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Willard L. Eckhardt

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PROPERTY LAW IN MISSOURI*

WILLARD L. ECKHARDT**

I. CONSTRUCTION OF LIMITATIONS—DEFEASIBLE OR DETERMINABLE FEE, OR FEE SIMPLE ABSOLUTE SUBJECT TO RESTRICTIVE COVENANT— DURATION OF RESTRICTIVE COVENANTS—REMEDIES IN EQUITY AND AT LAW

*Duncan v. Academy of the Sisters of the Sacred Heart*¹ is an important decision on the construction of limitations containing restrictions on the use of property. In 1854 certain grantors for \$630 conveyed a tract of a little more than three acres to one Ann Shannon, a Roman Catholic nun, by a deed which included the following provision: "Provided however and these presents are upon this express condition that she the said Ann Shannon shall hold said land for the sole use and benefit of the order of the sisters of the Sacred Heart of the City of St. Joseph in the County and State aforesaid and for no other use or purpose whatever." The grantee, who had purchased as trustee, conveyed to a corporation, The Academy of the Sisters of the Sacred Heart of St. Joseph, Missouri. The Academy then constructed a girls school on the tract, and operated it continuously up to the date of suit, a period of at least 106 years. The Academy had consummated plans to build a new school at another location, was negotiating with purchasers or lessees for the sale or lease of the tract at the date of the suit, and in the meantime intended to turn the tract over to another Roman Catholic order.

The heirs of the original grantors, claiming an interest only as heirs of the grantors, brought suit for a declaratory judgment that title had reverted or would revert to them by reason of the "condition" in the deed, or in the alternative, that violation of the "condition" be enjoined, alleging the facts stated above. The trial court on motion dismissed the petition, and on appeal the dismissal was affirmed.

*This article contains a discussion of selected Missouri court decisions appearing in Volumes 346-356, inclusive, of the South Western Reporter, Second Series.

**Professor of Law, University of Missouri.

1. 350 S.W.2d 814 (Mo. 1961).

The first problem was what estate the grantee received under the 1854 deed.² One possible construction is that the "condition" in the deed was a condition subsequent, that the grantee got a defeasible fee simple, and that the grantors retained a right of entry for condition broken to which the plaintiffs succeeded. Another possible construction is that the "condition" in the deed was a special limitation, that the grantee got a determinable fee simple, and that the grantors retained a possibility of reverter to which the plaintiffs succeeded. The court rejected both of these constructions, relying principally on the leading case of *Chouteau v. City of St. Louis*,³ and held that the deed conveyed a fee simple.

The *Chouteau* case, of course, is persuasive authority in the *Sacred Heart* case, but the two are not on all fours and could be distinguished. In the *Chouteau* case the court emphasized the use by the grantors of the word "forever" in the granting clause. Only the "condition" is set out in the opinion in the *Sacred Heart* case, not the entire deed, and the word "forever" may not have been used in the granting clause. Furthermore, it is significant that the conveyance in the *Sacred Heart* case was for substantial consideration, probably the fair market value of the land (though at this stage of the cause there was no proof as to this matter), while the grant in *Chouteau* was a gift. There would be less inclination to find a condition subsequent where a grantee has paid the fair market value than where the land was received as a gift.

In both cases the alleged conditions subsequent or special limitations were so ineptly drawn (from the vantage point of hindsight a hundred years later) that a court had a rather free hand in construing the words to achieve a fair end result. What is really most significant in both cases

2. See Fratcher, *Trusts and Succession in Missouri*, 27 Mo. L. Rev. 594, 606 (1962), for the suggestion that the "condition" could be construed simply as making the grantee, Ann Shannon, a trustee.

If this suggested construction be adopted, the grantors and their successors would have no more rights than any other private citizens with respect to a charitable trust. The substantial consideration paid supports the trust construction. This possible theory was not urged by the parties (although the plaintiffs alleged that she purchased as trustee), and was not considered by the court, nor is it considered further in this discussion of the case.

The defendant's motion to dismiss also alleged a 1911 quiet title suit in which the issues had been adjudicated against the plaintiffs, but this allegation was not considered on appeal.

