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Cover Page Footnote

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REVERTERS, RIGHTS OF ENTRY, AND EXECUTORY INTERESTS: SEMANTIC CONFUSION AND THE TYING UP OF LAND†

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I. INTRODUCTION

REVERTERS, rights of entry and executory interests are commonly used to tie up wealth and to enforce the desires of the transferor as to its use in a specified manner or until the happening of a stated event. Donor autonomy, if given free rein, would be detrimental to the well-being of society. Especially where land is involved, the usual private restriction is apt to do more harm than good. Not only is this method of regulating land use obsolete and dangerously inefficient, but the most economical use of the community's one basic resource is impaired because such restrictions do not have the flexibility to meet changing demands and conditions. The dictates of the transferor may be used as a club to foredoom the land to remain undeveloped or to limit it to an uneconomic use unless an extravagant price is paid for the release of the restraint.[1]

What is equally objectionable (and more likely to occur) is that the tying up imposed by a long departed donor cannot be released because of the impossibility of determining the identity of all those who have the right to enforce it. Such interests fractionate with the passage of each generation until the determination of the heirs and successors of the original transferor becomes an overwhelming, well-nigh impossible task.[2] The impediment to marketability thus produced indirectly affects the financial well-being and the tax structure of the community. The fact

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1. These themes are elaborated in Simes, Elimination of Stale Restrictions on the Use of Land, Section of Real Property, Probate and Trust Law, A.B.A., 4 (1954). See also Committee on Improvement of Conveyancing and Recording Practices, Section of Real Property, Probate and Trust Law, Report, A.B.A., 73, 76 n.10 (1957).

2. The problem of locating the holders of the various fractional shares after several generations have passed on tends to cause the present owner not to undertake the task and to resign himself to the restricted use long after sensible management would dictate a very different use. For a recent decision which highlights the danger of creating a possibility of reverter in favor of a corporate grantor see Saletri v. Clark, 13 Wis. 2d 325, 108 N.W.2d 548 (1961). This case held that the dissolution of the corporate owner of the reverter still left the defunct holder "sufficiently alive to be a repository of title," and that when the determinable fee ended, the title passed to the erstwhile corporation in the same manner as any other assets omitted from the final distribution. Id. at 331, 108 N.W.2d at 551.

that the saleable value of the land is greatly reduced in turn lowers the tax base of the community, and thereby causes the assessed valuation of unrestricted land to be raised to obtain the needed public revenue.[3]

Most observers would agree that private tying-up arrangements should be viewed with judicial disfavor, that they should be reluctantly enforced, if at all, and where possible, eliminated altogether. Regardless of how the restraint is established, *e.g.*, by possibility of reverter, right of entry, or executory limitation, the results of essentially identical techniques of creation should be the same. Legal doctrines aimed at like degrees of restraint, although effectuated by different labels, should receive consistent treatment. Numerous writers have cried out repeatedly for a rational, uniform policy towards "dead-hand" control which may not be evaded by phraseology or drafting techniques.[4]

Both the traditionalist and the realist will find much that is unsatisfactory in the decisions rendered within the past few years dealing with private restraints on land. The traditionalist will point with particular dissatisfaction to cases where the distinguishing characteristics of different doctrines and concepts are treated with ignorance or indifference, while in others the wrong term is applied, or even worse, mutually exclusive dogma is used interchangeably and synonymously with its counterpart. The functionalist will regard with disfavor the line of recent decisions in which form is exalted over substance to the extent that allowable tying up is dependent upon the manner in which the gift is phrased. He will look with equal disdain upon judicial preoccupation with doctrinal distinctions, and the reliance on purely fortuitous factors (such as the location of the gift in the instrument or whether two clauses are used rather than one) which make it possible to avoid the policing effect of the Rule Against Perpetuities.

Both would agree, however, from their differing perspectives, that the case authorities have been unfortunate, confused and haphazard, and

3. An excellent statement concerning the undesirability, from a policy standpoint, of enforcing land use restrictions by forfeiture is contained in Leach & Logan, Cases on Future Interests and Estate Planning 75 n.45 (1961).

4. A good deal has already been written on the inconsistent and confusing results that are produced by the different doctrines traditionally associated with various future interests which are functionally similar. See, e.g., Dukeminier, Contingent Remainders and Executory Interests: A Requiem for the Distinction, 43 Minn. L. Rev. 13 (1958); Lynn & Ramser, Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited, 43 Iowa L. Rev. 36 (1957); Lynn & Van Doren, Applying the Rule Against Perpetuities to Remainders and Executory Interests Orthodox Doctrine and Modern Cases, 27 U. Chi. L. Rev. 436 (1960). Much of the contemporary interest in doctrinal similarities may be directly traced to the teachings and writings of McDougal. See McDougal, Future Interests Restated: Tradition Versus Clarification and Reform, 55 Harv. L. Rev. 1077 (1942).

that there is little or no predictability as to result. A major purpose of this article is to examine some of the decisions rendered within the past few years and to evaluate the results in terms of orthodox doctrine and policy.

II. The Battle of Labels

The Rule Against Perpetuities is society's chief weapon to police and regulate the extent of permissible tying up of wealth. It is through the Rule that the community declares for whom, for what purposes, and upon what events the attempt of the transferor to impose private restrictions will be given effect.

Possibilities of reverter, rights of entry and executory interests are frequently employed to effect a shift in the enjoyment of property upon the happening of an event which might never occur. The problem of labels arises from the doctrinal distinctions made in applying the Rule to these interests. Despite persuasive argument that the functional equivalence of these devices should be recognized[5] and that they should be accorded comparable treatment, authoritative common-law doctrine discriminates against the executory interest.

