IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2010-CA-02000

HEMETER PROPERTIES, LLC, PEACHTREE PROPERTIES, LLC, GARDNER CLARK FAMILY, LLC, T R CLARK, LLC, CHARLES M. HAMILTON, JAMES STEVEN GARDNER, ADRIAN CODY CLARK, FRANKLIN D. HEMETER, JR., STEPHANIE A. BAREFOOT, AND JAMES SCOTT HEMETER — APPELLANTS

VERUS

REYNOLDS CLARK — APPELLEE

APPEAL FROM THE CHANCERY COURT OF WAYNE COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

JAMES L. QUINN, MSB#[redacted]
Attorney At Law
Post Office Box 271
Hattiesburg, MS 39403-0271
(601) 544-1842 -Telephone

ATTORNEY FOR APPELLANTS
HEMETER PROPERTIES, LLC, PEACHTREE PROPERTIES, LLC, GARDNER CLARK FAMILY, LLC, T R CLARK, LLC, CHARLES M. HAMILTON, JAMES STEVEN GARDNER, ADRIAN CODY CLARK, FRANKLIN D. HEMETER, JR., STEPHANIE A. BAREFOOT, AND JAMES SCOTT HEMETER

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal:

A. Parties

Appellants:

Florence C. Hemeter, Jr.
P.O. Box 344
Waynesboro, MS 39367
Membership Interest in
Hemeter Properties, LLC

Nola V. Gardner
P.O. Box 530
Waynesboro, MS 39367
Membership Interest in
Gardner Clark Family, LLC

Franklin D. Hemeter, Jr.
P.O. Box 344
Waynesboro, MS 39367

Adrian Cody Clark
P.O. Box 491
Waynesboro, MS 39367

Tena R. Clark
35 West Dayton Street
Pasadena, CA 91105
Membership Interest in
T.R. Clark, LLC

James Steven Gardner
2409 Covemont Dr., SE
Huntsville, AL 35801

Sherry C. Hamilton
P.O. Box 488
Grove Hill, AL 36451
Membership Interest in
Peachtree Properties, LLC

James H. Gardner
P.O. Box 491
Waynesboro, MS 39367
Membership Interest in
Gardner Clark Family, LLC

Stephanie A. Barefoot
52 Rosemary Lane
Laurel, MS 39443

James Scott Hemeter
P.O. Box 1134
Waynesboro, MS 39367

Charles H. Hamilton
P.O. Box 488
Grove Hill, AL 36451

Franklin D. Hemeter, Sr.
P.O. Box 344
Waynesboro, MS 39367

Appellee: Reynolds Clark
606 Wayne Street
Waynesboro, MS 39367

B. Attorneys:

Appellants: James L. Quinn, Esq., attorney for Appellants
P.O. Box 271
Hattiesburg, MS 39403-0271

Appellee: John Jeffries, Esq., attorney for Reynolds Clark
Post Office Box 6
Laurel, MS 39441-0006

J. Robert Sullivan, Sr., Esq., attorney for Reynolds Clark
Sullivan & Sullivan
P.O. Box 45
Laurel, MS 39441-0045

C. Trial Judge: Chancellor for 19th Chancery District
Honorable Franklin C. McKenzie, Jr.
P.O. Box 1961
Laurel, MS 39441

This the 28 day of March, 2011.

JAMES L. QUINN, Attorney For Appellants Hemeter Properties, LLC, Peachtree Properties, LLC, Gardner Clark Family, LLC, TR Clark, LLC, Charles M. Hamilton, James Steven Gardner, Adrian Code Clark, Franklin D. Hemeter, Jr., Stephanie A. Barefoot, and James Scott Hemeter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

STATEMENT REGARDING ORAL ARGUMENT

This case involves a claim and counterclaim to confirm title to royalty and overriding royalty interests productive of oil and gas. The competing claims are represented in separate chains of title originating from a common source. There are independent dispositive issues including will construction, Mississippi's Mortmain Statute, and bona fide purchaser status. The title instruments and documents and relevant facts are submitted by stipulation. At least two of the dispositive issues were not fully addressed below, and due to the fairly complex titles to the disputed interests, the court may have specific questions about arguments advanced by the parties and oral argument will likely assist the court in its analysis. The Appellants request oral argument.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The question in this case is which party has the paramount title. The issues for review on this appeal include:

(1.) Whether a devise "upon condition that said land never be sold" is void and lapsed;

(2.) Whether the limitation period of Mississippi's Mortmain Statute of "not longer than 10 years after such devise becomes effective,..." begins at the testator's death;

(3.) The status and title of the grantee of the sole heir-at-law of a testator whose will was offered for probate 5½ years after the heir's conveyance and 16 years after the testator's death;

(4.) Whether the issue of bona fide purchaser status of a predecessor in title is within Appellants' counterclaim; or whether the issue was tried by consent.

STATEMENT OF THE CASE

This is an action to confirm title to minerals, royalty and overriding royalty under the SE 1/4 of the NE 1/4 of Section 20, Township 8 North, Range 6 West, Wayne County, Mississippi. The 40 acre tract is part of an original 80 acre unit for the Clark 21-5 oil well located in the adjacent Section 21. The 40 acre tract is now within a pooled unit for the South Winchester Field. The operator of the Clark 21-5 well Venture Oil and Gas has placed the disputed interests in a suspense status and is withholding proceeds of hydrocarbon production.

The royalty and overriding royalty in dispute and claimed by the Appellants is as follows:

Royalty interest-45% x 5916/61776 x 1/8

Overriding royalty interest- 45% x 1/8

The Appellants claim under one chain of title and the Appellee claims under a separate chain of title each originating from a common source. The Appellee ("Reynolds Clark") filed his "Complaint to Remove Cloud on Title" on December 16, 2008. (Vol. I, pp. 12-20). The defendant Tri-Star Texas Petroleum, LLC was dismissed by Reynolds Clark on February 18, 2009 as Tri-Star was the mineral lessee of all of the claimants to the disputed interests and is not a necessary party. (Vol. I, pp. 23-24; R. 64-67 item 6; R.E. Tab 3).

On April 27, 2009, Defendants and Appellants Hemeter Properties, LLC, et.al. ("Hemeter Properties") filed their answer and counterclaim to cancel the claim of Reynolds Clark and to confirm title to certain mineral and royalty interests. The parties later stipulated that the disputed interests involve only the SE 1/4 of the NE 1/4 of Section 20, Township 8 North, Range 6 West, Wayne County, Mississippi. (Vol. I, p. 64; R.E. Tab 3).

