here the plaintiff is willing to disclose it. He calls a doctor to testify concerning his injuries and that the injuries were caused by the accident. However, he objects to the defendant calling a doctor to show that plaintiff's physical condition previous to the accident was not good. It is indeed harsh to permit other people to show that his health was good and to allow the plaintiff to testify to such fact himself and then on the basis of the privilege to prevent the defendant from showing that it was not.

The conclusion is submitted that the statute was susceptible of two constructions. But arguments of precedent and policy both favored admissibility. *King* v. *Barrett, supra,* and *Spitzer* v. *Stillings, supra,* although dealing with the lawyer-client relationship, seemed to cover the same point and in both cases it was held that the privilege had been waived. On questions of policy the argument seems equally strong. The decision would seem to represent a step backward from Ohio's previous advanced position in regard to the construction of privileges.

PHILIP J. WOLF

FUTURE INTERESTS

RECOGNITION OF DETERMINABLE FEE WHERE THERE IS NO EXPRESS RESERVATION OF POSSIBILITY OF REVERTER

Appellant Board of Education filed an action to quiet title to a lot which had been conveyed to its predecessor by a deed containing the following recitals: "said lands to be occupied for the purposes of a school house and for no other use or purposes whatsoever," and, in the *habendum* clause, "to have and to hold . . . so long as the same shall be used as a site for a school house and no longer." Use of the lot for school purposes had been discontinued by appellant four years before the filing of this action. Appellee denied title of appellant and alleged that he had acquired title from the heirs of one of the original grantors. Appellant claimed that the deed gave its predecessor an unrestricted fee. Appellee contended that appellant had only the right to occupy the lot as long as it was used for school purposes, and that appellant had forfeited its interest in discontinuing such use. Held, that the language used clearly expressed an intention on the part of the original grantor to provide for a reverter and forfeiture and conveyed a tenure limited to the continued use for school purposes, *Board of Education* v. *Hollinesworth et al.,* 56 Ohio App. 95 (1936).

The general rule in the construction of deeds, that the intention is controlling, obtains in the construction of conditions; the language of a

condition should be construed so as to effectuate if possible the intention of the parties as gathered from the whole instrument and the existing facts, *Harris* v. *Roraback*, 137 Mich. 292, 100 N.W. 391 (1904); 8 Ruling Case Law 1111; 13 Ohio Juris. 959. Ordinarily mere statements in the deed that the property is conveyed for certain purposes, or is to remain for stated purposes, and similar statements, are not construed as conditions or limitations of the grant. *Raley* v. *Umatilla County*, 15 Or. 172, 13 Pac. 890 (1897); *Faith* v. *Bowles*, 86 Md. 13, 37 Atl. 711 (1897); *Barker* v. *Barrows*, 138 Mass. 578 (1885); *Chapin* v. *School District*, 35 N.H. 445 (1857); 44 L.R.A. (N.S.) 1222. A conveyance to A and his heirs for a named purpose merely, does not create a determinable fee. *Curtis* v. *Board of Education*, 43 Kan. 138, 23 Pac. 98 (1890); *Adams* v. *First Baptist Church*, 148 Mich. 140, 111 N.W. 757, 11 L.R.A. (N.S.) 509, 12 Ann. Cases 224 (1907); *Riggs* v. *New Castle*, 229 Pa. 490, 78 Atl. 1037 (1911); and see *In re Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N.E. 218 (1929). It has been held that a conveyance of land in fee simple "to be used as a cemetery and for no other purpose" gives the grantee a fee simple absolute, *Phinney* v. *Gardner*, 121 Me. 44, 115 Atl. 523 (1921).

On the other hand, it would seem that no particular words are necessary as a matter of law for the creation of a determinable fee. In fact, almost any words which indicate that the fee is to determine automatically upon a named event are sufficient to secure this result. The typical words are "so long as" or "until" or "during." The presence of express words of reverter would not ordinarily seem to be essential. However, one of the most important Ohio cases, *In re Copps Chapel M. E. Church, supra*, has indicated that the absence of such words may tend to show that an absolute fee was created. An expression to the effect that there will be no reverter in the absence of express terms of forfeiture may be found in *Boyer* v. *Miller*, 21 Ohio N.P. (N.S.) 225, 29 Ohio D. 281 (1918).