By definition, reverters and rights of entry are interests in favor of the transferor or his estate;[6] an executory interest is in favor of some third party transferee.[7] The Rule has no application to the former, and there are many American cases enforcing possibilities of reverter and rights of entry even though unlimited in duration.[8] But "no one has ever doubted that executory interests . . . are within the rule . . . ."[9]

5. Ibid.

6. Reverters involve the idea that a part of the ownership is retained by the donor simply because it has not been given away. Gulliver, Cases on Future Interests 52 (1959). The American Law Institute defines a possibility of reverter as "any reversionary interest which is subject to a condition precedent." Restatement, Property § 154 (1936). A right of entry traditionally refers to the power of the donor to reacquire the interest given on the happening of a condition subsequent. Goldstein, Rights of Entry and Possibilities of Reverter as Devices To Restrict the Use of Land, 54 Harv. L. Rev. 248 (1940). See also Walsh, Conditional Estates and Covenants Running With the Land, 14 N.Y.U.L. Rev. 162 (1937).

7. Simes & Smith, Future Interests § 221 (2d ed. 1956) [hereinafter cited as Simes & Smith].

8. 2 Powell, Real Property § 179 (1950); 5 id. § 769 (1962). In England, however, both the right of entry and the possibility of reverter have been held subject to the Rule. See, e.g., In re Trustees of Hollis' Hosp. and Hague's Contract, [1899] 2 Ch. 540 (right of entry); Hopper v. Corporation of Liverpool, 88 Sol. J. 213 (1944), 62 L.Q. Rev. 222 (1946) (possibility of reverter); Simes & Smith §§ 1238-39; 6 American Law of Property §§ 24.9, 24.62 (Casner ed. 1952); Restatement, Property §§ 370, 372 (1944).

9. Simes & Smith § 1236. Historically, "the rule first developed in its modern form to check the abuse of the executory interest." Ibid. 1 American Law of Property §§ 1.32, 1.38, 4.32 (Casner ed. 1952); 6 id. § 24.20.

One need, therefore, be concerned about violating the Rule Against Perpetuities only if he is attempting to create a future interest in a third party, rather than in the transferor or his estate.

Critics have aptly pointed out that the tying up afforded by reverters and rights of entry is just as serious as that effected by the executory interest, and that it is ridiculous to suggest that one verbal form transgresses public policy but not the other.[10] Surely such differences in result should not be made on the basis of differences in the identity of the holder of the future interest.

Perhaps due in part to such criticism, a line of recent decisions has in practical effect nullified the application of the Rule Against Perpetuities to remote executory interests. For the competent draftsman, it is an easy task to make a shifting gift to a third party transferee upon a remote contingency. All that needs to be done is to insure that the interest of the transferee is placed in a category that is unobjectionable from a doctrinal standpoint. For example, if T devises to X Church "so long as the premises are used for church purposes," then to A, the attempted shift is void as a remote executory limitation and T's heirs have a possibility of reverter. But if the gift to A is contained in a *subsequent* clause of the will, it is effective, not as an executory limitation, but as a devise of T's possibility of reverter.[11] The irony of the situation is intensified when it is recalled that there are a number of other drafting techniques by which the prohibited gift to A could have been accomplished.[12]

As a further illustration of the confusion inherent in technical legal concepts, consider the following disposition: T devises to X Church "but should the premises ever cease to be used for church purposes, then

10. The traditional doctrine is that executory interests do not have the capacity to "vest in interest" before they become possessory. Restatement, Property § 370 (1944). Leach and Tudor have strongly urged that "this ancient conceptual distinction should not be significant in the application of the Rule against Perpetuities." 6 American Law of Property § 24.20, at 62 (Casner ed. 1952). See also Lynn & Ramser, Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited, 43 Iowa L. Rev. 36 (1957).

11. Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N.E.2d 922 (1950).

12. The following ways are illustrative: (a) "To X Church for 999 years so long as the premises are used for church purposes, then to A and his heirs." A would have a valid vested remainder after a term of years rather than an executory interest. Simes & Smith §§ 103, 221; (b) Deed to X Church "so long as . . . etc.," and the transferor thereafter by separate instrument assigns his possibility of reverter to A. Simes & Smith § 1860; (c) The transferor, by exacting a promise from the transferee upon sufficient consideration could tie up the land indefinitely, for the Rule applies only to property, not to contracts. Simes & Smith § 1246.

I give said land to A." The will left the residuary estate to B. Depending upon the label chosen, plausible technical arguments could be made that the land, upon cessation of the specified user, should go to either (1) A, (2) B, (3) T's heirs, or (4) remain in X Church. A will receive the land if he successfully maintains that he was the devisee of the possibility of reverter which remained in T's estate after creation of the determinable fee in the church. B will win if he convinces the court that the church received a determinable fee, with an attempt to create an executory devise in favor of A. This interest would violate the Rule, thus leaving a possibility of reverter which would be passed under the residuary clause to him. T's heirs would urge that the possibility of reverter passed to them by intestacy, on the theory that the gift to A and the gift to B were void executory devises and could not be given effect. X Church would be entitled to retain the land if the will were construed to give the church a fee simple (rather than a determinable fee) subject to a void executory interest in A. The invalidity of A's gift would thus leave an absolute, indefeasible estate in X Church.[13]

Despite the excessive reliance on legal technicality, each of these results finds some support in policy-type reasoning. Conceptually, there is perhaps no reason why a possibility of reverter or a right of entry may not be devised by the same instrument under which the preceding determinable fee was created. Moreover, a convincing argument could be made that it is preferable to pass the interest to the selected objects of the donor's bounty rather than send it by intestacy to his heirs. On the other hand, a determination that the first devisee received an absolute interest would be consistent with the policy favoring greater alienability by the elimination of future interests which clog the title.

The major point of criticism is that the validity or invalidity of the gift is made to turn on a label, and the label turns upon meaningless and irrelevant technicalities. This absurdity may be demonstrated by several recent cases dealing with void executory gifts.