The parties conducted discovery and by order entered October 29, 2009, the case was set for trial on February 23, 2010 in Waynesboro, Mississippi. (Vol. I, p. 51).The case was submitted on

written stipulation of facts, which included an agreement that the instruments and documents described as Exhibits 1 through 49 are jointly offered into evidence, their authenticity and admissibility acknowledged. (Vol. I, pp. 64-67, 67A-67-E; R.E. Tab 3). By order entered March 1, 2010, the chancery court acknowledged that the case was submitted upon stipulation of the parties with exhibits jointly submitted and allowing the parties 30 days in which to file memorandum briefs. (Vol. I, pp.68-69).

On September 28, 2010, Chancellor Franklin C. McKenzie, Jr. entered "Findings of Fact, Conclusions of Law and Final Judgment Removing Cloud on Title" in favor of Plaintiff Reynolds Clark. (Vol. II, pp. 151-160; R.E. Tab 4). On October 7, 2010, Hemeter Properties filed "Motion to Amend Pleadings to Conform to the Evidence and for Reconsideration or to Alter or Amend Judgment." (Vol. II, pp.161-173; R.E. Tab 5). By order entered November 22, 2010, the court denied and overruled the motion of Hemeter Properties. (Vol. II, p. 179; R.E. Tab 6). On December 3, 2010, Hemeter Properties filed its Notice of Appeal to this Court from the adverse ruling and final judgment entered September 28, 2010, and from the order denying its post-trial motion entered November 22, 2010. (Vol. II, pp. 180-181).

STATEMENTS OF FACTS

The Appellants' Title

Title to the subject land was severed from the United States government by grant dated February 4, 1853 in favor of the Mobile and Ohio Railroad.(Exh. 1). The Mobile and Ohio Railroad then conveyed said land and other lands to J.G. Meador by deed dated November 18, 1890.(Exh. 2). By final decree dated April 19, 1946 in a partition suit involving the heirs of J. G. Meador, deceased, the subject lands, including the oil, gas and other minerals thereunder, were allocated to Ben Meador, subject to an outstanding one-eighth non-participating royalty interest, allocated to all of the heirs, including Ben Meador, according to the interests of each. (Exh. 4).

Ben Meador died testate on February 16, 1962 survived by spouse Martha Meador. Ben Meador and Martha Meador were married but once, and then to each other. There were no children born to the marriage. Martha Meador died intestate without issue on September 19, 1973, 11 years and 7 months after the death of Ben Meador. (Vol. I, p.65, items 8,9; R.E. Tab3)

On August 24, 1972 by duly recorded letters of attorney, Mrs. Ben Meador, one and the same as Martha Meador, conveyed the subject lands to Charles Cole, IV, by and through G.B.Cole, her attorney-in-fact.(Exh. 8). The deed contained a recitation that it operated to convey minerals under the subject lands along with all of her mineral interests in Wayne County, Mississippi, subject to reservation of a life estate. G. B. Cole and Charles Cole, IV were nephews of Martha Meador.

In 1978, the will of Ben Meador was offered for probate as a muniment of title in Wayne County by Father Flanagan's Boys Home, a Nebraska charitable corporation. The will purports to devise all of the testator's property to Martha Meador for life. The will further provides that upon the death of Martha Meador his real property shall go to Father Flanagan's Boys Home "upon the condition that said land never be sold." (Exh. 5., pp. 4-5; R.E. Tab 7).

By mineral right and royalty transfer dated April 21, 1983, G.B. Cole individually and as attorney-in-fact for Charles H. Cole, IV and Charles H. Cole, IV, individually conveyed the oil, gas and other minerals under the subject lands to Nolan Clark. (Exh. 18).

By mineral right and royalty transfer dated July 23, 1983, Nolan Clark conveyed 45% of the minerals under the subject lands to J. Shannon Clark (Exh. 20); and by mineral right and royalty transfer dated March 6, 1985 he conveyed a 10% mineral interest under said lands to John R. Gunn. (Exh. 21).

The 45% mineral interest in the subject lands of Nolan Clark is now owned in equal shares by Defendants Hemeter Properties, LLC, Peachtree Properties, LLC, Gardner Clark Family, LLC, and T R Clark, LLC. (Exhs. 24, 25, 26, 28, 29, 30, 31).

Each successor to Nolan Clark executed separate oil, gas and mineral leases to a person or persons related to membership interest owners in the LLC. The leases provided for a one-year term and reservation of a 1/8 royalty. (Exhs. 35, 36, 37, 38). The lessees then assigned the oil, gas and mineral leases to Tri-Star Texas Petroleum, LLC reserving an overriding royalty interest equal to the difference between 25% and one-eighth[1].(Exhs. 38, 39, 40, 41, 42). The royalty interest and overriding royalty interest claimed by the Defendants are as follows:

Gardner Clark Family, LLC,	1/4 x 5916/61776 x 1/8 royalty interest
Hemeter Properties, LLC,	1/4 x 5916/61776 x 1/8 royalty interest
Peachtree Properties, LLC,	1/4 x 5916/61776 x 1/8 royalty interest
T R Clark, LLC	1/4 x 5916/61776 x 1/8 royalty interest
Charles M. Hamilton,	1/4 x 45% x 1/8 overriding royalty interest
James Steven Gardner,	1/4 x 45% x 1/8 overriding royalty interest
Adrian Cody Clark,	1/4 x 45% x 1/8 overriding royalty interest

[1] The mineral interest allocated to Ben Meador in the decree in 1946 was burdened by a 1/8 royalty interest. This royalty interest was allocated to all of the heirs of J.G. Meador, Sr. including Ben Meador whose royalty interest in said lands was 5916/61776 x 1/8. In order for a successor of Ben Meador to realize a greater interest in any production proceeds it was necessary to reserve an overriding royalty in any mineral lease granted.

Franklin D. Hemeter,	1/3 x 1/4 x 45% x 1/8 overriding royalty interest
Jr. Stephanie A. Barefoot,	1/3 x 1/4 x 45% x 1/8 overriding royalty interest
James Scott Hemeter	1/3 x 1/4 x 45% x 1/8 overriding royalty interest

The Appellee's Title

Sixteen years after the death of Ben Meador, his will was offered for probate as a muniment of title by Father Flanagan's Boys Home, a Nebraska non-profit corporation. The will was admitted by order of the Chancery Court of Wayne County, Mississippi on March 29, 1978.(Exh.5, pp. 8-7, R.E. Tab 7). Pursuant to petition of Father Flanagan's Boys Home Special Chancery Judge Michael Sullivan entered a "Decree Construing Will" dated February 2, 1979. The order states that the intent of the testator was to convey a life estate to his wife Martha Meador with the remainder to Father Flanagan's Boys Home; and held that the provision "... upon the condition that said land never be sold" void as an illegal restraint on alienation. The order provided further that Father Flanagan's Boys Home was a proscribed charitable institution under the terms of Mississippi's Mortmain Statute, requiring Father Flanagan's Boys Home to divest itself of the property within 10 years or suffer defeasance. Chancellor Sullivan decided that the 10-year period of the Mortmain Statute commenced when Martha Meador died on September 19, 1973 rather than February 16, 1962, when the testator died. (Exh. 5, pp. 51-53).