In general, however, the courts of Ohio have adopted a middle ground by refusing to impose any arbitrary requirement of particular language but nevertheless have required that there be a clearly expressed intention to convey only a determinable fee. The most significant criterion, as in other states, has been the intention of the grantor. Of course, the clearest evidence of an intention to create a determinable fee may be found in conveyances where there has been a coupling of one of the typical phrases before-mentioned with a clear and definite expression of a possibility of reverter. *May* v. *Board of Education*, 12

Ohio App. 456 (1920). But when anything less than that appears, *i.e.*, where a use is specified but there is no express reservation of a possibility of reverter, as in the principal case, there arises a more difficult problem of construction upon which the courts may disagree. The Ohio cases have held in accordance with the general rule before-mentioned that the mere expression of a purpose will not of and by itself create a determinable fee. *Ashland* v. *Greiner*, 58 Ohio St. 67, 50 N.E. 99 (1898); *Cleveland Terminal & Valley R. Co.* v. *State*, 85 Ohio St. 251, 97 N.E. 967, 39 L.R.A. (N.S.) 1219 (1912); *Watterson* v. *Ury*, 5 Ohio C.C. 347, 3 Ohio C.D. 171 (1891); *In re Copps Chapel M. E. Church, supra.*

The court in the instant case approached the question of whether the deed conveyed an absolute fee or merely a tenure limited to the continued use for school purposes as presenting the problem of the intention of the grantor as such intention is gained from the words used. The court considered the cases of *In re Copps Chapel M. E. Church, supra; Schwing* v. *McClure et al.*, 120 Ohio St. 335, 166 N.E. 230 (1929); *Licking County Agricultural Society* v. *County Commissioners*, 48 Ohio App. 528, 194 N.E. 606 (1934); *Schurch* v. *Harriman*, 47 Ohio App. 383, 191 N.E. 907 (1933). In the *Copps Chapel* case, the deed contained the following recital in the *habendum* clause, "But they and every one of them (the grantor and his heirs) shall by these presents be excluded and forever barred so long as said lot is held and used for church purposes." The court there held that this statement did not constitute a condition, nor a limitation of the grant, but a mere covenant that the property should be used in a particular way. The court distinguished *Lessee of Sperry* v. *Pond*, 5 Ohio 388 (1832), in which the language used was much the same as that employed in the principal case, in that the following expression appears in the deed: "so long as they should continue to use and improve the same for the express purpose of grinding and no longer." This was held sufficient to create a determinable fee although, as in the instant case, no express words of reverter appeared. The court in the *Copps Chapel* Case considered as significant the absence of the phrase "and no longer" which was present in the *Sperry* case. While these words may quite naturally have a shade stronger meaning as tending to show the intention of the grantor that the tenure should be limited to the use stated, a technical distinction upon this basis would seem unwarranted. Yet, while subsequent Ohio cases have not expressly considered the presence or absence of such words as a criterion in construing the intention of the grantor, it is submitted that a consideration of such a distinction may have influenced

the thinking of the courts upon this problem of a determinable fee. The court in the instant case, while agreeing with Judge Marshall's dissenting opinion in the *Copps Chapel* case, that the words "no longer" add nothing to the strength of the words used to express a limitation, states that it feels justified in adopting the same line of demarcation used by the Supreme Court in distinguishing the *Sperry* case from the *Copps Chapel* case, and in concluding that the language used clearly expressed the intention to provide for a reverter and forfeiture.

There is authority for the decision in the principal case in the *Sperry* case and *Schurch* v. *Harraman, supra,* in which it was held that a warranty deed to the trustees of a church "as long as used for church purposes," containing a like *habendum* clause running to such church, but with no stipulation for forfeiture or reversion, passed a fee simple determinable. It would seem that the court in the instant case has pursued a sensible and legitimate construction of the words in the deed and has reached a sound conclusion.

The solution of this problem of construction of determinable fees will depend in a considerable measure upon the attitude with which the courts approach the problem. If the court feels the influence of a strong social policy against remote future interests based upon considerations somewhat similar to those underlying the rule against perpetuities, it will be inclined to pursue the more strict and technical method of construction which was used in the *Copps Chapel* case. But if the court is favorably impressed with the efficacy of the determinable fee device as a means of alienation, it will tend to follow the more liberal construction based upon the standard of intention as was done in the principal case. The determinable fee would seem to be justified today only in the case of conveyances for charitable or educational purposes. Many people might hesitate to convey property outright to educational and eleemosynary institutions without any restriction upon use. Covenants inserted to restrict the character of the use are not always specifically enforced by the courts. Consequently, gifts to such institutions through the device of determinable fees can be justified. Determinable fees should be recognized where, as in the instant case, an intention to restrict the tenure to the use named is clearly and adequately expressed.

CHARLES L. GRAMLICH