III. The Effect of a Void Executory Interest

What happens when there is a void executory interest depends upon whether the preceding interest is classified as a fee simple or a determinable fee. If the present taker receives a fee simple, the failure of the executory limitation simply leaves the preceding estate absolute and indefeasible.[14] But if the first taker receives a determinable fee, there

13. Gray, Rule Against Perpetuities § 593 (4th ed. 1942); Restatement, Property § 229 (1936).

14. McMahon v. Consistory of St. Paul's Reformed Church, 196 Md. 125, 75 A.2d 122

is a possibility of reverter remaining in the transferor despite the failure of the executory interest.[15] This interest will pass either under the residuary clause or by intestacy. The cases, for the most part, are in confusion as to what language creates what interest, and the decisions are based on inconsistent results reached by courts faced with essentially the same problem.

An example of the judicial hostility towards forfeiture provisions and a readiness to construe the preceding interest as an absolute one is found in *Edward John Noble Hosp. v. Board of Foreign Missions*.[16] In 1922, Lucy A. Turnbull conveyed a tract of land to a named hospital " 'forever' " upon the condition that the grantee, its successors and assigns " 'shall forever use the . . . property for hospital purposes only. . . . ' " The deed further provided that " 'any failure or neglect to maintain a general public hospital shall work a complete and absolute forfeiture . . . of the hereby granted property and estate and the same shall thereupon revert and become part of the residuary estate. . . ' " of the grantor.[17] Mrs. Turnbull's will, probated in 1928, left her residuary estate to three charities. In 1950, the premises ceased to be used for hospital purposes, whereupon the residuary devisees sued to recover the land from the hospital's successor in interest.

The court held that the 1922 deed created a fee simple rather than a determinable fee in the hospital, to be cut short by an executory interest in favor of the grantor's residuary estate. Since this shift in enjoyment was upon a remote contingency, it was void and the hospital retained an absolute fee which passed to its successor in interest. By way of dictum the court commented on the language employed:

> If the clause creating the fee simple in the hospital had included automatic words of termination—for example, "so long as the property is used for hospital purposes only" or "until the property ceases to be used for hospital purposes only"—the hospital would have received a fee simple determinable. In that event, when hospital use ceased, the property would have automatically reverted to the grantor or her estate. . . . However, the clause creating the fee simple in the hospital contained none of these characteristic words appropriate to the creation of a fee simple determinable.[18]

Lucy A. Turnbull's desire to benefit the residuary takers under her

(1950); Proprietors of the Church in Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855).

15. First Universalist Soc'y v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925); Restatement, Property § 228, comment b (1936).

16. 13 Misc. 2d 918, 176 N.Y.S.2d 157 (Sup. Ct. 1958).

17. Id. at 919, 176 N.Y.S.2d at 159.

18. Id. at 920-21, 176 N.Y.S.2d at 160.

will whenever the property ceased to be used for hospital purposes could have been realized in several ways, however, *i.e.*, (1) by making a gift to the hospital "so long as" rather than "forever" thereby retaining a possibility of reverter which would have passed into her residuary estate for the benefit of the three charities; (2) by specifically naming the three charities as holders of the executory interest rather than providing that it go to the "residuary estate" (this would be valid, for a charitable gift on a remote contingency is good if preceded by a gift to charity);[19] (3) by construing the language of "condition" as creating a fee simple subject to a condition subsequent in the hospital. The corresponding right of entry in the grantor would have been exempt from the Rule, and, therefore, it could pass under the residuary clause of the will.

Despite the frustration of Mrs. Turnbull's desires and the availability of alternative drafting techniques, the *Noble Hosp.* case was correctly decided. Had the grantor intended to create a determinable fee, it would have been very easy to have said so, or to have spelled it out in a reverter clause. The word "forever" strongly suggests a fee simple rather than a determinable fee. Recent decisions have been reluctant to enlarge the determinable fee, and they have indicated a strong tendency to construe the interest as a fee simple absolute whenever this is possible.[20] It is accepted doctrine that a statement of purpose, without more, does not qualify the estate, and, therefore, failure of the declared purpose will not terminate the interest of the initial holder.

There are, however, several holdings which reach the opposite result on virtually indistinguishable facts. This dubious line of authority suggests that the first taker of necessity receives a determinable fee, even though no words of limitation or reverter are used, if followed by an executory interest. A good example of this position is *In re Pruner's Estate*,[21] where the testator devised certain described realty "in trust forever" for the establishment and support of a Home for Friendless Children from two specified Pennsylvania boroughs. There was no residuary clause, but a codicil to the will provided that "should there exist any Reasons why the Borough of Tyrone and the Borough of

19. 5 Powell, Real Property § 768-70 (1962); 4 Scott, Trusts § 401.5 (2d ed. 1956); Restatement (Second), Trusts § 401 (1959); Restatement, Property § 397 (1944).

20. Restatement, Property § 229 (1936) states a constructional preference for finding the prior interest indefeasible in the absence of manifestation of a contrary intent. See, e.g., Rostell v. Arkansas & Ozarks Ry., 230 Ark. 515, 323 S.W.2d 539 (1959); D. C. Burns Realty & Trust Co. v. City & County of Denver, 143 Colo. 430, 354 P.2d 150 (1960); Hill v. Towson Realty, Inc., 221 Md. 389, 157 A.2d 796 (1960); McMahon v. Consistory of St. Paul's Reformed Church, 196 Md. 125, 75 A.2d 122 (1950).

21. 400 Pa. 629, 162 A.2d 626 (1960), 109 U. Pa. L. Rev. 433 (1961).