By quitclaim deed dated August 31, 1978, Father Flanagan's Boys Home conveyed the subject land to Reynolds Clark and Robert T. Comerio, reserving all minerals. (Exh. 13). By quitclaim deed dated December 8, 1978, Father Flanagan's Boys Home conveyed the subject property to Reynolds Clark without mineral reservation.(Exh. 14). By corrected mineral right and royalty transfer dated April 20, 2006, Reynolds Clark conveyed a one-half mineral interest in the subject lands to John M. Clark, M. Scott Clark and Geoffrey M. Clark.(Exh. 22).

On December 12, 1978, Reynolds Clark and Robert T. Comerio filed suit to confirm title to

the SE 1/4 of the NE 1/4 of Section 20, Township 8 North, Range 6 West, Wayne County, Mississippi (and other lands) less and except all oil, gas and other minerals. (Exh. 16). By final decree entered February 2, 1979, the Chancery Court of Wayne County confirmed title to the subject lands, less and except the oil, gas and other minerals thereunder, in favor of Reynolds Clark, Robert T. Comerio, and others.[2] (Exh. 17).

In 2006, and prior to execution of any oil, gas and mineral leases, Reynolds Clark (½), John M. Clark(1/6), M. Scott Clark(1/6) and Geoffrey M. Clark(1/6) claimed the mineral interest in the subject lands. At the same time and before execution of any oil, gas and mineral leases, Hemeter Properties, LLC Peachtree Properties, LLC, Gardner Clark Family, LLC (45%), Shannon Clark (45%) and John Gunn (10%) claimed the mineral interest under the subject lands through a separate chain of title.

In 2006, Reynolds Clark and John M. Clark, M. Scott Clark and Geoffrey M. Clark executed mineral leases covering the subject lands in favor of R. Shannon Clark reserving a one-eighth royalty. (Exhs. 32, 33) Shannon Clark assigned these leases to Tri-Star Texas Petroleum, LLC reserving an overriding royalty equal to the difference between 25% and one-eighth. (Exh. 34) Shannon Clark then executed a mineral right and royalty transfer on July 23, 2007 in favor of John M. Clark, M. Scott Clark and Geoffrey M. Clark covering all of the grantor's interest acquired from Nolan Clark (45%) subject to the existing mineral lease from the grantor to the grantees. (Exh. 48) Shannon Clark also assigned to Reynolds Clark the overriding royalty reserved in the assignment

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[2] Reynolds Clark and Robert T. Comerio were grantees under warranty deed from Charles H. Cole dated January 12, 1976 covering the subject lands, less all oil, gas and other minerals. Between 1976 and 1978, Clark and Comerio developed a part of the SE 1/4 of the NE 1/4 of Section 20, Township 8 North, Range 6 West, as a residential subdivision. Clark and Comerio conveyed a number of residential lots to third parties by warranty deeds. Apparently, it was the appearance of the will of Ben Meador offered for probate by Father Flanagan's Boys Home in March of 1978, that cast some doubt upon their title and those of their grantees.

of Shannon Clark's mineral lease from Reynolds.(Exh. 49).

In 2007, John R. Gunn executed a mineral lease to his children Karen L. Gunn and John P. Gunn providing for a 1/8 royalty.(Exh. 43). Karen L. Gunn and John P. Gunn then assigned this lease to Tri-Star Texas Petroleum, LLC reserving an overriding royalty equal to the difference between 25% and 1/8. (Exh. 44).

Stipulations of Interest of the Clarks and the Gunns

Upon execution of the assignment in Exh. 49, Shannon Clark claimed the overriding royalty interests created in the mineral leases covering the ½ mineral interest claimed by John M. Clark, M. Scott Clark and Geoffrey M. Clark; as well as the overriding royalty interest created from the mineral leases covering the 45% mineral interest conveyed by Nolan Clark to Shannon Clark (Exh. 20) and then by Shannon Clark to John M. Clark, M. Scott Clark and Geoffrey M. Clark (Exh.48).

Shannon Clark, John M. Clark, M. Scott Clark, Geoffrey M. Clark, John R. Gunn, Karen L. Gunn and John P. Gunn entered a written stipulation of ownership dealing with one-half of the royalty and overriding royalty attributable to a 10% mineral interest in the subject lands claimed by John R. Gunn.(Exh.21). Only one-half of the 10% interest claimed by Gunn was adverse to Shannon Clark, John M. Clark, M. Scott Clark and Geoffrey M. Clark.(Exh. 45).

At the time the written stipulation of interest was entered, the operator of Clark 21-5 oil well had suspended proceeds of production attributable to the royalty and overriding royalty from 55% of the mineral interest under subject lands. The effect of the stipulation between the Clarks and the Gunns caused the operator to release the royalty and overriding royalty from ½ of the 10%, mineral interest claimed by John R. Gunn.

Subsequently, the Gunns entered into a stipulation of interest with the Plaintiff Reynolds Clark for the royalty and overriding royalty interest for the other 5% mineral interest claimed by John

R. Gunn.(Exh. 46) As a result, the operator released to Reynolds Clark and to John Gunn the proceeds of overriding royalty for the other 5% mineral interest.

According to the operator of the Clark 21-5 well there remains in suspense proceeds of production attributable to the royalty and overriding royalty which burden the 45% mineral interest claimed by the successors of Nolan Clark. Only the Appellee and the Appellants now claim the 45% x 1/8 overriding royalty interest and the 45% x 5916/61776 x 1/8 royalty interest and proceeds therefrom.

SUMMARY OF THE ARGUMENT

The ultimate issue in this case is whether the mineral interest and royalty interests claimed by the Plaintiff Reynolds Clark through Father Flanagan's Boys Home is the paramount title; or whether the mineral interest and royalty interests claimed by the successors of Nolan Clark through Martha Meador is paramount.

The Appellee and the Appellants each claim through a separate chain of title with a common source in Ben Meador who died in 1962. He undertook to devise the subject property by will to Father Flanagan's Boys Home "on the condition that said land never be sold." Father Flanagan offered the will for probate in 1978, 16 years after the testator's death. The devise to Father Flanagan is void because the condition attending the devise is an unlawful prohibition against alienation.

