REHABILITATING REPUGNANCY? PRESERVING THAT PIECE OF MEDIEVAL LUMBER

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This article examines restraints on alienation imposed by the grantor as a condition in the transfer of property to the grantee (rather than contractual restraints subsequently entered into by an owner). It considers whether the doctrine of repugnancy has any useful part to play in testing the validity of such restraints in light of Glanville Williams' criticism of the doctrine as 'pseudo-logical' and lacking utility. Examining the numerus clausus *principle and Australian, English and (certain) American cases in which the doctrine has been addressed, the article argues that a wholesale rejection of repugnancy is unwarranted. First, some version of the repugnancy doctrine is necessarily required as part and parcel of distinguishing between various forms of proprietary (and non-proprietary) interests. Second, the courts continue to apply the repugnancy doctrine in distinguishing between determinable interests and those defeasible by condition subsequent when ascertaining the validity of a condition that operates upon a purported alienation or bankruptcy. Finally, it may be seen that testing restraints by reasonableness and policy alone, without recourse to repugnancy, can produce problematic results. The doctrine of repugnancy cannot, therefore, simply be dismissed as a mere historical relic.*

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I Introduction

For some time, the doctrine of repugnancy has had a bad name. The striking down of a restriction imposed on the enjoyment of a proprietary interest, on the basis that the restriction is fundamentally inconsistent with the essential characteristics of the interest granted, once held sway in the area of restraints on alienation. But it doesn't any longer, at least for restraints imposed by contract, where the 'cogent' method of applying public policy has displaced the 'scholastic'[1] doctrine of repugnancy. This article examines the conceptual foundations of the doctrine of repugnancy and considers whether it should be retained as serving a useful purpose in the contemporary law of restraints on alienation. Or, should it be discarded, as Glanville Williams has said, as 'a useless piece of medieval lumber'?[2]

Part II of this article deals with the relevant basal concepts. It will explain what is meant by a restraint on alienation and describe the origins, content and general application of the doctrine of repugnancy. The article will then explore two areas of property law in which the doctrine of repugnancy might still have a concealed, but useful, part to play. Part III will deal with the *numerus clausus* principle, which is based on the idea that specific proprietary interests do have essential and inherent characteristics. In Part IV, we will see how the doctrine of repugnancy has been applied in relation to restraints on the alienation of specific and diverse proprietary interests under English and Australian law. Reference will also be made to the work of the American Law Institute in its various restatements on the law of property.[3] The most important aspect of this Part is the distinction between determinable interests and absolute interests defeasible by condition subsequent, a distinc-

[1] Richard E Manning, 'The Development of Restraints on Alienation Since Gray' (1935) 48(3) *Harvard Law Review* 373, 401.

[2] Glanville L Williams, 'The Doctrine of Repugnancy: Clogging the Equity and Miscellaneous Applications' (Pt 3) (1944) 60 (April) *Law Quarterly Review* 190, 194. Needham J quoted this evocative term in *Reuthlinger v MacDonald* [1976] 1 NSWLR 88, 99 ('*Reuthlinger*'). For a brief outline of the medieval origins of the doctrine, see Michael D Kirby, 'Restraints on Alienation: Placing a 13th Century Doctrine in 21st Century Perspective' (1988) 40(3) *Baylor Law Review* 413, 414–15.

[3] See below Part IV(D), discussing American Law Institute, *Restatement of Property* (1944) ('*First Restatement*'); American Law Institute, *Restatement (Second) of Property: Donative Transfers* (1983) ('*Second Restatement*'); American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) ('*Third Restatement*').

tion upheld in the context of insolvency by the Supreme Court of the United Kingdom ('UK Supreme Court').[4]

Part V of the article will examine two American cases dealing with restraints on alienation. We will see that, in these cases, the employment of an ex post facto policy analysis has produced uncertain or unprincipled results. Arguably, these results are inferior to those that would have been reached under the a priori doctrine of repugnancy.

This article concludes that a wholesale rejection of the doctrine of repugnancy is unwarranted. It is logically required by a structured approach to property as comprising a limited list of discrete and distinct proprietary interests; it is expressly or implicitly used in the distinction between permissible determinable limitations and impermissible defeasible interests; and it may be employed to give greater *ex ante* certainty to parties than applying an ex post facto policy analysis.

II The Context: Restraints and Repugnancy

Our concern is with the doctrine of repugnancy as it might apply to transfers of property subject to a condition that restricts the transferee in their ability to deal with the property. In such circumstances, the question arises as to whether the restriction imposed by the condition is inconsistent, or 'repugnant' to the interest granted. If the interest and the condition cannot stand together, the condition is rendered invalid and the interest takes effect freed from it.[5] In this context, the doctrine of repugnancy is based on the belief that the ability to transfer property is inherent in the bundle of rights that makes up ownership so that, as a matter of logic, one cannot own property when one is substantially deprived of the ability to transfer it.[6]

More specifically, our focus is on situations where such a 'restraint on alienation' is imposed as a condition in the grant (that is, the transfer of the asset itself from the grantor to the grantee), as opposed to where the restric-

[4] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 ('*Belmont Park Investments*').

[5] Glanville Williams, 'The Doctrine of Repugnancy: Conditions in Gifts' (Pt 1) (1943) 59 (October) *Law Quarterly Review* 343, 343–4 ('Part 1: Conditions in Gifts').

[6] This principle was enunciated in the 15th century in Thomas de Littleton, *Littleton's Tenures*, ed Eugene Wambaugh (John Byrne & Co, 1903) 171–2 (§ 360), and in the 17th century in Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton: Not the Name of the Author Only, But of the Law Itself* (13th rev ed, 1628) bk 3, 223a. See generally *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 694–5 [142]–[144] (Campbell JA) ('*Gora*').

tion is created by a contract between the current owner of the property and a third party.[7] But our concern also extends to the involuntary 'transfer' of property on the bankruptcy of the owner, where the asset is taken from the owner by operation of law.[8] Accordingly, we consider the circumstances in which a transfer of property is made subject to a condition that purports to terminate the transferee's interest if the transferee attempts to alienate the property in a way prohibited by the grant,[9] or where the transferee becomes bankrupt.[10]

Such a restraint on alienation imposed as a condition in the grant of the property might or might not be effective. There are two bases on which the restriction could be struck down. The first is repugnancy. The second is public policy: the idea that to promote the public good, all property — especially land — must be freely alienable.[11] A possible third basis only applies to land,

[7] In recent times, most cases have concerned restraints on alienation created by contract: see, eg, *Gora* (n 6) 746 [366] (Campbell JA), where the restraint was valid, as it served a legitimate collateral purpose; *Warren v Lawton [No 3]* [2016] WASC 285, [84]–[118] (Le Miere J), where the restraint was invalid, as it did not serve a valid collateral purpose. In *Woolworths Ltd v About Life Pty Ltd* (2017) 18 BPR 36983, 37014–15 [146]–[150] (Emmett AJA), the relevant aspect of right of first refusal was held not to constitute a restraint on alienation. Other aspects of the right of first refusal might have been invalid restraints, but these could be read down or severed pursuant to the contract between the parties. For a consideration of restraints of alienation created by contract, see Scott Grattan, 'Revisiting Restraints on Alienation: Public and Private Dimensions' (2015) 41(1) *Monash University Law Review* 67.

[8] See, eg, *Caboche v Ramsay* (1993) 119 ALR 215 ('*Caboche*').

[9] It should be noted that the law also regards the following as restraints on alienation, even though there is no actual prohibition on alienation. First, a transfer of property subject to a third party being granted a right of pre-emption/right of first refusal to purchase the property, at a price below market value, where the owner desires to sell the property: see, eg, *Re Rosher; Rosher v Rosher* (1884) 26 Ch D 801, 811 (Pearson J) ('*Re Rosher*'); *Re Cockerill; Mackaness v Percival* [1929] 2 Ch 131, 135 (Eve J) ('*Re Cockerill*'). Cf *Oliver v Oliver* (1958) 99 CLR 20 ('*Oliver*'), where the transfer of property subject to an option giving a third party a right to acquire the property at undervalue was held not to be a restraint on alienation because the option could be exercised even when the owner did not desire to sell the property. Second, a transfer of property subject to a condition, not constituting a charge, that if the property is sold, a defined part of the proceeds will be paid to a third party: *Re Elliot; Kelly v Elliot* [1896] 2 Ch 353, 356–7 (Chitty J) ('*Re Elliot*').