Bellefonte Cannot Carry out the provisions of this will . . . then the Property that was bequeathed . . . for the purpose of a Home if such becomes invalidated from any cause then said Real Estate—is bequeathed absolutely to my Niece Sallie M. Hayes. . . ."[22] The testator died in 1904. The boroughs accepted the gift, established the Home and for a number of years provided care for several children. Sallie died in 1933, leaving a will which gave her residuary estate to her four children. Since 1949, there have been no children in the Home. The court, although not quite sure what estates were created,[23] held in substance that the boroughs received a determinable fee, that the intended gift over to Sallie was a void executory devise, and that the possibility of reverter remained in the donor's estate and passed to his heirs by intestacy, there being no residuary clause in the will.[24]

In support of its reasoning that the failure of the purpose caused an automatic termination of the estate in the first taker, the court stated:

> When the Boroughs of Tyrone and Bellefonte could no longer carry out the provisions of testator's gift, their determinable interest ceased and terminated. When the gift over to Sallie M. Hayes was invalidated because it violated the rule against perpetuities, the real and personal property which testator gave . . . first to the Boroughs and then to Sallie M. Hayes, *revert back to the estate of the testator* by operation of law with the same force and effect as if there had been no gift over . . . and an intestacy results.[25]

Here again, the will could easily have been drafted so that Sallie or her heirs would have received the property by giving it to the boroughs "so long as" the premises are used as a Home for Friendless Children; then by devising the possibility of reverter by a subsequent clause to Sallie. Or Sallie's interest would have been good under the language used by the testator had the will made a gift of the residuary estate to Sallie. This would have transferred the possibility of reverter to her.

22. Id. at 632, 162 A.2d at 628.

23. "Irrespective of the exact name of the interest or estate which testator gave to the Home for Friendless Children, it is well settled that . . . if the purpose fails, the estate given to the Home determines and is automatically terminated." Id. at 639, 162 A.2d at 632.

24. A similar result was reached in Fletcher v. Ferrill, 216 Ark. 583, 227 S.W.2d 448 (1950). In that case there was a conveyance of land for the benefit of an orphans home and school, "'and when it ceases to be so used, or when said home and school shall be moved from Batesville, Arkansas, said property shall revert to the heirs of the said J. W. Fletcher.'" Id. at 583, 227 S.W.2d at 449. The grantee foolishly conceded that it had but a determinable fee, and disclaimed any further interest in the property after the specified user ceased in 1948. If a determinable fee is created, it is clear that a possibility of reverter remains in the transferor and that it will pass either under his will or by intestacy. The concession of the grantee was a crucial and unnecessary one, in the absence of language sufficient to create a special limitation. See 4 Baylor L. Rev. 246 (1952).

25. 400 Pa. at 640-41, 162 A.2d at 632-33.

Under the court's view, the attempt to create an interest in her by *codicil* made it an executory devise, but if done by the *residuary clause*, presumptively it would have been valid. This is clearly a distinction without a difference. Surely there is no reason why a subsequent *codicil* could not serve to transfer a possibility of reverter.

The preferable solution, however, would follow the line of reasoning in the *Noble Hosp.* case and hold that the boroughs took an absolute fee (not a determinable fee) and that the failure of the executory interest simply left an indefeasible fee in the boroughs. *Cy pres* could thus have been applied to carry out the general charitable purpose.[26] Such a result is desirable in terms of both doctrine and policy. The only qualifications imposed by the donor were (1) a statement of purpose and (2) provision for a gift over. In the absence of language clearly creating a determinable fee, the courts should not manufacture one, for this makes for inalienability.[27]

Equally unsatisfactory is the decision of the Kansas Supreme Court in *Commercial Nat'l Bank v. Martin.*[28] Testator's will devised land to his son for life, then in trust with directions that the land be sold, its proceeds invested in securities, and the income therefrom paid to a named school district to maintain a course in vocational agriculture. The will further provided that if the school district " 'shall fail for a period of one school year to maintain a course in vocational agriculture in said school, then this trust shall cease and terminate, and the principal . . . shall be . . . paid to my heirs at law according to the laws of descent and distribution of the State of Kansas.' "[29] The court held that the school district received a fee simple determinable with a possibility of reverter in favor of the testator's heirs. The reasoning was as follows:

> By the terms of the will, the land in question was devised . . . in trust subject to a life estate, with the added provision that it was to go to W. M. DeVore's heirs at law upon the happening of a certain event, which, in fact, might never happen. Thus, the condition on which appellee's [the school district's] estate depended was a *condition subsequent* and, therefore, appellee acquired a *vested estate* in trust *subject to defeasance.*
>
> The interest created in W. M. DeVore's heirs at law was a *possibility of reverter* . . . and as such is not subject to the rule against perpetuities.[30]

26. Fisch, The Cy Pres Doctrine in the United States (1950); 4 Scott, Trusts § 399 (2d ed. 1956); 2A Bogert, Trusts and Trustees §§ 431-36 (1953).

27. The Pruner case has been criticized for its "clouding of what was formerly clear doctrine" and for its "disturbing effect" on the construction of wills. 109 U. Pa. L. Rev. 433, 436-37 (1961). The court violated the principle that a determinable fee does not arise by implication but must be expressed. Sparks, Future Interests, 36 N.Y.U.L. Rev. 305 (1961).

28. 185 Kan. 116, 340 P.2d 899 (1959).

29. Id. at 117, 340 P.2d at 901.

30. Id. at 121-22, 340 P.2d at 904. (Emphasis added.)

Both the traditionalist and the realist would agree that this decision is wrong. The court's own discussion clearly indicates that the interest in the heirs traditionally would be classified as an executory interest on a remote contingency and void under the Rule Against Perpetuities. The court admitted that it was a condition subsequent which defeated the prior estate and cut it short. This was a fee on a fee, a gift to charity, subject to a remote gift over to private individuals. The orthodox result would hold the shift void and allow the first taker to retain an absolute fee. There was no language used to show any intent to create a determinable fee. Further, from a policy standpoint, the court showed an undue readiness to place a label on the interest that would permit the tying up of a fund.