The devise is unambiguously subject to a condition that is against public policy and unlawful. The prerequisite prohibition of alienation is integral, not merely incidental to the devise. The devise fails and the specific real property passed to Martha Meador the testator's sole heir-at-law by statute. If the condition of the devise is ignored, Father Flanagan's interest is subject to Mississippi's Mortmain Statute effective at the time.

Under Mortmain, Father Flanagan was empowered to convey its title to the subject property

within 10 years after the devise became effective. Otherwise, title reverts to the heirs or devisees of the testator. Mississippi case law is clear that the 10-year period begins upon the death of the testator because the remainder interest of the heirs or devisees vests at that time. This is the rule even though any interest devised to Father Flanagan did not include a present right of possession.

The Appellee Reynolds Clark claims through Father Flanagan's Boys Home which undertook to convey the subject mineral and royalty interest to him in 1978, the same year Ben Meador's will was offered to probate. Six years before in 1972, Martha Meador conveyed the subject property by warranty deed to Charles H. Cole, IV, an innocent purchaser. In 1983, Charles Cole, IV conveyed his mineral interest in the subject property to Nolan Clark, the Appellants' predecessor in title.

The Appellants' title through Martha Meador is supported by three independent legal grounds. The Appellee's claim through Father Flanagan's Boys' Home depends upon a 1978 chancery court decree applying the doctrine of equitable approximation to the will of Ben Meador and holding that the 10-year period of Mortmain began more than 11 years after the testator's death. The decree is contrary to the established case law of will construction and Mortmain. It has no preclusive effect because the only party to the proceeding was the Petitioner Father Flanagan and none of the elements of res judicata or collateral estoppel are present.

The Appellants assert bona fide purchaser status of a predecessor in title in support of a claim, not merely as a defense. The deed in question is described in the deraignment of title in the Appellee's complaint and the Appellants' counterclaim. The issue was tried by consent as well. The Parties jointly offered relevant facts and documents. The question was argued and briefed and decided by the chancellor on the merits.

STANDARD OF REVIEW

The issues on appeal are of law and the standard of review is *de novo*. *Tucker v. Prisock*, 791 So. 2d 190 (Miss. 2001).

ARGUMENT

The Will of Ben Meador

The common source of title to the interest in dispute is Ben Meador who died February 16, 1962. His will, offered for probate March 29, 1978, sets forth in the fifth item:

> At the death of my wife, it is my will that all of the real estate of which I die seized and possessed, all of same being Section 29, Township 8 North, Range 6 West and Section 20, Township 8 North, Range 6 West, in Wayne County, Mississippi, shall go to FATHER NICHOLAS H. WEGNER, Director, and his successors in office for the use and benefit of Father Flanagan's Boys' Home, Boystown, Nebraska, upon the condition that said land never be sold.

(Exh. 5, pp. 4-5, R.E. Tab 7).The condition that the subject land never be sold is an unlawful restraint on alienation and against public policy. *Hern v. Autumn Woods Office Park Property Owners Assn.*, 757 So. 2d 155, 159 (Miss. 1999). The question then becomes whether the devise should be respected without the offending conditions; or whether the devise fails entirely.

In *Tinnin v. First United Bank of South Mississippi*, 502 So.2d 659 (Miss. 1987), the will contained the following provision:

> "After the death of my mother, my trustees shall, in their discretion, make loans to students of a state college or university of and operated by the State of Mississippi, who are found worthy and who are of the caucassion (sic) race and no other"

Id, 661. Finding the racially restrictive clause against public policy, the court determined its alternatives as (a) striking the racially restrictive clause and continuing the trust or (b) causing the trust to fail and the property to be distributed to the testator's heirs at law. *Id* at 669. The court remanded the case for determination of whether the unenforceable racial exclusion was integral or

"condition" as

> a clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in the case of a will, to suspend, revoke, or modify the devise or bequest. A qualification, restriction, or limitation modifying or destroying the original fact with which it is connected; an event, fact, or the like that it is necessary to the occurrence of some other, though not its cause; a prerequisite; a stipulation.

Black's Law Dictionary 265 (5th ed., West 1979). Webster's Ninth New Collegiate Dictionary defines "condition"as :

> 1 a: a premise upon which the fulfillment of an agreement depends: STIPULATION b. *obs*: COVENANT c: a provision making the effect of a legal instrument contingent upon an uncertain event:... 2: something essential to the appearance or occurrence of something else: PREREQUISITE...

Webster's Ninth New Collegiate Dictionary 273 (Merriam-Webster 1987). The unmistakable language establishes that the offending provision is a prerequisite and therefore integral, not merely incidental, to the devise.

The surest guide to testamentary intent is the wording employed by the maker of the will. This Court will not refer an intent different from that clearly shown by the language of the will despite the Court's favorable disposition toward charitable gifts. *Johnson v. Board of Trustees of Mississippi Annual Conference of The Methodist Church*, 492 So. 2d 269, 276 (Miss. 1986). The language in Ben Meador's will is unmistakable. A prerequisite and condition of the devise to Father Flanagan is that the land never be sold. The testator placed a clear condition on the devise that fails as a matter of law. The wording leaves no room for a different interpretation.

Where a testamentary devise fails because it violates law or public policy and where the will's residuary clause fails to pick it up, the force of private law is spent. Public law provides for the descent and distribution of property not effectively devised. Miss. Code Ann. §91-1-1, et. seq.

(1972); *Tinnin*, 502 So.2d at 665. This is what is meant by the many cases arising in different contexts, each holding that a particular devise lapses and therefore passes to the testator's heirs as though he had died intestate. *Id.*; *Moffett v. Howard* 392 So. 2d 509, 512 (Miss. 1981).

In *Moffett*, this court held that the lapsed portion of a residuary clause passed to the heir-at-law and not the other devisees in the will. The court explained "while the intention of the testator to dispose of all of his estate may appear from the face of the will, if a condition later arises which was clearly not contemplated by the testator, it is not within the power of the courts to amend the will by attempting to supply the omission. If the testator has overlooked a condition which he would perhaps have provided for if it had occurred to him, the court can not guess at what provision he would probably have made if he had thought of it." *Id.* at 511.

While charitable trusts are favored by the law, courts may not ignore the testator's intent in order to give effect to doubtful trust provisions by invoking the doctrine of *cy pres*. *Cy pres* is a liberal rule of construction used to carry out, not defeat, the testator's intent. *Tinnin*, 668 citing *Simmons v. Parsons College*, 256 N.W. 2d 225, 227 (Iowa 1977).