[10] Such a condition might be problematic, not simply because it constitutes a restraint on involuntary alienation, but also because the susceptibility of property to be taken on the holder's bankruptcy can be regarded as one of the standard incidents of ownership, as part of the characteristic of 'liability to execution': AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 123. On this view, the doctrine of repugnancy must be cognisant of both the rights and liabilities inherent in the concept of property. See below n 18 and accompanying text.

[11] *Hall v Busst* (1960) 104 CLR 206, 218 (Dixon CJ) ('*Hall*').

and is of historical interest only: namely, that restraints on alienation are contrary to the effect of the statute of *Quia Emptores 1290*.[12] By contrast, where the restraint on alienation is imposed by contract, the test for validity is based on public policy alone.[13]

There is a long line of English cases that have used repugnancy as the basis for striking down a restraint on alienation.[14] Similarly, Australian cases have found various restraints on alienation void on the basis of repugnancy.[15] Repugnancy has also been used in the United States as the reason why substantial restraints on alienation have been held to be ineffective.[16] Some of these English and Australian cases will be considered below. For now it is sufficient to note that repugnancy was used to invalidate the restraint in all of

[12] Ibid 217 (Dixon CJ), discussing *Quia Emptores 1290*, 18 Edw 1, c 1 ('*Quia Emptores*'). This argument is derived from the assumption that restraints on alienation can only be supported where the person benefitted holds a reversionary interest in the land, and that such reversions — except in favour of the Crown — ceased when subinfeudation was abolished by *Quia Emptores*: see generally *De Peyster v Michael*, 6 NY 467, 479–81 (Ruggles CJ) (1852). See also Percy Bordwell, 'Alienability and Perpetuities' (Pt 2) (1937) 23(1) *Iowa Law Review* 1, 10–12, 15–16; *Carma Developers (California) Inc v Marathon Development California Inc*, 826 P 2d 710, 717 (Puglia ACJ) (Cal, 1992) ('*Carma*').

[13] *Hall* (n 11) 217–18 (Dixon CJ); *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 1 AC 85, 106–7 (Lord Browne-Wilkinson) ('*Linden Gardens Trust*'); *Nullagine Investments Pty Ltd v The Western Australia Club Inc* (1993) 177 CLR 635, 649 (Brennan J); *Gora* (n 6) 669 [3] (Giles JA), 718 [234], 741 [339] (Campbell JA). However, there are isolated instances where repugnancy to the interest granted was used to void a contractual restraint: see, eg, *Hall* (n 11) 225 (Fullagar J); *Re MacKay* (1972) 20 FLR 147, 150 (Judge White) ('*Re MacKay*').

[14] See, eg, *Muschamp v Bluet* (1617) J Bridg 132; 123 ER 1253 ('*Muschamp*'); *Attwater v Attwater* (1853) 18 Beav 330; 52 ER 131; *Holmes v Godson* (1856) 8 De G M & G 152; 44 ER 347; *Hood v Oglander* (1865) 34 Beav 513; 55 ER 733 ('*Hood*'); *Hunt-Foulston v Furber* (1876) 3 Ch D 285 ('*Hunt-Foulston*'); *Re Machu* (1882) 21 Ch D 838 ('*Re Machu*'); *Re Rosher* (n 9); *Re Dugdale; Dugdale v Dugdale* (1888) 38 Ch D 176 ('*Re Dugdale*'); *Metcalfe v Metcalfe* (1889) 43 Ch D 633 ('*Metcalfe*'); *Re Elliot* (n 9); *Re Smith; Smith v Smith* [1916] 1 Ch 369 ('*Re Smith*'); *Re Ashton; Ballard v Ashton* [1920] 2 Ch 481 ('*Re Ashton*'); *Re Cockerill* (n 9); *Re Brown; District Bank Ld v Brown* [1954] 1 Ch 39 ('*Re Brown*').

[15] See, eg, *Grayson v Grayson* [1922] St R Qd 155 ('*Grayson*'); *Re Williams' Settlement; Trustees Executors and Agency Co Ltd v James* [1923] VLR 609 ('*Re Williams*'), citing *Re Smith* (n 14); *Re Mavromates* [1964] VR 612 ('*Re Mavromates*'), citing *Re Brown* (n 14); *Re MacKay* (n 13); *Caboche* (n 8). See also *Oliver* (n 9), in which the High Court of Australia tested the alleged restraint — a devise of land subject to an option granted to a third party to purchase at a fixed price per acre — against the doctrine of repugnancy, and found that it was not repugnant.

[16] See, eg, *Potter v Couch*, 141 US 296, 315 (Gray J for the Court) (1891); *Davis v Geyer*, 9 So 2d 727, 729 (Buford J) (Fla, 1942) ('*Davis*'); *RH Macy & Co Inc v The May Department Stores Co*, 653 A 2d 461, 467 (Rodowsky J) (Md, 1995) ('*RH Macy & Co*'); *Hicks v Castille*, 313 SW 3d 874, 881–2 (Hancock J) (Tex Ct App, 2010).

them. The following illustration from *Re Dugdale; Dugdale v Dugdale* is representative.[17] A gift of property in a will to the testatrix's son was subject to a gift over (an 'executory devise') in favour of that son's wife or living children if, by any act of the son or by operation of law, the son ceased to the beneficial owner of the property. Kay J held:

> The events upon which the executory devise in this case is to take effect seem to be, 1. alienation, and 2. bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to A, were to declare that such an estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. …
>
> I am of the opinion for the foregoing reasons that the executory devise in this case is invalid as repugnant.[18]

Several of these cases used supplementary reasoning that, in purporting to restrict the alienability of an inherently alienable interest, the settlor or testator was attempting to create a new type of interest, one unknown to, and indeed forbidden by, the law.[19] Like the doctrine of repugnancy, the inability to create novel proprietary interests is based upon the notion that such interests have a distinct and predetermined set of characteristics.

[17] *Re Dugdale* (n 14).

[18] Ibid 182.

[19] See, eg, *Muschamp* (n 14) 1255; *Re Elliot* (n 9) 356–7 (Chitty J); *Davis* (n 16) 729 (Buford J). See also *Johnson v Whitton*, 34 NE 542 (Holmes J) (Mass, 1893), where the qualification attached to a fee simple that it was to descend to the heirs of the donee on her father's side only was void, meaning that the donee took, and could pass to a purchaser, a fee simple absolute.

The leading English critic of the doctrine of repugnancy is Glanville Williams.[20] He labelled the doctrine as 'spurious'[21] and 'pseudo-logical'[22] on the following basis. The doctrine makes the (unverifiable) assumption that each type of proprietary interest has a distinct and fixed essence and that alienability is, at least for some of these interests, held to be an inseparable aspect of that essence.[23] However, Williams says, this reasoning is circular. It presupposes that alienability is an indispensable incident of ownership and then goes on to conclude that a purported grant of ownership without the power to alienate is an attempt to do something which is impossible, so that the grant must take effect with the offending condition severed. The grantor cannot give with one hand and try to take with the other.[24]

Williams concludes that the doctrine of repugnancy, rather than being based on logic, is employed as a mechanism for promoting public policy favouring the free alienability of land.[25] However, it is an imperfect mech-

[20] In making his critique, Williams acknowledged the earlier work of Charles Sweet, 'Restraints on Alienation' (Pt 1) (1917) 33 (July) *Law Quarterly Review* 236, as containing the best exposition of the law of restraints on alienation: Williams, 'Part 1: Conditions in Gifts' (n 5) 351. However, Sweet examined the law of restraints from the perspective of public policy and, in particular, how a restraint may be upheld if it advances a valid collateral purpose, rather than from the perspective of repugnancy: Sweet (n 20).

[21] Williams, 'Part 1: Conditions in Gifts' (n 5) 344, 348.

[22] Ibid 345 n 9, 349. It should be noted that Williams did refer to a very narrow version of the doctrine of repugnancy that he thought was valid. This was where two provisions of a document could not coexist as a matter of strict logic: at 343. An example of this might be the possibility considered in *Chopra v Bindra* [2009] EWCA Civ 203, which addressed the potential interpretation of a trust for sale of land. Clause 1 of the deed granted A and B beneficial interests in the proceeds of the sale in specified proportions (75:25), but cl 4 provided that if either party died before the land was sold, the survivor would be entitled to the entire proceeds of any sale: at [4] (Rimer LJ). At issue was whether cl 4 was repugnant to rights incidental to cl 1, since the latter gave A and B absolute interests in the proceeds, while the former divested an absolute interest and shifted it to another: at [7], [13] (Rimer LJ). However, the Court felt able to read the two clauses together in a way that would give effect to the clear intention of the parties (and avoid any repugnancy). Clause 1 was construed as giving to A and B an interest for their joint lives or until sale only, with cl 4 giving a remainder to the survivor were the land unsold during their joint lives: at [22]–[23] (Rimer LJ).