An interesting case where purely fortuitous factors were used to determine that the estate was a right of entry rather than an executory interest is *Knowles v. South County Hosp.*[31] There a life estate was devised to Earl Jacob Knowles provided that he reside on the farm at least three months of each year, pay all taxes, insurance and repair bills and " 'grow, or have grown, at least a peck of Indian maize, or Rhode Island Johnycake corn, on the ear.' " Upon Earl's death there was a gift over of the farm to Earl's " 'oldest male heir, under the foregoing conditions, except Homestead Farm becomes his in fee simple upon his fortieth (40th) birthday. . . . ' " Concerning breach, it was provided that " 'failure to comply with any of the foregoing terms, or neglect or inability to do so, will result in Homestead Farm becoming and remaining part of my estate, whereupon it is to be bequeathed to the Rhode Island State College . . . . ' "[32] The residue of the estate was left to three named charities in equal shares. Upon Earl's failure to comply with the terms of the gift (requiring that he reside on the premises a certain number of months per year), the title was claimed by (1) Rhode Island State College; (2) the three charities as residuary takers under the will; and (3) Earl J. Knowles, the life tenant.

The court decided in favor of Rhode Island State College on the theory that Earl had but a life estate subject to a condition subsequent, with a right of entry in the testator's estate. This latter interest in turn was given over to Rhode Island State College by a subsequent provision in the will. In answer to the contention of the residuary beneficiaries that the attempted gift over to Rhode Island State College was an executory interest which was void under the Rule Against Perpetuities, the court said:

31. 87 R.I. 303, 140 A.2d 499 (1958).
32. Id. at 305-06, 140 A.2d at 500-01.

If it were not for the testamentary language expressly providing for a reversion to the testamentary estate in the event of a breach of the conditions it would be a conditional limitation because it cuts down the preceding freehold estate before its regular termination. As is well known such a limitation is not good at common law, but under the statute of wills it is valid as an executory devise. It is always contingent and subject to the rule against perpetuities.[33]

The court hastened to add that no executory interest was created here but rather that the testamentary language was "equivalent to a re-entry with all its consequences."[34] And of course the important consequence is exemption of the latter, but not the former, from the operation of the Rule. The right of entry could be devised by a *subsequent* clause of the will; but if the donor had provided, in the *same clause* of the will which made the original devise to Earl, for a direct shift in enjoyment to Rhode Island State College, such executory interest would have fallen under the ban of the Rule.

The result turned on the insignificant circumstance that the testator created what the court termed a right of entry to his estate and then transmitted this by a later clause in the will to Rhode Island State College. If a direct shift in enjoyment had been provided for it would have been void, the title in the first takers absolute and, therefore, readily marketable. What the court really did was to give effect to a void executory interest by calling it a right of entry, and permitted it to pass under the will to the college. For the knowledgeable draftsman it is thus quite easy to evade the Rule by using two clauses instead of one to make the gift.[35]

Here again is the familiar battle of the doctrines, with the court free to pick and choose at random. Had the court chosen to label the gift to Rhode Island State College an executory interest and void, it would be possible by manipulation of the variables involved, to have decided in favor of any one of the other three claimants. The failure of the gift

33. Id. at 309, 140 A.2d at 502.

34. Id. at 308, 140 A.2d at 502.

35. The Knowles case permitted the same thing to be done with the right of entry that Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N.E.2d 922 (1950) allowed to be done with the possibility of reverter. "Since, unfortunately, the possibility of reverter is not subject to the rule against perpetuities, this decision permits a testator, by placing a gift in the residuary clause, to make it a possibility of reverter and thus exempt it from the rule against perpetuities." Simes, Is the Rule Against Perpetuities Doomed?, 52 Mich. L. Rev. 179 n.4 (1953). The Knowles decision simply represented an extension of what Leach aptly calls the two-bites-at-the-cherry approach to rights of entry. See Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721, 741-43 (1952); Leach & Tudor, The Rule Against Perpetuities 189 (1957); 6 American Law of Property § 24.62 (Casner ed. 1952). The Woburn Church case is noted in 64 Harv. L. Rev. 864 (1951).

over could leave either an absolute, indefeasible title in Knowles and his heir, or else by classifying their interests as determinable estates, the testator's possibility of reverter could be passed under the residuary gift to the three charities. A third possible solution would be to classify both the gifts to the college and the gift of the residue as void executory interests, and thus send the land by intestacy to the testator's heirs.

A final illustration is the Arkansas decision, *McCrory School Dist. v. Brogden*.[36] This case involved a conveyance of land to a school district " 'for use as for a School (said property to revert to the heirs of the Patterson Estate if discontinued as School property) . . . .' " The *habendum* clause contained the phrase " 'to have and to hold the same . . . so long as this property is used for school purposes.' "[37] The court decided that this language created a determinable fee in the school district, but that the gift over to the heirs of the transferor's estate was void as a remote executory interest. This left a possibility of reverter in the grantor which could be disposed of as he wished. After reiterating the traditional differences between reverters and executory interests, the court continued:

> Therefore, the creation of the determinable fee was valid, but the gift over to the heirs of the Patterson estate . . . constituted an executory interest and was void as violative of the rule against perpetuities. Upon the occurrence of the condition set out in the deed . . . Mrs. Patterson became entitled to possession. . . .[38]

This entire line of decisions indicates a judicial propensity for wandering and groping around in a doctrinal jungle. The shore is but dimly perceived, if at all, in this hypnotic enchantment with labels and semantic refinements. Although an occasional good result is reached, it is by the smuggling in of policy through the backdoor prior to affixing the classification. The method of approach and the majority of results attained are a reproach to the legal profession.

IV. Language Patterns and the Traditional Classification of Interests: Some Recent Cases

The confusion in terminology makes it possible for a court to decide which legal consequences best conform to its current conception of policy and equities, and then to construe the language so as to apply the label that will produce that result. Several recent cases have exhibited a cavalier disregard of doctrinal niceties where the latter would produce undesirable consequences.

36. 231 Ark. 664, 333 S.W.2d 246 (1960).
37. Id. at 667, 333 S.W.2d at 249.
38. Id. at 671, 333 S.W.2d at 251.