3. 331 Mo. 781, 55 S.W.2d 299 (1932). In *Chouteau v. City of St. Louis*, 331 Mo. 1206, 56 S.W.2d 1050 (1932), a different case concerned with the same deed, the plaintiffs unsuccessfully advanced the theory that the conveyance gave the county (now city) an easement only and not a fee simple.

is that the grantees observed the "conditions" for approximately one hundred years and that the grantors got all they fairly could expect from the "conditions." It always has seemed to me with reference to the *Chouteau* case that if no court house ever had been built and if the problem of construction of the limitation had arisen a few years after the grant, the court would have construed the deed as including a condition subsequent and an implied right of entry for condition broken, or a special limitation and possibility of reverter. *Sacred Heart* strikes me the same way; if no school had been built and operated for many years, but rather the Academy had proposed to sell the land for private purposes a few years after the 1854 grant, the court might well have construed the "condition" in the deed as providing for forfeiture. A court could not do this where limitations are so clearly drawn that there is no room for construction, but a court has a fairly free hand in construing an amorphous limitation to get the result that is fair under all of the circumstances.

Sacred Heart is a good example of the practical difficulties which arise when a grantor or testator overreaches himself and wants his dead hand to control property forever. The initial grant should have provided an unqualified, unrestricted fee simple absolute in the charity after, say, twenty years.⁴ In England, where rights of entry⁵ and possibilities of reverter⁶ are subject to the rule against perpetuities, the potential problem is not nearly so serious as it is in Missouri, where these reversionary interests are not subject to the rule.

After the court decided that the grantee got a fee simple absolute, the next issue was whether such fee was subject to a restrictive covenant, and if so, whether the plaintiffs were entitled to injunctive relief. The court assumed for the purposes of the case, but did not decide, that the "condition" created a restrictive covenant, but denied relief on two grounds. First, plaintiffs alleged an interest solely as heirs of the grantors, but did not allege any interest in contiguous or nearby land that would be adversely affected by the threatened violations; hence they were not entitled to injunctive relief. Further, injunctive relief is discretionary, and even if the

4. See PETERSON & ECKHARDT, MISSOURI LEGAL FORMS §§ 777-778 (1960), for forms both limited and unlimited as to time, with comments as to their use.

5. The leading case is *In re Trustees of Hillis' Hospital and Hague's Contract*, [1899] 2 Ch. 540.

6. *Hopper v. The Corp. of Liverpool*, 88 Sol. J. 213 (1944).

plaintiffs owned contiguous or nearby land which would be adversely affected by a violation, it would be inequitable to enforce a restriction which had been observed for 106 years, and where more than a reasonable time had elapsed.⁷

It is respectfully submitted that these latter observations of the court may be too broad and may be modified in future cases. It is clear that it would be inequitable to enforce a restrictive covenant by injunction where the plaintiff has no substantial interest to be protected, either because he owns no nearby land or because the enjoyment of nearby land which he owns would not be substantially impaired by the violation. The court goes further and seems to indicate that as a matter of law it would be inequitable, after 106 years, to enforce a restrictive covenant even though the plaintiff owned nearby land and would be adversely affected by the violation. The soundness of this latter proposition is doubtful, and, in any event, *quaere* whether this issue should be determined on a motion to dismiss, or only after the evidence is heard. If relief is denied on the theory that granting an injunction would be inequitable, it leaves the breaching fee owner in the undesirable situation of being free from an injunction in equity, but being liable for damages at law.⁸

If a restrictive covenant is not expressly stated by the parties either to be limited to a definite period of time or to be perpetual, a court may be justified in construing that the covenant is to expire for all purposes after a reasonable time. The court seems to indicate that as a matter of law this would be less than 106 years for this type of covenant. This theory has the definite advantage of terminating the covenant for all purposes, both at law and in equity. But again, *quaere* whether this issue should be determined on a motion to dismiss, or only after the evidence is heard.

Perhaps the most significant feature of the *Sacred Heart* case is the basic attitude of the court, that, somehow, old, stale restrictions should not clutter titles.

7. 350 S.W.2d at 819.

8. See generally Hyler, *Restrictive Covenants in Missouri: Creation, Enforceability in Equity, and Termination*, 23 Mo. L. REV. 214 (1958); Hyler, *Creation and Enforceability of Restrictive Covenants at Law*, 24 Mo. L. REV. 62 (1959).