[23] Williams, 'Part 1: Conditions in Gifts' (n 5) 345–6.

[24] Ibid 347–8. The American writer Percy Bordwell had also pointed out this circularity of reasoning: Bordwell (n 12) 14.

[25] Williams, 'Part 1: Conditions in Gifts' (n 5) 345–6, 348. Williams' critique in this respect was preceded in the United States by Manning (n 1) 402–4 and Merrill I Schnebly, 'Restraints upon the Alienation of Legal Interests' (Pt 1) (1935) 44(6) *Yale Law Journal* 961, 981, who likewise saw the concept of repugnancy employed to cloak outcomes based upon policy considerations.

anism for doing so, because it does not fully escape its logical pretensions. For example, the doctrine of repugnancy would strike down as an impermissible restraint on alienation: (a) a condition in the transfer of Property 1 that the donee not alienate Property 1; but not (b) a condition in the transfer of Property 2 that the donee not alienate Property 1 (already owned by the donee). Further, the doctrine of repugnancy would invalidate: (a) a condition that if property is alienated a fine must be paid; but not, according to Williams, (b) a contract not to alienate property, the breach of which would result in damages. In each of these cases, public policy favouring free alienation would be offended, and would make no distinction between the form of the restraint in case (a) and case (b). By contrast, the doctrine of repugnancy would, in both contexts, invalidate case (a) because of the view that the condition was inconsistent with the nature of the interest granted, but not case (b), which is functionally equivalent to case (a) but conceptually different.[26] At its heart, for Williams, the doctrine of repugnancy is 'pure verbiage, serving no purpose except to conceal the absence of a reason'.[27]

On various occasions, Australian courts have expressly or impliedly approved Williams' characterisation of the doctrine of repugnancy as archaic. In *Elton v Cavill [No 2]*, Young J stated that restraints on alienation should not be governed by the 'ghosts of old property law rules, rules which were worked out for a completely different social system in a different age'.[28] Similarly, in *Bondi Beach Astra Retirement Village v Gora* ('*Gora*'), Campbell JA characterised the doctrine of repugnancy as based upon conveyancing rules that were 'medieval'.[29] However, his Honour did not hold that the same test for validity or invalidity of a restraint on alienation should be applied to restraints imposed as conditions in grants and those imposed by contract. In finding that the contractual restraints in *Gora* were valid, Campbell JA stated that if the same restraints were imposed as conditions in the transfer of the fee simple they would, in accordance with previous cases, be held to be invalid.[30] Although his Honour did think that the same result should be reached in determining the validity of restraints imposed by condition and by contract, Campbell JA qualified this in terms of the relevant test being one of public

[26] Williams, 'Part 1: Conditions in Gifts' (n 5) 344, 348–50.

[27] Glanville L Williams, 'The Doctrine of Repugnancy: In the Law of Arbitration' (Pt 2) (1944) 60 (January) *Law Quarterly Review* 69, 82.

[28] (1994) 34 NSWLR 289, 300.

[29] *Gora* (n 6) 741 [339].

[30] Ibid 737–8 [325]. See also *Reuthlinger* (n 2) 101 (Needham J).

policy.[31] Campbell JA did not say that the doctrine of repugnancy does not apply to restraints imposed by condition.[32]

A similar view of the difference between the operation of the doctrine of repugnancy as between conditions in grants and those imposed by contract has been expressed in the context of leases. Millet LJ has said that a restraint on the assignment of a lease imposed as a condition in the grant of the lease as a proprietary interest is void for repugnancy. However, one imposed as a covenant in the lease agreement as a part of the bargain between the lessor and lessee — supported by the lessor's right of re-entry for breach — is effectual. A consequence of this is that, in either case, an assignment of the lease is effective to vest the interest in the assignee of lessee, although in the latter case the lessor has a right to terminate the lease.[33]

III The *Numerus Clausus* Principle and the 'Essence' of Property

One objection can be taken immediately against Williams' critique of the repugnancy doctrine. This objection is that it is an organising principle of both common law and civil law systems that various types of proprietary interests do have inherent characteristics and incidents that are essential. It is the existence of such defining characteristics that segregates proprietary interests (which are standardised and binding on third parties) from non-proprietary personal interests (which, at least where based on contract, are customisable and lack a third-party effect).[34] Further, these essential defining characteristics distinguish the various types of proprietary interests from one another. This phenomenon is known as the *numerus clausus* (or closed list) principle, under which, for a set of rights to be treated as a proprietary

[31] *Gora* (n 6) 739 [330].

[32] Although on the basis that it should not be possible 'to do indirectly what one cannot do directly', Campbell JA expressed a preference for a distinction between: (a) restraints imposed at the time of acquisition of the interest (whether by condition or contract); and (b) restraints imposed at a subsequent time (necessarily by contract), rather than a distinction between restraints imposed by condition and those imposed by contract: *Gora* (n 6) 738 [326], 739 [329]. See also Grattan (n 7) 91–2.

[33] *Hendry v Chartsearch Ltd* [1998] EWCA Civ 1276, cited in *BG Global Energy Ltd v Talisman Sinopec Energy UK Ltd* [2015] EWHC 110 (Comm), [76] (Cooke J).

[34] See, eg, Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia, 2008) 2–3; Nestor M Davidson, 'Standardization and Pluralism in Property Law' (2008) 61(6) *Vanderbilt Law Review* 1597, 1598–9, 1605; William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 174–7 [4.04]–[4.11].

interest, the set 'must fit within firmly established pigeonholes, of which the law permits only a small and finite number'.[35]

Although having its roots in Roman law, serious and systematic examination of the *numerus clausus* principle began in 19th century German jurisprudence with von Savigny. The principle is often explained in terms of two concepts: (1) a legal system has a limited number of property rights ('*Typenzwang*'); and (2) the content of each of these rights is also limited to a permissible range ('*Typenfixierung*').[36] These concepts are complementary, being related but distinct.[37]

There is a wealth of examples where the courts have considered whether a transaction created proprietary or non-proprietary (personal) rights and,

[35] Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32(2) *Monash University Law Review* 387, 387. There are other Australian works dealing with the *numerus clausus* principle: see, eg, Pamela O'Connor, 'Contractual Specification of New Property Rights in Resources: The Problem of Measurement Costs' (2013) 39(1) *Monash University Law Review* 38, 43–9; Michael Weir, 'Pushing the Envelope of Proprietary Interests: The Nadir of the *Numerus Clausus* Principle?' (2015) 39(2) *Melbourne University Law Review* 651. For a recent English consideration of the merits and limitations of the principle, see, eg, Ben McFarlane, 'The *Numerus Clausus* Principle and Covenants Relating to Land' in Susan Bright (ed), *Modern Studies in Property Law* (Hart Publishing, 2011) vol 6, 311; Peter Sparkes, 'Certainty of Property: *Numerus Clausus* or the Rule with No Name?' (2013) 20(3) *European Review of Private Law* 769. Williams acknowledged the rigidity of the list of proprietary interests: Williams, 'Part 1: Conditions in Gifts' (n 5) 348, 350.

[36] Akkermans (n 34) 6–7. See also SE Bartels and JM Milo, 'Contents of Real Rights: Personal or Proprietary. A Principled History' in Steven Bartels and Michael Milo (eds), *Contents of Real Rights* (Wolf Legal Publishers, 2004) 5, 13, 16–17.