An apparent deliberate mislabeling was sanctioned in *Washington City Bd. of Educ. v. Edgerton*.[39] A tract of land was conveyed in 1904 to the school board " 'upon condition that the same shall be held and possessed . . . only so long as the said property shall be used for school purposes.' "[40] Thereafter a three-story brick school building was erected on the premises and continuously used for school purposes until 1956. In that year, the building was sold and removed, and the land was offered for sale by the school board. Although the verbal formula "so long as" appropriate to the creation of a possibility of reverter was used, the court ignored this factor and instead emphasized the absence of any express provision for a right of entry. From this irrelevancy, the conclusion was reached that the school board had a fee simple absolute and could therefore dispose of the land as it wished. The court reasoned as follows:

> [W]e reach the conclusion that the language used in the *habendum* clause . . . was not intended to impose rigid restrictions upon the title or to create a condition subsequent, but that it was intended by the parties thereby to indicate the motive and purpose of the transfer of title. It expresses no power of termination or right of re-entry for condition broken.[41]

Two recent New Jersey decisions have held that even though an express provision for reverter is employed, a right of entry and not a possibility of reverter is created if the purpose of the parties would thereby be better served. In *Oldfield v. Stoeco Homes, Inc.*,[42] the deed provided that " 'a failure to comply with the covenants and conditions . . . will automatically cause title to all lands to revert to the City of Ocean City . . . . ' "[43] The court held this explicit language was insufficient to create a possibility of reverter because the parties never intended an automatic reversion. Other language was discovered which was susceptible of being construed as a desire to create a condition subsequent. In refusing to focus attention solely on particular forms of expression, the court observed:

> The ancient land law imputed a thaumaturgic quality to language. . . . If the judicial eye in scanning the instrument chanced upon a pet phrase the inquiry was ended without resorting to the arduous effort of reconciling evident inconsistencies therein. The universal touchstone today is the intention of the parties to the instrument creating the interest in land.[44]

This philosophy of ignoring particular language when it would

39. 244 N.C. 576, 94 S.E.2d 661 (1956).
40. Id. at 577, 94 S.E.2d at 662.
41. Id. at 578, 94 S.E.2d at 663. (Emphasis added.)
42. 26 N.J. 246, 139 A.2d 291 (1958).
43. Id. at 251, 139 A.2d at 294.
44. Id. at 257, 139 A.2d at 297.

frustrate the ultimate results desired was quickly followed in another New Jersey case.[45] A provision in the deed directed that title "shall revert" if the grantee fails to improve the property within a specified period. This clear and positive language of reverter was held to create a fee on condition subsequent and not a determinable fee.

A Virginia decision[46] furnishes yet another illustration that the so-called basic distinctions tend in practice to become so blurred that the terms are used interchangeably. The conveyance contained an express provision for reverter should the premises ever cease to be used for railroad purposes. With disarming candor, the court made the following observation:

> Technically, perhaps, there is a distinction between a possibility of reverter and a right of re-entry for breach of a condition subsequent; but the distinction is usually not observed and possibility of reverter and right of re-entry . . . are treated as the same.[47]

Following that heretical pronouncement, the opinion went on to talk about the "breach of a condition subsequent upon which the possibility of reverter depends," and said that the estate of the grantee continued until entry.[48] Since the right of entry was now barred by the statute of limitations, the result was an indefeasible fee simple in the transferee.

Throughout the cases there is a frequently reiterated policy that interests in the transferor which may result in forfeiture will be strictly construed. What this means is that even though the courts may feel forced to admit that a right of entry has been created, they seek to avoid a finding that there has been a breach.[49] A recent example of this technique is *Erskine v. Board of Regents of Univ. of Neb.*[50] The donor's will devised a sizeable tract of land to the University of Nebraska to be operated as an experimental farm, the income therefrom to be used to provide scholarships in the College of Agriculture. There was a gift over to certain named individuals in the event of the University's failure to observe the terms of the gift, which included several requirements designed to memorialize the testator's bounty. Plaintiffs alleged a failure to comply, and asserted their claims as takers of the gift over. The court held that the University had substantially complied

45. Alexander Bldg. Corp. v. Borough of Carteret, 31 N.J. 87, 155 A.2d 263 (1959).

46. Sanford v. Sims, 192 Va. 644, 66 S.E.2d 495 (1951).

47. Id. at 648, 66 S.E.2d at 497.

48. Id. at 649, 66 S.E.2d at 497.

49. Stewart v. Weaver, 264 Ala. 286, 87 So. 2d 548 (1956); see, e.g., Holbrook v. Board of Educ., 300 S.W.2d 566 (Ky. 1957).

50. 170 Neb. 660, 104 N.W.2d 285 (1960).

with the spirit of the gift, although perhaps not literally, and refused to decree a forfeiture.

The result is unobjectionable, but it should be pointed out that the University should have raised the perpetuities problem in addition to its defense of substantial performance. The named takers in event of breach had a shifting executory interest which was void for remoteness. This would leave the absolute fee in the University since the divestment could never take place even though a breach of the conditions of the gift did occur.

Another method of handling a perpetuities problem is to ignore it or simply state that it does not exist. In *Monawa Tribe No. 352 v. Wiley*,[51] the Indiana court sidestepped an obviously void executory interest and sustained the transfer without mentioning the Rule Against Perpetuities. This case involved a conveyance of land by the Monawa Tribe, with the latter retaining the upper story of a building on the premises "so long as" certain restrictions as to user were observed. In case of violation, the Tribe's rights to the upper story " 'shall cease and the use and occupancy . . . shall revert to and become the absolute right and property of the owners of the fee of said real estate.' "[52]

The rights which the Tribe retained for itself in the second story did not neatly fit any of the conventional categories or definitions, and this perplexed both the court and counsel. Rights of entry and possibilities of reverter are, by definition, for the benefit of the *grantor*; but here the restrictions were for the *grantee's* benefit. The fact that the parties were reversed troubled the court. It was pointed out that the grantee cannot be considered the grantor of the estate reserved and the "rules relating to the reverter of estates to grantors has no application to the facts in this case and proof of re-entry was unnecessary."[53]

The hapless court finally worked its way out of this dilemma by proclaiming that the grantee was the recipient of the fee subject to certain rights in the second story which the Tribe reserved to itself as long as the stipulated conditions were complied with. The retained interest of the Tribe was likened to a leasehold estate or to an easement or license. Upon breach, the "right of user reserved by the grantor is merely extinguished."[54] Thus, the practical result was the same as though a determinable fee had been created in the Tribe with a possibility of reverter in its grantee.