II. CONSTRUCTION OF LIMITATIONS—TENANCY IN COMMON IN FEE,
JOINT TENANCY IN FEE, OR JOINT TENANCY FOR LIFE WITH
CONTINGENT REMAINDER IN WHOLE IN SURVIVOR—
TITLE TO REAL ESTATE, JURISDICTION ON
APPEAL—PARTITION, WHEN CONTRARY
TO TESTATOR'S INTENT

Variants of the *Hunter v. Hunter*⁹ type of limitation continue to be litigated. *Johnson v. Woodard*¹⁰ was concerned with a 1957 devise by a testatrix of city residential property, her home, to her sisters, S-1 and S-2, and her Niece, N, "to share equally, and to the survivor of them." One of the devisees, S-1, brought suit for partition against S-2 and N, praying the court determine the interests of the parties, order partition and sale, and divide the proceeds. The plaintiff's theory was that the will created a tenancy in common in fee; the defendants' theory was that the will created a joint tenancy for life with a contingent remainder in fee in the survivor. The trial court dismissed the suit on the ground that partition would be contrary to the intention of the testatrix,¹¹ and plaintiff appealed to the St. Louis Court of Appeals. This court transferred the cause to the supreme court, it being "apparent that there is a question of title to real estate involved in this action,"¹² at the same time recognizing that in the typical partition suit there is no dispute as to title and that title to real estate is not involved in the jurisdictional sense.

The supreme court, in a per curiam opinion, retransferred the cause to the St. Louis Court of Appeals, because in its view title to real estate in the jurisdictional sense was not involved.¹³ The criterion applied by the court was whether the decree would take title from one litigant and give it to another. The court said that regardless of the construction, each of the three parties would come out with an identical interest, either a life estate in one-third with a contingent remainder in fee in the whole, or a fee in

9. 320 S.W.2d 529 (Mo. 1959), discussed in Eckhardt, *Property Law in Missouri*, 24 Mo. L. REV. 456 (1959). See also *McCleendon v. Johnson*, 337 S.W.2d 77 (Mo. 1960), discussed in Eckhardt, *Property Law in Missouri*, 25 Mo. L. REV. 390 (1960); Annots. 69 A.L.R.2d 1058 (1960), 46 A.L.R.2d 523 (1956).

10. 343 S.W.2d 646 (St. L. Ct. App. 1961).

11. See Mo. R. Civ. P. 96.13, providing that no partition shall be made which is contrary to the intention of the testator. This rule is the same as § 528.130, RSMo 1959.

12. The Missouri Constitution provides that the supreme court shall have exclusive appellate jurisdiction in all cases involving title to real estate. Mo. CONST. art. V, § 3.

13. *Johnson v. Woodard*, 352 S.W.2d 9 (Mo. 1961).

one-third, and that title will not be taken from one party and put in the others. To generalize, the rule of the case would seem to be as follows: In every case involving the construction of a class gift, where there is no dispute as to membership in the class, and in every case involving the construction of a limitation giving identical interests to two or more individuals, title to real estate in the constitutional sense as to appellate jurisdiction is not involved.

It is beyond the scope of this brief comment to evaluate critically the soundness of this doctrine; an exhaustive study of the problem as to when title to real estate in a jurisdictional sense is involved is long overdue. It was apparent to the court of appeals that title to real estate was involved, and it seems clear to me that title was involved. The plaintiff either gets one-third in fee, or gets a life estate with only a possibility of getting a remainder in fee in the whole; this would seem to be taking title out of one person and putting it in another. *Quaere* if there would have been any real doubt as to title being involved if the suit had been solely to quiet or determine title. If one wants appellate jurisdiction in the supreme court in a case involving deed or will construction and partition, consideration should be given to the advisability of bringing a separate suit for construction, and then after a definitive construction, bringing a separate suit for partition if partition is desired.

Be that as it may, the cause finally was decided by the St. Louis Court of Appeals.¹⁴ Just what finally was decided, however, is uncertain. Both the supreme court and the court of appeals emphasized that the *sole* question was the plaintiff's *right to partition, viz.*, whether partition was contrary to the testatrix's intent.¹⁵ This being true, *quaere* whether the court's determination of the estates created by the limitation was not in the nature of dictum, and perhaps subject to relitigation for a definitive answer.