[37] The concepts that there are a limited number of proprietary interests and that each interest has a limited content are closely related. The *numerus clausus* principle would cease to have meaning — and descend into nominalism — if a legal system allowed only a limited number of named proprietary interests but each of these permitted a wide range of disparate variations: RRM Paisley, 'Contents of the Real Right: Practical Problems and Dogmatic Rigidity' in Steven Bartels and Michael Milo (eds), *Contents of Real Rights* (Wolf Legal Publishers, 2004) 115, 133–4. For example, a legal system would not reflect the *numerus clausus* principle if it recognised a proprietary interest called the 'interest in land' that encompassed any right that related to the use of land. However, the concepts are also distinct, in that, over time, a specific named interest can undergo a variation in content, but still remain the same interest in substance: Davidson (n 34) 1612–15. See, eg, the changes to the fee simple interest worked by the statute of *Quia Emptores* (n 12) and the *Tenures Abolition Act 1660*, 12 Car 2, c 24, discussed in EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, 18th ed, 2011) 33–42. Chang and Smith note the potential difficulty in determining whether a change in legal position varies an existing interest or creates a new interest: Yun-chien Chang and Henry E Smith, 'The *Numerus Clausus* Principle, Property Customs, and the Emergence of New Property Forms' (2015) 100(6) *Iowa Law Review* 2275, 2279 n 15.

if the former, which type of proprietary interest had been created. In doing so, the courts looked for the presence or absence of the essential defining characteristics, consistent with the principles of *Typenzwang* and *Typenfixierung*, rather than how the parties themselves labelled the interest. Here are some examples. A transaction might create:

- a fee simple in a horizontal stratum of airspace (comprising the parts of a building above the ground) or an easement;[38]
- an easement or a restrictive covenant;[39]
- an easement and restrictive covenant as separate interests over the same parcel of land or the grant of a right of exclusive possession;[40]
- a lease or a non-proprietary licence;[41]
- a fixed-term or an implied periodic lease;[42]
- an easement (or profit à prendre) or a set of contractual rights relating to land;[43]
- a profit à prendre or a contract for the sale of goods;[44]

[38] *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73, 76 (Barwick CJ), 83–4 (Menzies J), 91–2 (Windeyer J). The Court found the former, because a right to exclusive 'ownership' — together with the right to demolish and rebuild — had been granted: at 91 (Windeyer J, Barwick CJ agreeing at 79).

[39] *Ryan v Sutherland* (2011) 16 BPR 30101, 30104–5 [7]–[11]. Black J preferred the construction of the interest as an easement, but held that it would also have been valid if found to be a restrictive covenant: at 30105 [11]–[12].

[40] *Tiller v Hawes* (2005) 13 BPR 24203. Smart AJ found that there was 'substance in the contention' that the restrictive covenant could not be enforced because, when regard was had to the positive rights conferred on the owner of the dominant land by the easement, the servient owner had been left with rights of ownership and occupation that were 'sterile and nominal': at 24212–13 [47]. However, the conduct of the servient owner in both the earlier and current proceedings meant that it was not possible for the servient owner to rely on the unenforceability of the covenant on that basis: at 24213 [49], 24221 [126].

[41] See, eg, *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174. It is clear that an interest described as a 'licence' will nevertheless be a lease if it confers on the grantee a right to exclusive possession: see, eg, *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513, 522, 524–5 (Jenkins LJ), 529 (Parker LJ); *Radaich v Smith* (1959) 101 CLR 209. It is also clear that a document described as a 'lease' will only be a mere licence if it does not grant a right to exclusive possession of the subject land: *Clore v Theatrical Properties Ltd* [1936] 3 All ER 483, 491–2 (Romer LJ).

[42] *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386. As the maximum duration of the agreed term was uncertain, no fixed term lease had been granted: at 390–3 (Lord Templeman).

[43] *Clos Farming Estates Pty Ltd v Easton* (2002) 11 BPR 20605.

- a bailment or a sale (with payment in kind);[45]
- a bailment or a licence;[46]
- a chattel mortgage or a pledge;[47] or
- a fixed or a floating charge.[48]

The answer to such questions is determined not by how the parties intend their transaction to be characterised, but rather by how the law characterises the rights created by the transaction. Accordingly, factors such as: whether or not exclusive possession has been granted, and if so for what period;[49] whether or not the right accommodates or benefits other land or is for the personal benefit of the grantee only; and whether or not the thing which can be removed from the grantor's land is something naturally occurring or the product of human industry,[50] will determine whether or not a particular type of proprietary interest has been created. In this sense, proprietary interests must have indispensable and defining characteristics, the premise upon which the doctrine of repugnancy is based. Williams' general criticism that this is not so is therefore blunted.

Of course, the position is more complicated in regard to ownership interests (such as the fee simple in land) as opposed to those that are limited (such as leases, easements, restrictive covenants and bailments). After all, ownership interests are not defined with the same precision as these lesser interests.[51] The lesser interests have essential characteristics that operate in a

44 *Ellison v Vukicevic* (1986) 7 NSWLR 104, 116 (Young J).

45 *Chapman Bros v Verco Bros & Co Ltd* (1933) 49 CLR 306.

46 *Walton Stores Ltd v Sydney City Council* [1968] 2 NSWR 109.

47 *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249. The transaction was held to be the former as it involved the conditional transfer of title, and not simply possession as security: at 258–9 [16]–[19], 261–2 [24]–[27] (McHugh, Gummow, Hayne and Gummow JJ).

48 *Re Cosslett (Contractors) Ltd* [1998] Ch 495, 509–11 (Millett LJ). In this case, the charge over the subject engineering machinery was held to be floating, rather than fixed, because it related to a potentially fluctuating body of assets. The right of the chargee — the owner of the land where the chargor's machinery was to be used in performance of the work contracted for — to prevent the removal of the machinery from the land was not part of the security interest granted. Rather, the right to prevent removal was to ensure the prioritisation of the work for the chargee over that of the chargor's other customers: at 510 (Millett LJ).

49 The right to exclusive possession is an indispensable requirement for the grant of a fee simple or a lease: see above nn 38, 41. However, it would be a disqualifying factor for the purported grant of an easement, profit à prendre or restrictive covenant: see above nn 40, 43. For a fixed term lease, the maximum duration must be certain from the outset: see above n 42.

50 See above nn 43–4.

51 Bartels and Milo (n 36) 19–20.

binary way: one simply needs to know whether a jural characteristic is present or absent.[52] However, although ownership is traditionally seen as the right to use, exclude and alienate,[53] it is accepted that these rights may be limited, qualified or absent in various contexts.[54] For ownership, a limitation should only be held to be repugnant if it *substantially* deprives the owner of these powers.[55]

However, demonstrating that proprietary interests *do* have inherent essential and defining attributes does not itself go to Williams' specific criticism that is the cornerstone of his rejection of the doctrine of repugnancy: it is a mere assumption that the right to transfer is an inherent aspect of various proprietary interests. It is useful to consider more closely what Williams says in this regard:

> But when judges assert that alienability is of the essence of a fee simple, all that they mean is that alienability is a quality that *in law* cannot be severed from a fee simple. The proposition is not one of empirical fact but one of law. Hence when one asserts that the power to alienate cannot be divorced from a fee simple *because* it is of the essence of a fee simple that it can be alienated, one is not really giving a reason for the rule, though appearing to do so: one is simply expressing the same rule over again by a different linguistic formula.[56]

Williams also states that he does not believe that confusion or uncertainty in the law would result from recognising the inalienable fee simple.[57]

What Williams states about the 'law' making a choice to regard alienability as a requirement central to the concept of property is true.[58] But this does not prove that the doctrine of repugnancy itself is spurious, only (at most) that a doctrine of repugnancy which asserts that inalienability is essential in all contexts is misconceived. As we have seen manifested by the *numerus clausus* principle, the law makes a choice that proprietary interests have certain defining characteristics, such that a lease must confer on the grantee a right to exclusive possession of the land, and an easement must accommodate

[52] Ibid.

[53] See, eg, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 272 (Blackburn J); Richard A Posner, *Economic Analysis of Law* (Aspen Publishers, 7th ed, 2007) 33; Lawrence C Becker, *Property Rights: Philosophic Foundations* (Routledge & Kegan Paul, 1977) 18.

[54] AM Honoré (n 10) 112–13, discussed in Becker (n 53) 19–20.

[55] See below Part IV(E).

[56] Williams, 'Part 1: Conditions in Gifts' (n 5) 347–8 (emphasis in original).

[57] Ibid 350.

[58] Ibid 345–6.

dominant land. The law of property is replete, and indeed characterised, by making such choices, none of which are empirical, but which nevertheless give the law coherence.

Further, although the vast majority of the repugnancy cases deal with restraints on alienation, other types of restrictions have been held to be repugnant to the interest granted. For example, in *Re MacKay*, a car was sold subject to various contractual conditions to be observed by the purchaser for so long as any part of the purchase price was outstanding.[59] If the purchaser breached any of these conditions, the vendor was entitled to recover ownership of the car. In addition to restraining the purchaser's rights of sale or transfer, the contract restricted the purchaser's rights to enjoy ownership of the car in significant ways. The purchaser was under various obligations: to have the car repaired by the vendor; to indemnify the vendor for the loss of, or damage to, the car; to insure the car and pay to the vendor any moneys received from the insurer; and not to alter the car or to conceal its whereabouts or to remove it from the jurisdiction. Judge White held that these restrictions upon the purchaser's right of enjoyment of the car were repugnant to the absolute title to the car which had passed to the purchaser under the sale. Accordingly, the purchaser received title to the car free from those conditions.[60]

This case demonstrates that the doctrine of repugnancy serves a more general purpose than simply striking down restraints on alienation. It can, and must, be used to test the validity of other restrictions on enjoyment that potentially detract from essential rights of ownership. And, as we have seen above, to discard the notion that individual proprietary interests have essential requirements would be to overhaul a central organising principle of our property law. Although the doctrine of repugnancy might be more easily applied to interests that do not amount to ownership, ownership interests must also be receptive to the doctrine of repugnancy if the concept of ownership is to have any substance.