The Effect of Mississippi's Mortmain Statute

At the time of Ben Meador's death in 1962, Mississippi's Constitution and its Mortmain Statute limited the testator's ability to devise land to any charitable, religious, educational or civil institution. The laws in existence at the testator's death apply.[3] *Blackbourn v. Tucker* 72 Miss. 735, 17 So. 737 (1895).

The statute in effect in 1962 provides in pertinent part:

> ..."any land devised, not in violation of this section, to any charitable, religious, educational, or civil institution may be legally owned and

[3] Miss. Code Ann. §91-5-31 (1972) in effect in 1978 when Ben Meador's Will was offered for probate is practically identical to Miss. Code 1942 §671.

> further may be held by the devisee for a period of not longer than ten years after such devise becomes effective,..."
>
> "provided further, that within said period of ten years during which such land may be held, the charitable, religious, educational or civil institution holding the same shall have the power and right to sell and convey the said lands so held, or any part thereof, and its deed of conveyance may be treated as passing such title thereto as was possessed by the testator,... But if such land not be sold and disposed of within the said period of ten years, then in that event, at the expiration of the said ten years it shall revert to the heirs at law of the testator under whose will it was devised to the institution holding it, or to the devisees under such will as the case may be."

Miss. Code 1942, Section 671. A similar provision appears in Section 270 of the Mississippi Constitution as amended, effective January 18, 1940. Miss. Laws 1940, Chs. 325, 326. The Constitution and the statute create in the charitable institution an estate for 10 years with a power of disposition. The heirs or devisees of the testator have a vested remainder, subject to defeasance by the institution exercising its power of disposition. *Mississippi College v. May*, 235 Miss. 200, 108 So. 703, 711 (1959).

Father Flanagan's Boys Home is such a "charitable, religious, educational, institution..." described in the Mortmain Statute. (Vol.I, pp.64-67, item 7; R.E. Tab 3). Even if the condition upon which Ben Meador devised the property to Father Flanagan's Boys Home is simply disregarded the statute limits the time that Father Flanagan's Boys Home can hold its estate to 10 years "after such devise becomes effective..."

The 10- year Mortmain period begins to run from the date of the testator's death because the devise became effective at that time. The interest of the charitable institution and the remainder interest of the testator's heir vested at that time. A vested interest is one in which there is a fixed right of either present or future enjoyment. *May v. Hunt*, 404 So. 2d 1373,1378 (Miss. 1981).

> It is hornbook law that a will speaks at the death of the testator. All

> interests in land which are created by the will become effective at the death of the testator. This is nevertheless true though the interest initially created may become a greater or more definite interest.

Johnson v. Bd. of Trustees, 482 So. 2d 269, 276, citing Mississippi *College v. May*, 108 So. 2d at 712.

Father Flanagan's interest (remainder to the life estate of Martha Meador) was a vested interest freely transferable. *Anderson v. Anderson*, 217 Miss. 517, 64 So.217, (1914). This was limited only by Mortmain providing for defeasance unless the right of disposition be exercised within 10 years of vesting. Martha Meador's life estate and her remainder to Father Flanagan's interest under Mortmain was transferable as well.

> Under general principals of property law, the character of an estate as vested or contingent does not depend on the defeaseablitity or indefeaseability of the right of possession, or if there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate.

Hudson v. Moon, 732 So. 2d 927, 931 (Miss. 1999). In that case, the Mississippi Supreme Court discussed the 1987 amendment to the Mortmain Statute. The pertinent provisions of Mortmain as it existed at the time Ben Meador executed his will as well as when he died provided that the 10-year period begins "after such devise becomes effective..." In 1987, Section 270, Article 14 of the Mississippi Constitution was amended to read in pertinent part:

> "Any land devised... to any charitable, religious, educational, or civil institution may be legally owned, and further may be held by the devisee for a period not longer than ten (10) years after such devise becomes effective *as a fee simple or possessory interest...*"

The 1988 amendment to §91-5-31 contained the same amendmentory language. Miss. Code Ann. §91-5-31 (Supp. 1988). In 1992, Section 270 of the Mississippi Constitution was repealed. Section 91-5-31 was repealed effective from and after March 10, 1993. The amendments to the constitution and statute and their subsequent repeal have prospective application only. *Hudson v. Moon*, 732

So.2d at 930-31.

After 1988, the 10-year period of Mortmain would commence at the testator's death only where an estate with a present right of possession was devised to the charitable institution. Before the amendment, the Mississippi Supreme Court has uniformly held that the statute provides that the 10- year period commenced at the testator's death because his devise became effective at that time. Provisions in wills to avoid or extend the 10-year period have been consistently denied enforcement.

In *Mississippi College v. May*, *supra*, the testator devised his 465 acre farm to Mississippi College. The Foreign Mission Board, also a proscribed institution under Mississippi's Mortmain's Statute, was the beneficiary of the residuary clause. The Foreign Mission Board contended that after the end of the 10-year period after the testator's death its remainder interest vested in the Board in perpetuity. The court held that the remainder to the residuary devisee as well as the interest in Mississippi College became effective upon the testator's death and the 10-year period began running against both at that time, stating:

> The devise to the Board as well as to the College became effective upon the death of Dr. May. Since the devisees of the estate for years and the remainder are in the prohibited categories, we think the intent and effect of Const. Sec. 270 is to make the ten-year period applicable to the college coextensive in time with that pertinent to the remainder estate owned by the Board.

Id. at 712.

In *Methodist Hospital v. Slack*, 330 So. 2d 882 (Miss. 1976), the issue is whether the 10-year period of Mississippi's Mortmain Statute can be avoided or extended by devising the property in trust to a non-proscribed institution for the benefit of a proscribed institution. Citing *Mississippi College v. May*, *supra*, the court held that the trust created in the will impermissibly attempted to prevent the running of the 10-year period of Mortmain by naming the hospital as beneficiary as well as the recipient of the corpus of the trust at the expiration of 15 years. Holding in favor of the heirs,

the remainder interest owners under Mortmain, the court observed:

> The trustee had no power to sell (the land). It is therefore evident that the trustee's role was for the sole purpose of delaying the Methodist Hospital from taking title to (the land), yet allowing it to receive the profits therefrom, in an apparent attempt to prevent the running of the 10-year period of limitation during which a prescribed institution may legally own real property as provided for in Section 270 of the Constitution.

Likewise, the provisions in Ben Meador's will to avoid or prolong the period within which Father Flanagan's Boys Home might hold its interest are unenforceable.