The devise to *S-1, S-2, and N*, "to share equally, and to the survivor of them," is open to at least four constructions. (1) The devisees may be tenants in common in fee, in view of the presumption of a fee under section 474.480, RSMo 1959, and the absence of an express declaration of a joint tenancy under section 442.450. (2) The devisees may be joint tenants in fee, in view of the presumption of a fee under section 474.480, and the finding of a sufficient intent to satisfy the requirement of section 442.450 of an express declaration of a joint tenancy. (3) The devisees may be joint tenants

14. *Johnson v. Woodard*, 356 S.W.2d 526 (St. L. Ct. App. 1962).

15. 352 S.W.2d at 11; 356 S.W.2d at 527.

for the life of the longest liver, with a contingent remainder in fee in the whole in the ultimate survivor (the construction made by the court). (4) The devisees may be tenants in common each for his own life, with implied cross-remainders for life in the survivors, with a contingent remainder in fee in the whole in the ultimate survivor.

The plaintiff pleaded only the specific devise in article II of the will, set out above. Article VI of the will, the residuary clause, ran to S-1, S-2, and N, "to share equally, *or* to the survivor of them" (emphasis added).¹⁶ The court said: "It can be seen that the part of the will not before the trial court sheds no additional light in determining the intent of the testatrix in the devise of the real property."¹⁷ But, it is respectfully submitted, article VI may well shed additional light, because it may indicate that *or* instead of *and* was intended in article II, which, in turn, might indicate a substitutional construction rather than a successive construction; *i.e.*, survivorship has reference to surviving the testatrix, not to surviving each other.¹⁸ If *and* does mean *or* in article II, then there are additional possible constructions.

The court construed the devise as creating a joint tenancy for life, with a contingent remainder in fee in the whole in the ultimate survivor. In fact, S-2 died during the pendency of the cause, and the court said that her interest had been terminated. In view of the bad draftsmanship in drawing the limitation, and the absence of prior controlling cases in Missouri, the construction by the court may have been the best possible. On the other hand, some of the reasons assigned by the court are not convincing, and the case is not persuasive authority as to a similar but not substantially identical limitation.

In *Hunter v. Hunter*¹⁹ the court construed a certain devise as creating a joint life estate with a contingent remainder in fee in the whole in the survivor. In *McClendon v. Johnson*²⁰ the court construed a certain grant as creating a joint tenancy in fee. *Johnson v. Woodard*²¹ distinguishes these cases on the ground that in the former a will was construed, and in the

16. 356 S.W.2d at 527-28.

17. *Id.* at 528.

18. On one phase of substitutional and successive constructions, see ECKHARDT & PETERSON, POSSESSORY ESTATES, FUTURE INTERESTS AND CONVEYANCES IN MISSOURI § 58, n.93 (1952), 23 V.A.M.S. 53-54 (1952).

On reading *and* as *or*, see Eckhardt, *Construction and Interpretation of Limitations—"And His Heirs" As Words of Purchase and Not as Words of Limitation—"And" as Meaning "Or"*, 22 Mo. L. REV. 373, 378-382 (1957).

19. *Supra* note 9.

20. *Ibid.*

21. *Supra* note 14, at 528-30.

latter a deed was construed.²² It is respectfully submitted that the fact that one case involved a will and the other a deed is immaterial, and that the real distinction between the cases is that the limitations were not the same. In the *Hunter* case there were no words indicating a fee, but in the *McClendon* case words of inheritance were used, and the *McClendon* case expressly distinguished the *Hunter* case on this ground; this distinction is emphasized in my earlier analysis of the *McClendon* case.²³

*Powers v. Buckowitz*²⁴ is not sufficient authority for a conclusion that a joint tenancy was expressly declared in *Johnson v. Woodard*,²⁵ and the court correctly so held.²⁶ A limitation "to M and D as tenants by the entirety and to the survivor of them," as in *Powers v. Buckowitz*, is a far cry from a limitation "to S-1, S-2, and N, to share equally, and to the survivor of them," as in *Johnson v. Woodard*. Nevertheless, the court, without stating any specific reason, concluded that there was a joint tenancy for life in *Johnson v. Woodard*.²⁷ Section 442.450 applies to joint tenancies for life as well as in fee. If the court was right in stating that the testatrix had not expressly declared a joint tenancy, and I think the court was right, then there is only a tenancy in common for the several lives, and the only way to get the effect of a joint tenancy for life would be to imply cross-remainders for life. Such implication might be made after examining the entire will and after a hearing on the merits, but it should not be made on a motion to dismiss, where the only part of the will before the court is one clause.