The court's difficulty stemmed from the erroneous notion that the

51. 127 Ind. App. 660, 142 N.E.2d 488 (1957).
52. Id. at 664-65, 142 N.E.2d at 490.
53. Id. at 670, 142 N.E.2d at 492.
54. Id. at 667, 142 N.E.2d at 491.

function of definitions and rules is to point definitely and precisely to certain inevitable conclusions. The factors and policies which really influenced the decision remained undisclosed for the most part or were covertly brought in without explicit statement. It is a fact, however, that judges frequently create and apply their own preferences as part of their response. As an illustration, why could not the conveyance in the *Monawa Tribe* case have been construed to give a fee simple determinable in the upper story to the Tribe, with an easement over means of ingress and egress, subject to an executory interest in the grantee void for remoteness? Even though the parties were reversed, surely this is just as plausible a result from a doctrinal standpoint.

But under the circumstances there are reasons why it would not make sense to invalidate an arrangement of this sort. The purpose of the parties could have been accomplished by using two instruments, *i.e.*, have the Tribe convey the entire premises in fee simple to the grantee, then have the latter reconvey the second story to the Tribe "so long as" or with a right of entry in case of breach. One may approve of the result reached in the *Monawa Tribe* case but surely not the devious reasoning by which it was achieved. The perpetuities problem was obviously there, and it should have received explicit treatment by the court.

A closely related semantic problem arises when the transferor directs that upon the cessation of use for a particular purpose the premises are to "revert to the owner of the tract" from which it was originally taken. A provision of this nature was involved in *Donehue v. Nilges*[55] and in *Jones v. Burns*.[56] The *Donehue* case arose out of a conveyance in 1908 of a two-acre tract to a school district " 'so long as the aforesaid premises shall be used for a school house site and no longer, *and if the aforesaid premises be no longer used for a school house site, then the aforesaid premises shall revert to and become the property of the grantors herein or those claiming title . . . by, through, or under said grantors.*' "[57]

What troubled the court was the language providing for a shift in enjoyment to the grantors or their successors and assigns. After conceding that the school received a determinable fee, the court decided that the limitation over was in substance a gift over to the then owners of the balance of the tract. So regarded, it was a shifting executory interest upon a remote contingency and, therefore, void. The possibility of reverter thus remained in the grantor and passed to his heirs. When the use for school purposes ceased in 1951, title to the tract vested

55. 364 Mo. 705, 266 S.W.2d 553 (1954).
56. 221 Miss. 833, 74 So. 2d 866 (1954).
57. 364 Mo. at 708, 266 S.W.2d at 554.

in the heirs and their successors rather than in the person who at that time owned the adjoining land from which it was taken.[58]

On strict legal theory, this result is conceptually correct. Here was a gift over that looked and acted like an executory interest on a remote contingency to persons who might not be ascertained within the perpetuities period. Yet from society's standpoint, it would be far better to uphold the attempted shift to the present owners of the tract rather than to send it back to the grantor's heirs, who are likely to be numerous and difficult to locate with the passage of time.[59] The possibility of reverter will fractionate,[60] whereas the attempted gift over will always stay with the adjoining land, its holders can be more precisely determined and releases be more readily obtained. From a functional standpoint, it should be immaterial who succeeds to the enjoyment of the land upon cessation of the intended use, *i.e.*, whether it be the grantor, his heirs, the owners of the adjoining tract or any other person.

The point is that the type of disposition in *Donehue v. Nilges*[61] offers no threat to the policy of the Rule, and there is no reason why it should not be effective. One method of doing this would be to hold that the grantor's possibility of reverter was *assigned* by the language of the deed itself to the person claiming title "by, through, or under" the grantor. Since this could have been accomplished by a *separate* instrument of transfer, there is no good reason why the deed itself should not be regarded as a shorthand method of effecting the assignment of this interest.[62]

A final example of judicial maneuvering to reach an acceptable result, even though apparently contrary to established doctrine, is present in several recent cases involving options to purchase retained by the grantor. The orthodox rule is that such interests are subject to the Rule Against Perpetuities and, therefore, void if capable of being exercised beyond the period.[63] However, by declaring the remote option to

58. A similar result was reached in Jones v. Burns, 221 Miss. 833, 74 So. 2d 866 (1954). After conveying a two-acre tract of land to school trustees on a determinable fee, the deed provided that "'it is to revert to the owner'" of the adjoining tract from which it is taken upon cessation of the specified user. It was held that the shift in enjoyment was an executory interest, void for remoteness, and that the possibility of reverter was inherited by the heirs of the grantor.

59. See Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3, 77 (1960).

60. See note 2 supra.

61. 364 Mo. 705, 266 S.W.2d 553.

62. This was the ground of decision in County School Bd. v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950). See also Dvorak v. School Dist., 237 Iowa 442, 22 N.W.2d 238 (1946).