In *Crook v. Commercial National Bank & Trust Co.*, 375 So. 2d 1006 (Miss. 1979), the court set out a test to determine when real property may be left in a charitable testamentary trust without being subjected to the 10-year period of Mortmain: (1) there must be no restrictions placed on the trustee referenced to alienation of the property, (2) the property must not pass to a proscribed institution after the expiration of the trust or prior thereto except by a direct arm-length sale, (3) the trustee must be charged with the responsibility to deal with and manage the property as any prudent trustee would, including selling or disposing thereof as prudence would dictate, and (4) the trustee or trustees must not be the same owners, managements or trustees of a proscribed institution which is designated to share in the income or benefits of the trustee. *Id.*1012

The provisions of Ben Meador's will fall outside each of these requirements. His will prohibited alienation of the subject property, the trustee was not charged with specific duties in managing the property as a prudent trustee and the trustee (Father Nicholas H. Wegner and his successors) is also a trustee or director of the beneficiary Father Flanagan's Boys Home. (Exh. 5 pp. 10-53). All of the prongs of the *Crook* test must be met or the 10-year limitation of the Mortmain Statute is applicable. *Johnson v. Board of Trustees*, 492 So. 2d at 275.

Ben Meador died February 16, 1962. Whatever rights or estate that may have legitimately

passed under his will vested at that time. *In Re Estate of McRight*, 766 So. 2d 48, 49(Miss. App. 2000). Father Flanagan's Boys Home first undertook to convey the subject property in 1978, after it offered the will for probate that same year. At most, Father Flanagan held a vested remainder to a life estate of Martha Meador with a right of disposition until February 16, 1972. Martha Meador's remainder interest (subject to Father Flanagan's right of disposition) as the sole heir of Ben Meador vested at his death. Her interest was subject to defeasance, if at all, only for a period of 10 years thereafter. At the latest, Martha Meador held fee simple title to the subject lands on February 17, 1972.The later deeds from Father Flanagan's Boys Home to Reynolds Clark are not effective to convey any interest in the subject lands.

Special Chancellor Sullivan's Order in Cause No. 14,062

On March 29, 1978, Father Flanagan's Boys Home petitioned to probate the will of Ben Meador as a muniment of title.(Exh.5, pp. 1-7). In that cause Father Flanagan filed "Petition of Beneficiary to Construe Will." The petitioner alleged that it is a "non-profit charitable corporation" that the provision "upon the condition that said land never be sold" in Ben Meador's will "is void and contrary to the laws and public policy of this state and contrary to the terms of the Mortmain Statute..."(Exh. 5, pp. 10-13).

On February 2, 1979, Special Chancery Judge Michael Sullivan entered "Decree Construing Will" providing that Father Flanagan was an entity subject to provisions of Mississippi's Mortmain Statute and that the provision, "upon the condition that said land never be sold." is void as an illegal restraint on alienation. He further ruled that the intent of Ben Meador was to devise a life estate in the subject property to Martha Meador with remainder to Father Flanagan's Boys Home and that upon Martha Meador's death on September 19, 1973, the property became "legally owned and held" by Father Flanagan's Boys Home which had 10 years from that date to divest itself of the

property.(Exh. 5, pp. 51-53).

The order of February 2, 1979 doesn't take into account *Mississippi College v. May*, 235 Miss. 200, 108 So.2d 703 (Miss. 1959) where the Supreme Court held that the 10-year period provided in the Mortmain Statute begins to run from the date of the testator's death because the interests or estates of Martha Meador and Father Flanagan vested at that time. *Id.*; *Beach v. State*, 173 So. at 430. Further, Chancellor Sullivan's order has no preclusive effect against the Appellants, since they nor their predecessor in title were made parties. *Young v. Wark*, 76 Miss. 829, 25 So. 660, 661 (1899).

Also, because the interest of Martha Meador and Charles Cole, IV (grantor of Nolan Clark, Appellants' predecessor in title) vested before Wayne County Chancery Cause No. 14,062 was commenced, the Appellants' title can not be affected by Chancellor Sullivan's order. By that time, 16 years had passed since the death of Ben Meador and Martha Meador had conveyed the subject property to Charles Cole, IV. Chancellor Sullivan was without authority to construe Ben Meador's will in favor of Father Flanagan to the detriment of Martha Meador or her grantees.

> We also point out that we do not reach the issue of what steps the Chancery Court could have taken to save the disposition and insure that its benevolent purpose was fulfilled, either pursuant to the will itself or under the court's authority, *since application for such was not made before the 10 year lapse which vested title to the property in Johnson.*

Johnson v. Board of Trustees, 492 So. 2d at 275 (emphasis added). In that case, Johnson was the grantee of the heirs of the testator whose will was subject to the Mortmain statute.

The Deed From Martha Meador to Charles Cole, IV

By warranty deed dated August 24, 1972, Mrs. Ben Meador (one and the same as Martha Meador) conveyed the subject property to Charles Cole, IV under duly recorded letters of attorney. (Exhs.7,8). The warranty deed specifically provides that all minerals under the subject lands are

conveyed along with whatever mineral interest is owned by the grantor in Wayne County, subject to reservation of a life estate.(Exh.8). Martha Meador died September 19, 1973. (Vol I, p.65, item10; R.E. Tab 3).

Charles Cole, IV conveyed the subject property to Reynolds Clark and Robert T. Comerio by warranty deed dated January 12, 1976, "less all oil, gas and other minerals heretofore reserved and excepted."(Exh. 9). Even though no mineral interest had been previously reserved or excepted, the mineral reservation was effective and only the surface of the subject lands was conveyed. *Oldham v. Fortner*, 74 So. 2d 824 (Miss. 1954). See also *West v. Herrington*, 183 So. 2d 824, 825 (Miss. 1966) (provision "all oil, gas and minerals and all oil, gas and mineral rights belonging to or appurtenant to said land is hereby reserved and excepted from this conveyance, said oil, gas and minerals and mineral rights having heretofore have been reserved and excepted, and are not owned by grantor"was a valid reservation of mineral interest whether or not the disclaimer of ownership was true.)

There is no statute of limitations for probating a will. *Belt v. Adams*, 125 Miss. 387, 87 So. 666, 668 (1921). However, a will proponent may be subject to estoppel where there was "long delay in propounding the will for probate during which property of the estate was transferred to subsequent purchasers for value and without notice of the will." *In Re Will of Wilcher*, 994 So. 2d 170, 175 (Miss. 2008). In that case, the Supreme Court rejected the argument that the death of an owner of land creates a gap in the title rendering it unmerchantable until there is an administration of the estate or an adjudication of heirship.