IV Specific Applications of the Doctrine of Repugnancy

Thus far, we have spoken about the doctrine of repugnancy in largely general terms, namely how it aligns with the *numerus clausus* principle. We now turn to examine how the courts have applied the doctrine of repugnancy to part-

[59] *Re MacKay* (n 13).

[60] Ibid 148–51 (Judge White).

icular forms of proprietary interests. We will see that the outcome of applying the doctrine is heavily dependent upon the precise nature of the interest involved. Important for the enquiry are the distinctions that exist in English and Australian law between: (a) interests that are determinable and interests that are defeasible by condition subsequent; (b) interests that are absolute (including the fee simple estate in land) and interests that are limited in duration; and (c) interests that are vested in possession and interests that are not. After examining these distinctions, we will compare the analogous position in the United States. Finally, we will consider the difference between complete and partial restraints on alienation.

A *Determinable and Defeasible Interests*

As we will see, the distinction between determinable interests and those interests which are defeasible by condition subsequent is between interests that are limited from the outset and those that are absolute but subject to forfeiture. The distinction is an old one, and has recently been considered and accepted by the UK Supreme Court in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* ('*Belmont Park Investments*').[61] Before looking at the distinction and how it relates to the doctrine of repugnancy, it is necessary to provide a little context as to how it was addressed in *Belmont Park Investments*.

In that case, the UK Supreme Court explained the distinction in the course of its consideration of the anti-deprivation rule.[62] This is an English rule that, unlike the doctrine of repugnancy, relates to insolvency law specifically rather than property law generally.[63] The anti-deprivation rule is based upon public policy, and so operates in addition to any anti-avoidance provision in the relevant statute. It prohibits attempts to withdraw an asset of a bankrupt person or a company in liquidation or administration from the pool of

[61] *Belmont Park Investments* (n 4) 416–18 [84]–[91] (Lord Collins, Lord Walker JSC agreeing at 424–5 [121]–[122], Lords Phillips PSC, Hope DPSC, Baroness Hale and Lord Clarke JJSC agreeing at 447 [185]).

[62] Ibid 397 [2]–[5] (Lord Collins, Lord Walker JSC agreeing at 424–5 [121]–[122], Lords Phillips PSC, Hope DPSC, Baroness Hale and Lord Clarke JJSC agreeing at 447 [185]).

[63] See, eg, Sir Roy Goode, 'Perpetual Trustee and Flip Clauses in Swap Transactions' (2011) 127 (January) *Law Quarterly Review* 1, 3–4; Sarah Worthington, 'Insolvency Deprivation, Public Policy and Priority Flip Clauses' (2010) 7(1) *International Corporate Rescue* 28, 33 ('Insolvency Deprivation').

property otherwise available to creditors.[64] The Court made it clear that the distinction between determinable and defeasible interests can be relevant to the anti-deprivation rule, in the sense that a determinable interest may not fall foul of the rule, although a defeasible interest might.[65] However, for six of the seven Justices, the distinction was not directly relevant to the decision in the case.[66] The decision upheld the validity of the reversal or 'flip' of priority of the parties' respective interests in collateral on the insolvency of the party prima facie having priority. The majority did not reason that the 'flip' constituted a determinable rather than a defeasible interest, with the grantee's insolvency legitimately marking the duration of the interest as opposed to constituting an illegitimate trigger for its forfeiture/divestment.[67] Instead, the flip provision was upheld as it was a part of a complex commercial transaction entered into in good faith, without the intent to circumvent the anti-deprivation rule and applied to property purchased with the funds provided by the party benefiting from the flip.[68] By contrast, it appears that, in the UK Supreme Court, Lord Mance JSC,[69] and at trial, Sir Andrew Morritt C,[70] as a part of their reasoning,

[64] *Belmont Park Investments* (n 4) 397 [2]–[5] (Lord Collins, Lord Walker JSC agreeing at 424–5 [121]–[122], Lords Phillips PSC, Hope DPSC, Baroness Hale and Lord Clarke JJSC agreeing at 447 [185]), 433–4 [148]–[150] (Lord Mance JSC). This principle may not apply in Australia, where the matter is to be determined by construing the effect of the relevant legislation: *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 180–5 [72]–[93] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See generally Nishad Kulkarni, 'The Anti-Deprivation Rule in Australia' (2014) 88(10) *Australian Law Journal* 722.

[65] *Belmont Park Investments* (n 4) 416–18 [84]–[91] (Lord Collins, Lord Walker JSC agreeing at 424–5 [121]–[122], Lords Phillips PSC, Hope DPSC, Baroness Hale and Lord Clarke JJSC agreeing at 447 [185]).

[66] Only Lord Collins expressly discussed this distinction when deciding the case: ibid.

[67] Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule' (2012) 75(1) *Modern Law Review* 112 ('Good Faith'). Worthington characterised this as 'sidestepp[ing]' the issue of what type of limitation (or flaw) may be imposed upon an interest without offending the anti-deprivation rule: at 115, 118.

[68] *Belmont Park Investments* (n 4) 421–2 [105]–[109] (Lord Collins, Lord Walker JSC agreeing at 428 [133], Lords Phillips PSC, Hope DPSC, Baroness Hale and Lord Clarke JJSC agreeing at 447 [185]).

[69] His Lordship stated:

> I add that, even if it were right to regard LBSF as having enjoyed property in the form of swap counterparty priority 'unless' an event of default occurred with LBSF being the defaulting party, the case would fall within the category of interests limited to last until a certain event, rather than that of interests forfeitable upon a certain event.

Ibid 442 [168]. See also Sir Roy Goode, 'Flip Clauses: The End of the Affair?' (2012) 128 (April) *Law Quarterly Review* 171, 173; Worthington, 'Good Faith' (n 67) 119.

construed the flip clause as a determinable limitation rather than a defeasible interest. This meant that it was not invalidated by the anti-deprivation principle, because such an interest terminated naturally, and was not forfeited by the insolvency. The Court of Appeal did not refer to the distinction between determinable and defeasible interests expressly, although Lord Neuberger MR did say that the determination of a limited interest, such as a lease or licence or, in his view, charge, was a basis for holding that the anti-deprivation rule did not apply.[71]

Turning now to the precise nature of determinable and defeasible interests, Lord Collins described the distinction this way:

> The distinction for the purposes of insolvency law is between an interest determinable on bankruptcy/liquidation and an absolute interest which is made defeasible on bankruptcy/liquidation by a condition subsequent. A determinable interest is an interest the quantum of which is limited by the stipulated event, so that the occurrence of that event marks the end of the duration of the interest, whereas a defeasible interest is one which is granted outright and then forfeited.[72]

A determinable limitation, such as gift of property to X 'until X becomes bankrupt', is valid, because X's bankruptcy marks the natural end of X's interest. X's interest is not cut short by her or his bankruptcy, so the delimiting condition does not infringe the concept of repugnancy. X has no interest in the property on becoming bankrupt, so it will not be available to her or his creditors.

By contrast, a gift defeasible by condition subsequent, such as a gift of property to Y subject to a proviso for forfeiture and recovery by the donor, or a gift over to Z, 'if Y becomes bankrupt', does infringe the doctrine of repugnancy. The gift to Y is an absolute one but is cut short before reaching its otherwise natural (and unlimited) duration by Y becoming bankrupt. The effect of this is that the condition of defeasance is rendered void and Y

[70] *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWHC 1912 (Ch), [38], [43]–[46]. Morritt C was agreeing with the distinction for the purpose of the anti-deprivation rule made by Neuberger J in *Money Markets International Stockbrokers Ltd (in liq) v London Stock Exchange Ltd* [2002] 1 WLR 1150, 1182 [118] between determinable and defeasible interests (that is, interests 'coming to an end' on the transferee's insolvency and those subject to a condition that the asset will revest in the transferor on the transferee's insolvency); see also at 1163–4 [47]–[50], 1174 [89] (Neuberger J).

[71] *Perpetual Trustees Co Ltd v BNY Corporate Trustee Services Ltd* [2010] Ch 347, 378 [64], 383 [83]. See generally Goode (n 63) 10.

