

*RE McKELLAR*

A recent decision of the Court of Appeal for Ontario, *Re McKellar*, 27 D.L.R. (3rd) 289, 1972, affirmed, 36 D.L.R. (3rd) 202, 1973, has reinforced what had been an earlier decision in a largely theoretical area of the law of real property.

A conveyance to a grantee contained a recital that the property could be retained only as long as it was used for railway purposes. The operative part of the deed then created a similar condition. The court, after discussing the location and meaning of these clauses, concluded that the grant was one to be labelled a fee simple determinable. Having reached that stage it was fairly straightforward to conclude that the future interest then in the hands of the grantor, the right of re-entry, was subject, being a non-vested interest, to the rule against perpetuities and that that rule had been violated; result, fee simple absolute in the grantee.

Application of modern perpetuities legislation would have made this distinction unnecessary and while Ontario has a perpetuities statute it was not applicable to this situation due to the time involved. Perpetuities legislation in New Brunswick, when proposed, should take this case into account.

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