An examination of the Wayne County land records in 1972 would have revealed record title in Ben Meador by virtue of the 1946 partition decree in cause number 4973.(Exh. 4). An

investigation into Ben Meador's death and heirship would have revealed that he died February 16, 1962 in Wayne County, Mississippi and that he died without issue leaving a surviving spouse Martha Meador, his sole heir-at-law. An examination of the records of the chancery clerk would reveal that no estate was opened for Ben Meador, nor was any will offered for probate. Appropriate inquiries would have revealed further that Ben Meador was in actual possession of the subject property at the time of his death and that Martha Meador was in actual possession from 1962 through the year 1972. (Vol.I, pp. 64-67, items 8, 10, 11, 12; R.E. Tab3).

There is no evidence contradicting that Charles Cole, IV was an innocent purchaser. His warranty deed from Martha Meador recites consideration of "ten dollars ($10.00) and other good and valuable considerations...". Where such a warranty deed contains a statement or recital of consideration, it creates a rebuttable resumption that consideration actually existed. *Lancaster v. Boyd*, 927 So. 2d 756, 757 (Miss. App. 2005). Charles Cole, IV was a nephew of Martha Meador and under Mississippi law, love and affection is also valid consideration. *Holmes v. O' Bryant*, 741 So. 2d 366, 370 (Miss. App. 1999).

A person may execute a deed from any sort of motive satisfactory to him, whether that be love, affection, gratitude, partiality, prejudice, or even whim or caprice. *Herrington v. Herrington*, 232 Miss. 244, 98 So. 2d 646, 649 (1957). In Mississippi, a conveyance that acknowledges payment or receipt of valuable consideration is prima facie evidence that the grantee was a purchaser for valuable consideration without notice and places the burden of going forward to establish notice or the falsity of the recital of consideration on the party attacking the deed. *Mills v. Damson Oil Corp.*, 686 F.2d 1096, 1101 (5th Cir. 1982) (citations omitted). There is no evidence that Charles Cole, IV had any knowledge of facts that would lead a reasonable person to doubt that Martha Meador was fee simple owner of the lands she conveyed to him.

The lower court held that Charles H. Cole, IV and Nolan Clark were on notice that Martha Meador held only a life estate in the subject property. It is true that the will of Ben Meador, offered for probate in 1976, was filed before the mineral deed to Nolan Clark. However, at the time of the conveyance from Martha Meador to Charles H. Cole, IV in 1972, there was nothing of record and no facts imparting notice of adverse claims. Nolan Clark was the grantee of Charles H. Cole, IV, a bona fide purchaser without notice, and as such, he was the successor to all rights of his grantor.

> Where a subsequent purchaser for value takes title from a prior bona fide purchaser for value without notice, then the subsequent purchaser is entitled to all of the protection the recording system offered his grantor

Robertson v. Dombroski, 678 So. 2d 637, 640 (Miss. 1996). The rule may therefore be stated that where a bona fide purchaser of or from heirs complies with the requirements of the recording acts, he acquires a good title as against the grantee in an unrecorded deed from the ancestor. *Reddoch v. Williams*, 129 Miss. 706, 92 So.831, 835 (1922).

ISSUES TRIED BY CONSENT

All of the facts and instruments of title noted above establishing that Charles H. Cole, IV was a bona fide purchaser for value without notice of adverse claims were stipulated or jointly offered as evidence by the parties. (Vol.I. pp. 64-67,68, Exhs. 8,9,16, 17; R.E. Tab 3). Reynolds Clark argued in his trial brief that Nolan Clark was not a bona fide purchaser when he acquired the mineral interests of Charles H. Cole, IV. (Vol. I, p.74 Memorandum of Law of Reynolds Clark). He bases that argument on the parties' stipulation that Charles H. Cole, IV "was an invalid and had no visible means of support."(Vol. I, p.77). Reynolds Clark argued further that the failure to administer the Estate of Ben Meador caused a break in the chain of title, which rendered imperfect the title of Martha Meador defeating the claim of Charles H. Cole, IV as a bona fide purchaser from her. (see

Vol. I, p.78).

The status of Charles H. Cole, IV as a bona fide purchaser was addressed and urged by the Appellant Hemeter Properties, LLC in the lower court as well. (See Vol. II, p.146-148). Chancellor McKenzie addressed and ruled on these arguments in his "Findings of Fact, Conclusions of Law and Final Judgment Removing Cloud on Title"(Vol. II, pp.151-160) noting specifically that "the defendants argue that Martha's conveyance in 1972 to Charles Cole, IV, is legitimate because he was an innocent purchaser. The parties make various other legal arguments about whether not Charles Cole, IV, was an innocent purchaser for value." (Vol. II, p.156; R.E. Tab 4). The Chancellor noted that the Appellants did not assert that Charles H. Cole, IV was a bona fide purchaser as an affirmative defense in their answer. The lower court nevertheless addressed and ruled on that question finding no proof that Charles H. Cole, IV was a bona fide purchaser, citing the parties' stipulation that he was an invalid and never held a job. (Vol. II, p.159; R.E. Tab 4).

When evidence outside the pleadings is offered at trial, and the other side consents, the complaint is amended by operation of law. *In re Estate of Hood*, 955 So. 2d 943, 948-949 (Miss. App. 2007). Miss. R. Civ. P. 15 (b) provides:

> When issues not raised by the parties are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result at the trial of these issues....

The question of the status of Charles H. Cole, IV's as a bona fide purchaser was tried by implied, if not express, consent. *Setser v. Piazza*, 644 So. 2d 1211-1217 (Miss. 1994). Implied consent depends on whether the parties recognize that an issue not presented by the pleadings entered the case at trial. *Shipley v. Ferguson*, 638 So. 2d 1295, 1300 (Miss. 1994). There, the court stated

that the principal consideration is reasonableness. Implied consent is not found where evidence introduced is relevant to a pleaded issue and the non-objecting party has no notice that the evidence is intended to raise a new unpleaded issue into the case. *Id.*; *Lynn v. Soterra, Inc.*, 802 So. 2d 162, 169-170 (Miss. App. 2001).

In addition to his sponsor of relevant evidence and his stipulations of facts relevant to the issue, the Appellee Reynolds Clark had ample advance notice that the Appellants Hemeter Properties, LLC, et.al. based their claim to confirm title, in part, upon the status of Charles H. Cole, IV as bona fide purchaser. This is plainly stated in detail in Hemeter Properties' response to contention interrogatories of Reynolds Clark served July 31, 2009. (see Exhibit "A" to Motion to Amend Pleading to Conform to the Evidence and for Reconsideration or to Alter or Amend Judgment, Vol. II, pp.169-172).

