.[8]

2.

Dorothy's deed of gift also did not—like the will in Dunlop—impose a restriction on alienability with an *unlimited* scope and duration. The will provision in Dunlop punished the son if he sold the property to anyone at any time. It was a classic example of "a condition in restraint of alienation general as to time and person" and thus "void." 3 Thompson, supra, § 29.05, at 793. The condition was not reasonably limited in time and scope. See Camp 76 Va. at 143; cf. Carneal, 196 Va. at 609–10, 85 S.E.2d at 237–38.

In our opinion, the contested provision in Dorothy's deed of gift was reasonably limited in duration and scope. It was directed at a single individual, Reginald, for the limited period of his life.[9] It was thus wholly unlike the forfeiture provision in Dunlop, which sought to forever restrain the son from selling the property to anyone for any reason. Unlike the Dunlop restriction, therefore, the contested provision in Dorothy's deed of gift was not the kind of restraint "general

[8] "The modern estate in fee simple can be either an estate in fee simple absolute or an estate in fee simple defeasible. When it is defeasible, it can end by virtue of a special limitation, a condition subsequent, or an executory limitation." 1 Powell, supra, § 13.02, at 13–9 (footnotes omitted) (citing 1 Restatement (First) of Property §§ 14–16 (1936)); see, e.g., Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co., 239 Va. 46, 55–56, 387 S.E.2d 740, 745 (1990).

[9] The rule against perpetuities is not at issue in this case because possibilities of reverter are excluded from the rule against perpetuities as "[a] property interest ... that was not subject to the common-law rule against perpetuities." Code § 55–12.4(A)(7); see Scott Cty. Sch. Bd. v. Dowell, 190 Va. 676, 688, 58 S.E.2d 38, 43–44 (1950) ("At common law the possibility of reverter was not an estate subject to grant" and, as such, "was not void as violative of the rule against perpetuities.").

as to time and person" that courts historically have deemed unenforceable. 3 Thompson, supra, § 29.05, at 793.

3.

Finally, the contested provision in Dorothy's deed of gift (unlike the failed provision in the Dunlop will) is best understood not as an overreaching restraint on alienation but rather as a mere possibility of reverter.[10]

At common law, reversionary interests were classified as either a reversion or a possibility of reverter. See generally Minor, supra, § 807, at 893–94; 1 Herbert T. Tiffany, The Law of Real Property §§ 113, 116, at 269–73 (1903). A "true reversion" is a "vested estate *in praesenti*, with enjoyment *in futuro*." Scott Cty. Sch. Bd. v. Dowell, 190 Va. 676, 686, 58 S.E.2d 38, 43 (1950). In this respect, "[a] reversion is the remnant of an estate *continuing in the grantor*, undisposed of, after the grant of a part of his interest." Copenhaver v. Pendleton, 155 Va. 463, 477, 155 S.E. 802, 806 (1930) (citation omitted). Reversions, therefore, are "always *vested* estates," not contingent or conditional future interests. Id. (citation omitted).

In contrast, a "possibility of reverter" is a future interest that is "always contingent and corresponds to a contingent limitation." Id. at 478, 155 S.E. at 806 (citation omitted); see also Pence v. Tidewater Townsite Corp., 127 Va. 447, 451, 103 S.E. 694, 695 (1920). In this respect, a "possibility of reverter" at common law is "not an estate, present or future, but a possibility of having an estate." Commonwealth Transp. Comm'r v. Windsor Indus., 272 Va. 64, 78, 630 S.E.2d 514, 520 (2006) (citation omitted). Even so, "[w]hile a possibility of reverter is not a vested interest in real property, it is a property interest." Id. at 84, 630 S.E.2d at 523. Consequently, it is a "right inheritable at common law" and by statute "may be transmitted also by deed or will." Sanford v. Sims, 192 Va. 644, 648, 66 S.E.2d 495, 497 (1951) (citing Code § 55–6).

In Dorothy's deed of gift, the disputed provision stated that the fee conveyed "shall AUTOMATICALLY REVERT" to the grantor if Reginald, among other things, "ever acquire[d] *any* interest" in the property. J.A. at 7 (emphasis added).[11] This language created a possibility of reverter in Dorothy and her heirs upon the happening of the condition subsequent. It is true that the provision had the practical effect of precluding Melba or her successors in interest from ever selling or devising the property to Reginald, for the very act of doing so would trigger the reversionary condition. It is also true that "[c]onditions subsequent, because they tend to destroy estates, are not favored in law, and when effective to work a forfeiture of title they must have been created by express terms or clear implication." Pence, 127 Va. at 451, 103 S.E. at 695; accord Eagler v. Little, 217 Va. 869, 872, 234 S.E.2d 242, 244 (1977).