[72] *Belmont Park Investments* (n 4) 417 [87].

takes the gift absolutely. So, on Y becoming bankrupt, the property is available to Y's creditors.

The same outcomes apply where the relevant condition is attempted alienation rather than bankruptcy. In the case of a gift 'until alienation', the (determinable) interest will validly be brought to an end by attempted alienation.[73] But, where the interest gifted is subject to loss or forfeiture 'if' the donee attempts to alienate, then the condition is repugnant to the interest granted and the gift takes effect free from the offending condition.[74]

The distinction made in the law between interests which are determinable and those which are defeasible has been criticised on the basis that it is merely verbal, involving 'wafer-thin differences in language',[75] and yet has profound legal consequences. Williams himself levels this charge.[76] Yet, the UK Supreme Court has said that the distinction is too firmly entrenched to be removed other than by legislation.[77] Sitting as a judge in the Full Court of the Federal Court of Australia, Gummow J in *Caboche v Ramsay* ('*Caboche*'), held, in the context of restraints on alienation:

> Criticism has been levelled at this doctrine on the grounds that distinctions such as this are purely semantic … However, the two cases described above are logically distinct and the difference between them is well-settled and fundamental. In the [case of a gift defeasible by condition subsequent], the

[73] *Caboche* (n 8) 227 (Gummow J), quoting WN Harrison, 'Hall v Busst' (1961) 35(1) *Australian Law Journal* 3, 5.

[74] By and large, these cases deal with what the court has construed as the gift of an interest defeasible by condition subsequent: see, eg, *Hood* (n 14); *Hunt-Foulston* (n 14) 287 (Hall V-C); *Re Machu* (n 14) 842–3 (Chitty J); *Metcalfe* (n 14) 639 (Kekewich J); *Re Smith* (n 14) 373–4 (Sargant J); *Re Ashton* (n 14) 485–6 (Sargant J); *Re Brown* (n 14) 43 (Harman J). By contrast, and consistent with the distinction referred to above, a gift of annuities construed as a determinable limitation has been held to be valid: *Re Dempster; Borthwick v Lovell* [1915] 1 Ch 795, 799–801 (Sargant J) ('*Re Dempster*'). It is clear that the distinction is recognised in Australian law: see, eg, *Oliver* (n 9) 24 (Dixon CJ); *Re Mavromates* (n 15) 615 (Herring CJ); *Caboche* (n 8) 227, 230 (Gummow J); *Zapletal v Wright* [1957] Tas SR 211.

[75] Worthington, 'Insolvency Deprivation' (n 63) 36.

[76] Williams, 'Part 1: Conditions in Gifts' (n 5) 352.

[77] *Belmont Park Investments* (n 4) 417–18 [88] (Lord Collins), 439 [163] (Lord Mance JSC). The Victorian Law Reform Commission has recommended that the distinction be abolished by legislation effecting the prospective conversion of determinable fees simple into conditional (that is, defeasible) fees simple: Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Final Report No 20, 29 October 2010) 70–3 [5.42]–[5.63]. The primary basis of the recommendation appears to be the belief that it would better reflect the intention of the grantor of an interest subject to a void determining event for the grantee to take the interest absolutely and free from the restriction (as it would with a conditional grant) rather than take nothing at all: at 71 [5.53]. However, this should be regarded as speculative.

> donor is attempting to take back something which he has given absolutely, something which is beyond his power. In the [case of a determinable limitation], the donor is merely defining the nature of that being given. It is necessary in each case to construe the instrument creating the proprietary interest in question to determine into which category the interest falls.[78]

However, the criticism of the distinction reveals that it cannot be founded on public policy, as the functional effect of the restraint would be the same: the loss of the interest on attempted alienation or on bankruptcy. The justification must be based upon the consistency or inconsistency of the condition and the essential nature of the interest to which it is attached. Where the interest is absolute, the condition is inconsistent. Where the interest is limited to end on the happening of the event, there is no inconsistency. Therefore, the doctrine of repugnancy, and not public policy, is the mechanism being employed. This was explicitly recognised by Lee J in *Caboche*:

> I am unable to agree that some limited doctrine of public policy has been developed and defined in law to prevent the operation of the ordinary rule of repugnancy in respect of provisions of a superannuation deed which provide for the forfeiture of entitlements to property that have vested under such a deed.[79]

Unlike *Belmont Park Investments*, the distinction between determinable and defeasible interests was vital to the outcome in *Caboche*. In *Caboche*, a provision of a superannuation trust, of which Mr Alan Bond was the sole member, purported to forfeit to the fund any benefit to which he was entitled in the event of him becoming bankrupt. The Court found that the clause purported to work a forfeiture of an absolute interest. That is, the clause constituted the grant of an interest that was defeasible by condition subsequent on bankruptcy and was therefore invalid. Gummow J explained his construction of the relevant clause this way:

> The first point to note is that those drafting the instrument have not taken what would have been a course clearly indicated by authority and defined the interest taken as determinable in nature, by stating that it subsisted 'until' bankruptcy or other designated event. Rather, the terms used are indicative of termination and forfeiture.

[78] *Caboche* (n 8) 227. See also *Battenberg v Union Club* (2005) 215 ALR 696, 710 [57] (Campbell J).

[79] *Caboche* (n 8) 249. See also the judgment of Hill J at first instance: *Re Bond; Ex parte Ramsay* (1992) 25 ATR 61, 77; Worthington, 'Insolvency Deprivation' (n 63) 36.

> Clause 16(3) is the only provision which refers in terms to bankruptcy. The subclause applies to a person 'entitled to a benefit'. … Properly construed, this subclause does not attempt to define the extent of an interest created by the settlor. The subclause operates on an interest already defined (a person entitled to a benefit) and provides for the forfeiture of that interest if the person becomes bankrupt. The use of the word 'forfeited' also suggests that this is an attempt to terminate an absolute interest, as does the use of the word 'if' at the commencement of the subclause.[80]

Accordingly, Mr Bond received an absolute interest freed from the effect of the repugnant clause. When he became bankrupt, his superannuation benefit was not forfeited to the fund but was available to his creditors.

The same issue, but with a different outcome, arose in *Re Scientific Investment Pension Plan Trusts*.[81] This case involved a pension scheme paying instalments of an annuity to its members who had reached retirement age, with a right to commute part for a lump sum. Clause 24 of the deed provided that, in certain circumstances, a member's right to the benefit would be forfeited to the fund, in which case the trustees would have the discretion to pay a benefit to the member's dependants in the case of hardship. The forfeiture provision was to operate if an act or event occurred which would result in the benefit, 'if belonging absolutely to that member', becoming vested in a third party.[82] A benefit payable under the scheme would vest in a third party if the member purported to alienate the benefit or became bankrupt. If the benefit had been vested in the member absolutely, this forfeiture would infringe the repugnancy doctrine.[83]

However, the inclusion in the clause of the phrase, 'if belonging absolutely to that member', led Rattee J to construe the entitlement of the member to a benefit not as an absolute one, but rather one which was determinable on alienation or bankruptcy. His Honour construed those words as requiring the reader to hypothesise that a benefit *did* belong absolutely to a member, which meant that, by logical necessity, the benefit *did not* in fact belong absolutely to a member. This meant that the clause did not work a defeasance of a benefit that was absolutely vested, but rather rendered the benefit determinable in certain circumstances. This was not something that infringed the doctrine of repugnancy. As the relevant member had become bankrupt, and as cl 24 was

[80] *Caboche* (n 8) 230–1 (Gummow J); see also at 218 (Ryan J), 249 (Lee J).

[81] [1999] Ch 53 ('*Re Scientific Investment Pension Plan Trusts*').

[82] Ibid 58 (Rattee J).

[83] Ibid 59 (Rattee J).

valid in its entirety, his right to the benefit determined. His benefit vested in the fund and not in his trustee in bankruptcy.[84]

B *Absolute and Limited Interests*

We now briefly outline how the distinction between determinable interests (as in *Re Scientific Investment Pension Plan Trusts*) and interests defeasible by condition subsequent (as in *Caboche*) intersects with the distinction between interests that are absolute in quantum (such as the fee simple in land or ownership of personal property) and interests that are limited in duration (such as a life estate or a lease).[85]

We have observed the statements of Lord Collins and Gummow J to the effect that property may be validly given by way of determinable limitation so that the grantee's interest is brought to an end by their bankruptcy (or purported alienation).[86] There is nothing to suggest that his Lordship and his Honour thought that grants of a fee simple or of ownership of personal property were not within this principle. However, we must note that doubts have been expressed as to whether such interests can be granted by way of a determinable interest, particularly where there is a gift over to a third party on the occurrence of the determining event.[87] It is clear, however,

[84] Ibid 59, 62–3.