63. Simes & Smith § 1244; Restatement, Property § 393 (1944).

be a right of entry, the transaction becomes valid. In *Byars v. Cherokee County*,[64] the court thus manipulated the labels to reach the result it wanted:

> The condition stated in the deed in this case, giving the grantor by the express words used, the right to a reconveyance of the property should the appellant cease to use the land for curing house purposes, is a condition subsequent, and upon the happening of the event stated entitled the grantor to a reconveyance of the property.[65]

Similar decisions were reached by an Alabama court in *Dozier v. Troy Drive-In-Theaters, Inc.*[66] and *Rountree v. Richardson*.[67] In *Dozier* it was conceded that an option to repurchase, if unlimited in time, is ordinarily void under the Rule. But the court hastened to explain why this did not apply:

> But if the stipulation by which the grantor is to have the privilege of a repurchase on the occurrence of the condition named is a limitation on the fee to be conveyed, presently vested . . . such a limitation does not violate the rule against perpetuities, for a conditional reservation presently vested is not subject to that rule although exercisable on a contingency.[68]

This doubletalk and deliberate confusion of terminology was followed in *Rountree*, with the meaningless statement that "a rule of property has been created in this state which should be upheld."[69] What really mattered was the desire of the court to uphold commercial transactions of this nature and permit the wishes of the parties to be carried out. Viewed in that perspective, the decisions were wise, albeit doctrinally suspect, for the Rule should not be allowed to strike down business arrangements where there is not the slightest threat of a family dynasty involved.[70]

V. Conclusion

Since few instruments fall incontestably into one and only one category, the traditional crutch of classifying interests as a prelude to solution is an unreliable technique. The elaborate paraphernalia of

64. 237 S.C. 548, 118 S.E.2d 324 (1961).
65. Id. at 556, 118 S.E.2d at 328.
66. 265 Ala. 93, 89 So. 2d 537 (1956).
67. 268 Ala. 448, 108 So. 2d 152 (1959).
68. 265 Ala. at 104, 89 So. 2d at 546.
69. 268 Ala. at 453, 108 So. 2d at 156.
70. See Leach & Tudor, The Rule Against Perpetuities 220 (1957). Other escape devices are to hold that the interest is a "contract" or a "mere covenant." See Gould v. Rite-Way Oil & Inv. Co., 143 Colo. 65, 351 P.2d 849 (1960); Greco v. Meadow River Coal & Land Co., 113 S.E.2d 79 (W. Va. 1960). But cf. Gearhart v. West Lumber Co., 212 Ga. 25, 90 S.E.2d 10 (1955) holding the grantor's right to repurchase void as an option and not a provision for condition subsequent with a right of entry.

doctrines and concepts with which the law of property surrounds itself not infrequently produces the illusion of a seamless, logical consistency in the decided cases. Yet nothing could be further from the truth. The fact of the matter is that the asserted doctrinal distinctions are illusory, and the various labels used more often represent an excuse for a decision rather than a reason.

The courts have created a great deal of unnecessary difficulty and confusion by not keeping authoritative doctrines and principles in their proper subordinate position. The principal reason for this lies in the failure of officials to understand and appreciate context and to compare different techniques in a functional manner. This results in the problem being viewed not as one of policy, but rather what verbalism to choose from the competing array of concepts and principles. As has been demonstrated, the skilled draftsman too often may, unmindful of community preferences, route the court into one syntax rather than another, or in one direction in a particular syntax rather than another direction in that same syntax.

It obviously makes no sense to decide that a particular mode of tying up is void, and yet permit other modes that are just as objectionable in terms of the interest of society. What the American courts have failed to realize is that every attempt to tie up a fee simple interest in land poses a threat to the public interest by potentially immobilizing the one basic resource of the community. In the highly developed industrialized society of today, land use may be regulated most effectively, not by "dead-hand" control, but by zoning, land use planning, urban redevelopment and similar public controls.

Undoubtedly, the insubstantiality of the distinguishing features of reverters, rights of entry and executory interests should be recognized, and uniformity of treatment accorded to these basically similar devices, but more stringent restrictions are needed than the Rule Against Perpetuities would provide. Since contemporary land uses may change greatly in the short span of a decade or so, it is irresponsible to permit restraints which will endure for the full period of the Rule.

Judicial meanderings in the doctrinal thicket can most effectively be dealt with by legislation limiting the duration of permissible restrictions to a shorter time period. Although the ideal statute is yet to appear, the recent wave of legislation has doubtless paved the way for more adequate regulation.[71] Despite the political difficulty in getting intelli-

71. Massachusetts gave impetus to this movement in 1954 when it adopted a detailed statute as part of its reform of the Rule. This legislation, with some exceptions, set thirty years as the permissible duration for reverters, rights of entry and interests limited to third persons after a determinable fee. Mass. Ann. Laws ch. 184A, §§ 1-6 (1955) (Supp. 1961). For

gent statutes of this kind on the books, a consistent increase in legislative activity may be expected as the need for effective policing of these unruly interests becomes better understood. Surely, the decisions within the past decade have produced a stimulus in that direction.

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an analysis of case law and statutes see Simes, Improvement of Conveyancing by Legislation 201-17 (1960). Recent Kentucky legislation has sought to abolish the purported doctrinal distinctions between possibilities of reverter and rights of entry by converting the determinable fee into a fee simple subject to a condition subsequent. There is the further provision setting a thirty-year time period within which the forfeiture contingency must occur. Ky. Rev. Stat. §§ 381.215-.223 (1962). See Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3 (1960). New York, on the other hand, has set down the requirement that such limitations must be recorded initially not less than twenty-seven years and not more than thirty years after created, and a renewal declaration must thereafter be recorded after the expiration of nine years and before the expiration of ten years. Otherwise such limitation becomes void and unenforceable. N.Y. Real Prop. Law §§ 345-49. For statutes of other states whose purpose is to limit the duration of reverters, rights of entry, and executory interests in land, see Conn. Gen. Stat. Ann. §§ 45-95 to -99 (1960); Fla. Stat. Ann. § 689.18 (Supp. 1961); Neb. Rev. Stat. §§ 76-288 to -298 (1958); S.D. Code § 51.16B (Supp. 1960).