The present writer expresses no opinion as to whether the better construction is that the several devisees took concurrent interests in fee, or concurrent interests for life with a contingent remainder in fee in the whole

22. This explanation is repeated without comment in another discussion of *Johnson v. Woodard* in this issue. See Fratcher, *Trusts and Succession in Missouri*, 27 Mo. L. Rev. 594, 601 n.30 (1962).

23. Eckhardt, *Property Law in Missouri*, 25 Mo. L. Rev. 390 (1960).

The court in *Johnson v. Woodard* errs when it says: "That [limitation in *McClendon v. Johnson*] was the same language as was used in the will in the *Hunter* case, except for the words 'and not as tenants in common' which had no real significance." *Johnson v. Woodard*, *supra* note 14, at 529.

24. 347 S.W.2d 174 (Mo. 1961) (en banc), discussed in Eckhardt, *Property Law in Missouri*, 27 Mo. L. Rev. 65, 69-72 (1962), and in Graham, *Concurrent Estates in Missouri—Sufficiency of Words to Create a Joint Tenancy—Section 442.450*, RSMo 1959, 27 Mo. L. Rev. 287 (1962).

25. § 552.450, RSMo 1959 requires, in effect, that in order for a joint tenancy to be created, there must be an express declaration of such.

26. 356 S.W.2d at 528.

27. *Id.* at 530.

in the ultimate survivor. That the problem is extraordinarily difficult and subtle becomes clear when one compares the limitation in *Johnson v. Woodard* with the limitation in *Hunter v. Hunter*, the two limitations in *McClendon v. Johnson*, and the limitation in *Powers v. Buckowitz*.²⁸

The sole question in *Johnson v. Woodard* was whether partition was contrary to the testatrix's intent,²⁹ but somewhere along the way this question almost got lost. There is nothing in the opinion upon this point, except the bare assertion "that it was the intention of the testatrix to devise an estate which would ultimately go to the survivor, and that such an estate may not be severed by partition."³⁰ The rule of the case would seem to be that partition would be contrary to the intent of the testator as a matter of law in every joint tenancy created by will. I find no such doctrine previously announced in Missouri, and certainly this, the principal issue in the case, was worthy of a full discussion.³¹ Conceding that the ultimate survivor was intended to take the whole, and that partition of city residential property could be effected only by sale, one might indeed find an intent on the part of the testatrix that the land should not be partitioned. On the other hand, if there were a joint tenancy for life in three farms of equal value, where partition could be effected in kind, the problem would not be the same.

28. These limitations, in brief hypothetical form, are set out in the present writer's published analyses of the several cases. See Eckhardt, *Property Law in Missouri*, 24 Mo. L. Rev. 456 (1959); Eckhardt, *Property Law in Missouri*, 25 Mo. L. Rev. 390 (1960); and Eckhardt, *Property Law in Missouri*, 27 Mo. L. Rev. 65, 69-72 (1962).

The authorities cited in the annotation in 46 A.L.R.2d 523, 585 (1956), would seem to support a fee construction rather than a life estate and remainder construction; this annotation is cited in *Johnson v. Woodard*, 356 S.W.2d at 531.

29. 352 S.W.2d at 11; 356 S.W.2d at 527.

30. 356 S.W.2d at 531.

31. On the extraordinarily difficult problem of partition where both present and future interests are involved, see the authorities cited in ECKHARDT & PETERSON, *POSSESSORY ESTATES, FUTURE INTERESTS AND CONVEYANCES IN MISSOURI* § 38, n.30 (1952), 23 V.A.M.S. 35 (1952).