[85] Prior to the decision of the UK Supreme Court in *Belmont Park Investments* (n 4), Professor Worthington argued that, at least for the purposes of the anti-deprivation rule, the real distinction is instead between interests which are necessarily time-limited and those which are not: Sarah Worthington, 'Making Sense of Arguments about the Anti-Deprivation Rule' (2011) 8(1) *International Corporate Rescue* 26, 35. Alternatively, the distinction may be between interests in income as opposed to capital: Worthington, 'Insolvency Deprivation' (n 63) 37. In *Belmont Park Investments* (n 4) 440 [164], Lord Mance JSC stated that he did not accept the relevance of this distinction. Post *Belmont Park Investments*, Worthington has argued that the good faith escape from the anti-deprivation rule advanced by the majority will ultimately be unsustainable, and that more work will need to be done in defining what flaws will mark the distinction between permissible determination of the interest and its impermissible forfeiture: see, eg, Worthington, 'Good Faith' (n 67) 121; Sarah Worthington, 'The Scope and Application of the Anti-Deprivation Rule' in Dennis Faber and Niels Vermunt (eds), *Bank Failure: Lessons from Lehman Brothers* (Oxford University Press, 2017) 257.

[86] See above nn 72, 78 and accompanying text.

[87] See, eg, *Re Machu* (n 14) 842 (Chitty J); *Re Dugdale* (n 14) 181 (Kay J); *Caboche* (n 8) 227–8 (Gummow J), quoting Harrison (n 73) 4–5; Edward Jenks, 'An Inalienable Fee Simple?' (1917) 33 (January) *Law Quarterly Review* 11, 13–14; Sweet (n 20), who thought that it could not, at least where there was a purported gift over to a third party: at 238–40. The authority of *Re Leach; Leach v Leach* [1912] 2 Ch 422, 427, 428–9 (Joyce J), which upheld a determinable limitation with a gift over on purported alienation or bankruptcy, has been questioned

that the grant of a fee simple or absolute interest defeasible on alienation or bankruptcy infringes the doctrine of repugnancy and will take effect as a fee simple absolute.[88]

The cases in which determinable interests have been upheld have largely involved annuities (ie an interest lasting for the period of the donee's life).[89] Also of note is that, where a life interest is subject to termination with a gift over, the courts have treated the circumstances in which the life estate comes to an end as the equivalent of a determination, rather than defeasance by condition subsequent, notwithstanding the language used. This means that the grant is valid, so if alienation or bankruptcy occurs, the life interest ends and the gift over is effective. Where, however, there is no gift over, and the entitlement to the property would again vest in the grantor, the language used is important. A determinable life estate is valid, but where the life estate would be defeasible by condition subsequent and there is no gift over, the repugnancy doctrine is offended and the life estate becomes absolute.[90]

Where the interest is inherently limited in duration to a fixed period, such as a lease of land or a licence of intellectual property, it can, under the general law, be made defeasible on bankruptcy.[91] It is not necessary that words indicating determination be used.[92] Leases can be made forfeitable on alienation.[93]

or criticised: see, eg, Harrison (n 73) 5; Jenks (n 87) 14; Sweet (n 20) 421. See also Williams, 'Part 1: Conditions in Gifts' (n 5) 352.

88 *Re Machu* (n 14) 844–5 (Chitty J).

89 *Re Dempster* (n 74) 799, 801 (Sargant J); *Re Scientific Investment Pension Plan Trusts* (n 81) 62 (Rattee J).

90 *Metcalfe* (n 14) 639 (Kekewich J). See also Harrison (n 73) 4–5.

91 Cf *Bankruptcy Act 1966* (Cth) s 301(1)(a), which provides that a provision terminating or allowing the termination of a lease because of the lessee's bankruptcy is void; *Corporations Act 2001* (Cth) s 440B ('*Corporations Act*'), which imposes restrictions on the rights of lessors in relation to property leased by a company where the company is in administration. From 1 July 2018, significant amendments took effect to the *Corporations Act*, relating to the stays imposed on the enforcement generally of termination rights triggered by certain insolvency effects: see, eg, at s 415D, as inserted by *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth) sch 1 pt 2.

92 *Belmont Park Investments* (n 4) 417 [85]–[86] (Lord Collins), 425 [123] (Lord Walker JSC), 437 [158] (Lord Mance JSC).

93 See *Linden Gardens Trust* (n 13) 107 (Lord Browne-Wilkinson).

C *Vested and Contingent Interests*

Finally, we should note that where the interest subject to defeasance by condition subsequent is contingent or not otherwise vested in possession, the forfeiture does not infringe the doctrine of repugnancy. In this instance, the interest is validly defeasible by alienation or bankruptcy.[94] But where the forfeiture clause is wide enough to catch interests when vested in possession, the clause infringes the repugnancy doctrine, even if the relevant interest has not yet fallen into possession.[95]

D *Outcomes and Lessons from the United States*

What this survey indicates is that the law has developed a detailed set of principles governing restrictions on alienation that apply differently to distinct types of interests. This is consistent with the notion that discrete proprietary interests have individual defining characteristics. That the law regards alienability as inherent in some interests and not in others is something that the doctrine of repugnancy takes seriously. The doctrine of repugnancy cannot be accused of taking an overly broad brush to the issue.

The question then arises as to how it should be decided which interests attract a guarantee of alienability and which do not. Here, assistance can be found in the American Law Institute's *Restatement of Property* ('*First Restatement*'),[96] which uses the concept of de facto marketability in this context. Interests for which there is a market should be prima facie alienable and may only be subject to a restraint when there is a justifiable countervailing policy for doing so.[97] The position taken by the *First Restatement* on restraints on alienation is as follows.

[94] *Re Forder; Forder v Forder* [1927] Ch 291, 311 (Sargant LJ), 317 (Lawrence LJ), where the clause was construed to apply only to bankruptcies occurring prior to the gift falling into possession.

[95] *Re Smith* (n 14) 373–4 (Sargant J); *Re Williams* (n 15) 622 (Schutt J); *Re Scientific Investment Pension Plan Trusts* (n 81) 61 (Rattee J).

[96] *First Restatement* (n 3).

[97] See below n 108 and accompanying text. In its subsequent work on restraints on alienation, the American Law Institute moved away from heavy reliance upon the formalistic categories of interests approach it took in the *First Restatement* (n 3): *Second Restatement* (n 3) §§ 3.1–3.3, 4.1–4.3; *Third Restatement* (n 3) § 3.4. The later restatements progressively took a more unified approach based upon whether the restraint is reasonable. However, as with the *First Restatement*, whether or not the relevant interest would be otherwise marketable is an important factor in assessing reasonableness: see, eg, *Second Restatement* (n 3) § 4.2; see especially at cmts (c), (i), (u); *Third Restatement* (n 3) § 3.4 (including Reporter's Note on

The *First Restatement* categorises a restraint by the consequence that purportedly attaches to an attempted alienation of the interest in breach of the restraint. If the purported alienation is simply rendered void, the clause is a *disabling restraint*.[98] If the attempted alienation is effective but gives rise to contractual liability, the clause is a *promissory restraint*.[99] If the purported alienation leads to the termination of the entire interest, the clause is a *forfeiture restraint*,[100] which is the type of restraint considered in this article. Characterising the restraint in this manner is important, because disabling restraints, except where imposed on an equitable interest under a trust, are void.[101] By contrast, promissory and forfeiture restraints may in some circumstances be valid. The circumstances in which these latter two forms of restraint may be upheld vary, depending upon the type of interest burdened by the restraint. Where the interest is a legal fee simple vested in possession,[102] the restraint will be valid if it is qualified so as to permit alienation to some persons (as opposed to qualifications based upon time or types of alienation),[103] and the restraint is reasonable in the circumstances.[104] These factors look at the severity of the effect of the restraint and the purpose for which it is implemented. This incorporates policy analysis into the enquiry. The same principles apply where the relevant interest is a defeasible fee simple

cmt (c), which refers to the factors used to assess reasonableness under the *First Restatement* and *Second Restatement*).

98 *First Restatement* (n 3) § 404(2).

99 Ibid § 404(3).

100 Ibid § 404(4). The *Second Restatement* (n 3) §§ 3.1–3.3 retained the concepts of disabling, promissory and forfeiture restraints, while the *Third Restatement* (n 3) did not: at § 3.4.

101 *First Restatement* (n 3) § 405.