In 1976, Reynolds Clark and Robert T. Comerio accepted a warranty deed from Charles H. Cole, IV covering the subject lands and other lands, excepting the minerals. (Exh. 9) Based on that warranty deed, Reynolds Clark and Comerio, in turn, executed a number of warranty deeds describing residential lots within the subject property. (See Exh. 16, Bill of Complaint to Confirm Title, pp. 6-14). It is apparent, at least until Ben Meador's will was offered for probate in 1978, that Reynolds Clark believed Charles H. Cole, IV to be a bona fide purchaser for value without knowledge of adverse claims to the fee title of Martha Meador. Certainly, Reynolds Clark believed in his own title to the subject property (less the oil, gas and other minerals) since he warranted title to lots from that property in at least 13 separate warranty deeds executed by him in 1976 and 1977. (Exh. 16). Reynolds Clark may argue that his title is superior on other grounds, but he should not be heard to argue that in 1972, Charles H. Cole, IV was not a bona fide purchaser for value without notice.

Finally, Hemeter Properties, LLC was not required to assert bona fide purchaser status as an affirmative defense since the validity and effectiveness of the conveyance from Martha Meador to Charles H. Cole, IV is a basis of its *claim* to confirm title This is in contrast to such an assertion merely as a defense. The parties to this action are each required to rely upon the strength of their own title as opposed to the weakness of that of their adversary. *Joyner v. Cole*, 221 Miss. 484, 73 So. 2d 264 (1954).

In *Joyner v. Cole*, a partition suit filed by John Cole and Willie Cole resulted in a decree allotting the east half of a 160 acre tract to John and the west half to Willie. The will of James M. Cole, deceased, devised the property to John and Willie in equal shares, providing that if Willie Cole should die without issue, the property passed to John in fee simple. After a sale of his property, Willie Cole died without issue.

The heirs of John filed suit to confirm title in the entire 160 acre tract against the successors Willie's interest. The defendants (successors of Willie) argued that the plaintiffs (heirs of John) were estopped to assert that Willie Cole did not acquire a fee simple title to the land allotted to him in the partition suit. The plaintiffs argued that the defendants waived this defense because it was not asserted in their answer and the suit was defended on other grounds. The court rejected this argument holding that the plaintiffs could not deny the partition suit even though estoppel was not plead by the defendants, stating:

> the (plaintiffs) were required to rely upon the strength of their own title, the deraignment of which disclosed the partition, and the defendant was entitled to introduce the partition proceeding in support of his denial of the title asserted by the (plaintiffs). In other words, the deraignment of title set forth in the bill of complaint showed affirmatively that Willie Cole had obtained title to the 80 acres of land involved in the suit, and had done so under the partition decree whereby his undivided interest in the 160 acres of land was

converted into a full interest in the 80 acres allotted to him.

Id. at 267.

In this case, the deraignment of title by Reynolds Clark and the deraigment of the title of Hemeter Properties include the deed from Martha Meador to Charles H. Cole, IV as well as the mineral deed from Charles H. Cole, IV to Nolan Clark (R.p.17) and the parties jointly offered these deeds into evidence. (Exh.8, 9). The parties jointly offered in evidence the complaint to confirm title filed by Reynolds Clark and others (Exh. 16), and the final decree in that cause. (Exh.17). Under the authority of *Joyner v. Cole*, *supra*, the Appellants Hemeter Properties, LLC are not restricted as urged by Reynolds Clark. They can assert the full effects of stipulations of facts and of deeds and other documents of title jointly offered into evidence, including that Charles H. Cole, IV was a bona fide purchaser for value without notice, and that Reynolds Clark should not be heard to deny that Charles H. Cole, IV was a purchaser for value in the conveyance from Martha Meador. (Exh.8).

Martha Meador conveyed the subject property to Charles Cole, IV on August 24, 1972, reserving a life estate. She died September 19, 1973. When Charles Cole, IV executed the mineral right and royalty transfer to Nolan Clark on April 21, 1983, Cole owned a full mineral interest in the subject lands, subject only to a 55860/61776 x 1/8 royalty interest outstanding.

CONCLUSION

The devise to Father Flanagan's Boys Home fails and lapsed because it is conditioned on an unlawful premise. The condition is integral, not merely incidental to the devise.

The interest of Martha Meador and any interest in the subject lands of Father Flanagan's Boys Home vested upon the death of Ben Meador in 1962. Father Flanagan did not exercise a right of disposition within 10 years thereof. At the latest, Martha Meador was vested with a fee simple interest in the subject lands on February 16, 1972, ten years after the death of Ben Meador.

The order construing the will of Ben Meador entered by Special Chancellor Sulllivan in 1978 is in error and has no preclusive effect against the grantees of Martha Meador. This is because the fee simple interest of Martha Meador and the interest of Charles Cole, a bona fide purchaser, vested before the will of Ben Meador was offered for probate, and because necessary parties defendant were not joined.

Accordingly, the Appellants Hemeter Properties respectfully request this Court to reverse the lower court and render judgment providing that title to the disputed mineral, royalty and overriding royalty interest is confirmed in Hemeter Properties, LLC, et.al. according to their respective interests.

Respectfully submitted this the 28 day of March, 2011.

James L. Quinn

JAMES L. QUINN, Attorney For Appellants Hemeter Properties, LLC, Peachtree Properties, LLC, Gardner Clark Family, LLC, TR Clark, LLC, Charles M. Hamilton, James Steven Gardner, Adrian Code Clark, Franklin D. Hemeter, Jr., Stephanie A. Barefoot, and James Scott Hemeter

James L. Quinn, MSB #4590
Attorney at Law
Post Office Box 271
Hattiesburg, MS 39403-0271
(601) 544-1842

CERTIFICATE OF SERVICE

I, James L. Quinn, attorney for Hemeter Properties, LLC, Peachtree Properties, LLC, Gardner Clark Family, LLC, TR Clark, LLC, Charles M. Hamilton, James Steven Gardner, Adrian Cody Clark, Franklin D. Hemeter, Jr., Stephanie A. Barefoot and James Scott Hemeter , do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the Brief of Appellants to the following:

Honorable Franklin C. McKenzie, Jr.
Chancery Court Judge
P.O. Box 1961
Laurel, MS 39441

John Jeffries
Attorney at Law
Post Office Box 6
Laurel, MS 39441-0006

J. Robert Sullivan, Sr.
Sullivan & Sullivan
P.O. Box 45
Laurel, MS 39441-0045

This the 28 day of March, 2011.

JAMES L. QUINN, Attorney For Appellants
Hemeter Properties, LLC, Peachtree Properties, LLC, Gardner Clark Family, LLC, TR Clark, LLC, Charles M. Hamilton, James Steven Gardner, Adrian Code Clark, Franklin D. Hemeter, Jr., Stephanie A. Barefoot, and James Scott Hemeter