That said, "the converse proposition is equally well settled. If it is the clearly expressed intention of the parties to create an estate upon a condition subsequent, the courts must give effect to such intention." Pence, 127 Va. at 451, 103 S.E. at 695. In this case, Dorothy very clearly expressed her intention that the conveyance would revert if Reginald ever acquired any interest in

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[10] See generally 3 Thompson, supra, § 24.02, at 455–57 ("The interest that remains in a grantor, testator or settlor of a trust after creating a fee simple determinable is called a possibility of reverter. ... The 'possibility of reverter' is created by the conveyance of a limited fee."); 1 Restatement (First) of Property § 154 cmt. g ("When the owner of an estate in fee simple absolute transfers an estate in fee simple determinable, the transferor has a possibility of reverter.").

[11] The record says nothing about Dorothy's reason for including this provision, and thus, we have no factual basis for speculating about her subjective motivations. Though we are skeptical that subjective motivations should play any role in the reasonableness determination, contra Casey v. Casey, 287 Ark. 395, 700 S.W.2d 46, 49 (1985), we have no occasion in this case to rule on this question.

the property.[12] We know of no rule of law or equity that forbade Dorothy from making her conveyance subject to that condition or which authorizes us to declare it void. For this reason, the circuit court erred in declaring the possibility-of-reverter provision to be void.[13]

III.

We reverse the circuit court's holding that the possibility-of-reverter provision in the 1989 deed of gift was void. The case is remanded for entry of a final order consistent with this opinion. The final order shall be filed in the land records and may include, in the court's discretion, an additional award of fiduciary compensation.

Reversed and remanded.

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[12] For this reason, we find no merit in the administrator's reliance on Moore v. Holbrook, 175 Va. 471, 476, 9 S.E.2d 447, 450 (1940), which found a limiting condition to be "ambiguous" and thus insufficiently "clear and decisive" to reduce the otherwise unlimited scope of a devising clause of a will. "If a prior estate in fee is to be cut down to a life estate or taken away altogether by subsequent language it must be by express words or by compelling implication. It cannot be done by ambiguous or doubtful language." Id. Here, the possibility-of-reverter clause in Dorothy's 1989 deed of gift uses neither "ambiguous [n]or doubtful language." Id.

[13] Some authorities distinguish between possibilities of reverter that create only "a contingent right of re-entry upon condition broken" and those that do not require re-entry for the reversion to take place. Sanford, 192 Va. at 648, 66 S.E.2d at 497 (citation omitted). In the former category, "the original grantor, or its successor, was required to make 'entry, or its equivalent' to exercise the right to reconveyance." Windsor Indus., 272 Va. at 80, 630 S.E.2d at 521. In some cases, that can be a crucial distinction. "Where there is a breach of a condition subsequent upon which the possibility of reverter depends, the estate vested in the grantee does not cease in him and revest ipso facto in the grantor or his successors;" rather, the estate "remains unimpaired in the grantee or his successors until entry, or its equivalent, by the grantor or his successors." Sanford, 192 Va. at 649, 66 S.E.2d at 497. Thus, "the right to enforce the forfeiture may be waived" by an untimely or ineffective assertion of the right of re-entry. Id. The right of re-entry can be asserted not only by physical re-entry but also by its "equivalent," which we have recognized to include the assertion of the right in court. Id. at 649, 66 S.E.2d at 497–98; see also Pence, 127 Va. at 455, 103 S.E. at 696 (observing that the grantor must take "appropriate action to have himself reinvested").

In this case, we need not address whether the possibility of reverter in Dorothy's deed of gift created only a contingent right of re-entry. Edward's pleadings in the circuit court specifically asserted a right of re-entry. See J.A. at 13–14. And the administrator does not challenge the efficacy or timing of this assertion. Cf. Sanford, 192 Va. at 652, 66 S.E.2d at 499 (rejecting as untimely an assertion of a right of re-entry created by a possibility of reverter in a deed conveying real property).

Section 4. ESTATES IN LAND AND THE FAMILY

A. INTRODUCTION

The common law system of estates in land and future interests had its origins in a society many of whose members had strong dynastic tendencies. It developed numerous devices which allowed a person who had amassed wealth to accumulate it and pass it on to future generations virtually intact. What, however, of the present generation? As the materials on marital interests