102 Ibid § 406. The principles which follow also apply to restraints of a fee simple interest in remainder or reversion and to contingent fees simple where the restraint may endure once the interest has fallen into possession: at § 411.

103 Ibid § 406(b). Additionally, a forfeiture restraint must satisfy the requirements of the rule against perpetuities: at § 406(d).

104 Ibid § 406(c). Factors that tend to support the reasonableness of the restraint are: (1) 'the one imposing the restraint has some interest in land which he [or she] is seeking to protect'; (2) 'the restraint is limited in duration'; (3) 'the enforcement of the restraint accomplishes a worthwhile purpose'; (4) 'the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained'; (5) 'the number of persons to whom alienation is prohibited is small'; and (6) 'the one upon whom the restraint is imposed is a charity': at § 406 cmt (i). Factors that tend against the reasonableness of the restraint are: (1) 'the restraint is capricious'; (2) 'the restraint is imposed for spite or malice'; (3) 'the one imposing the restraint has no interest in land that is benefitted by the enforcement of the restraint'; (4) 'the restraint is unlimited in duration'; and (5) 'the number of persons to whom alienation is prohibited is large': at § 406 cmt (i).

in possession, such as a fee simple that is subject to a determination or defeasance by condition subsequent.[105] Some such interests are as marketable as fees simple absolute and, for those that are not, their non-marketability can be taken into account when assessing the reasonableness of the restraint.[106] By contrast, where the burdened interest is a life interest vested in possession, the promissory or forfeiture restraint is valid.[107] This is because their lack of permanence and uncertainty in the duration deprives life estates of marketability. The *First Restatement* explains its approach as follows:

> The extent to which a restraint on alienation of an interest in land may cause socially undesirable results is directly dependent on the nature of the estate restrained and the likelihood that such an estate can, as a practical matter, be alienated apart from any restraint on alienation.[108]

Where the restrained interest is a lease, the restraint is valid if, and only if, it was created as part of a business transaction, or the lease is terminable at the end of any specified life, or if the restraint would have been valid had the restrained interest been a fee simple.[109] With regard to commercial leases, which impose significant obligations on the tenant, it is in the landlord's interest to control the identity of the party who is to perform those obligations. This is a justification for the existence of a restraint that is important enough to outweigh the undesirable effect of restricting alienation. Further, as landlords grant commercial leases in order to maximise the economic use of their land, it is in their interest to exercise the powers given to them under any relevant restraint in a way that will achieve that purpose. Accordingly, the risk of the adverse effects that can flow from restraining alienation in other contexts is not as high for commercial leases.[110]

The *First Restatement* and the Anglo-Australian decisions on repugnancy come to different conclusions as to which interests should attract protection for their otherwise inherent alienability. For example, different approaches are taken regarding life estates, where the Anglo-Australian position distinguishes between determinable and defeasible variations, but the *First*

[105] Ibid § 407; see also at § 407 cmt (b).

[106] Ibid § 407 cmt (b). Further, the limitation or condition may lapse, with the estate becoming a fee simple absolute, thereby attracting the same reasons for protecting its alienability.

[107] Ibid § 409.

[108] Ibid § 409 cmt (a).

[109] Ibid § 410.

[110] Ibid § 410 cmt (a).

Restatement does not.[111] However, the rationale of protecting the alienability of interests for which there is a market is a powerful policy reason that can be effected by a considered application of the repugnancy doctrine. Such an approach holds that some proprietary interests are inherently alienable while others are not. Williams is thus correct in his assumption that the doctrine of repugnancy is somehow related to the policy of alienability.[112]

E *Restraints That Are Partial Only*

There is a substantial criticism that can be levelled against the doctrine of repugnancy that we have not yet addressed. This is the charge that the doctrine cannot cater for the existence of partial, as opposed to total, restraints on alienation. This concern was voiced in England by Pearson J in *Re Rosher; Rosher v Rosher* ('*Re Rosher*').[113] His Honour thought that a condition permitting alienation to everyone except a single, named person was just as much repugnant to a fee simple interest as a total prohibition on alienation, and thus should be void. Although his Honour recognised that the law had, on occasions, allowed partial restraints on alienation, Pearson J lamented the uncertainty this had created because of the difficulty in determining whether a partial restraint was valid or void.[114]

The leading case in which a partial restraint on alienation imposed in a grant was upheld is *Re Macleay*, where Jessel MR stated that the test for invalidity was 'whether the condition takes away the whole power of alienation substantially'.[115] Jessel MR upheld the restraint before him because it left the owner's power of alienation substantially intact. The condition of the devise prohibited the owner from selling certain land 'out of the family'.[116] Thus, the restraint applied to sales only, and did not prohibit leasing, mortgaging or settling the land. Further, it allowed alienation to a class —

[111] See above nn 90, 108–9 and accompanying text.

[112] Williams, 'Part 1: Conditions in Gifts' (n 5) 345–6, 348–9.

[113] *Re Rosher* (n 9). See also Manning (n 1), who argues that, logically, the doctrine of repugnancy must either allow or disallow all partial restraints on alienation: at 405–6; *RH Macy & Co* (n 16), where counsel argued that, under the repugnancy doctrine, all restraints are held to be void, whereas under the 'modern' rule, reasonable restraints serving a social or economic need are valid: 466 (Rodowsky J).

[114] *Re Rosher* (n 9) 813–14, 819.

[115] (1875) LR 20 Eq 186, 189.

[116] Ibid 187 (Jessel MR).

family members — that was probably large and certainly not small. Accordingly, the restraint was limited and therefore valid.[117]

Re Macleay was denounced by Pearson J in *Re Rosher*,[118] and has been distinguished in subsequent cases.[119] In several cases where the restraint permitted a sale to one of the devisee's siblings only, rather than to family members, the restraint was held to be invalid.[120] One reason given was that a person's siblings constituted a small and diminishing class, whereas one's family members constituted a class likely to increase.[121]

Arguably, the decision in *Re Macleay* was incorrect, because the restrictive nature of the class to which alienation was permitted meant that the devisee did not in substance retain a true right of alienation. However, the principle that a partial restraint on alienation is not necessarily repugnant to the interest granted is a cogent one. If alienability is an inherent characteristic of a proprietary interest and the owner retains a real but not unlimited right of transfer, then there is no logical contradiction between the existence of the restraint and the grant of the interest. Of course, the recognition of some partial restraints as valid does increase the potential for uncertainty into this area of the law, and fine judgements will need to be made as to whether a restraint leaves the grantee with a real power of alienation or not. But this difficulty is no reason for jettisoning the doctrine of repugnancy. This is because the application of a test for the legitimacy of a restraint, based not on logical inconsistency but on reasonableness and policy, can also lead to significant difficulties. An analysis of two American cases will demonstrate this.

V Reasonableness and Policy in Assessing Restraints

The first problematic case to be considered is *Alby v Banc One Financial* ('*Alby*').[122] In this case, the Supreme Court of Washington, by a 5:4 majority, upheld a restraint imposed as a determining condition in a conveyance of part of the family farm by Mrs and Mr Alby to Mrs and Mr Brashler. Mrs Brashler was Mrs Alby's niece. The land had a market value of $100,000 but was sold

[117] Ibid 189–90 (Jessel MR).

[118] *Re Rosher* (n 9) 816.

[119] See, eg, *Grayson* (n 15) 160–1 (McCawley J); *Re Mavromates* (n 15) 614–15 (Herring CJ), quoting *Re Brown* (n 14) 49–50 (Harman J).

[120] See, eg, *Grayson* (n 15) 163–4 (McCawley CJ); *Re Mavromates* (n 15) 615–16 (Herring CJ).

[121] *Re Mavromates* (n 15) 615 (Herring CJ).

[122] 128 P 3d 81 (Wash, 2006) ('*Alby*').

for $15,000. However, the contract of sale and the deed provided that the land would automatically revert to the Albys if the land were subdivided, mortgaged or otherwise encumbered while either of the Albys were alive. The purpose of this condition was to ensure that the land was kept in the family during the lifetime of the Albys. Despite the restriction, the Brashlers encumbered the land twice to secure the repayment of two loans and, when they defaulted on their repayments under the first loan, the lender exercised its power of sale. The Albys then sought a declaration that the land had automatically reverted to them when the land was encumbered. The party who purchased under the exercise of power of sale argued that the determining condition was void, as it was an unreasonable restraint on alienation, and therefore contrary to public policy.

The Court accepted that the condition was a restraint on alienation.[123] Not only did the determining condition prohibit the owner from dealing with the land by way of mortgage or encumbrance, it also limited the owner's ability to market the land for sale because a prospective purchaser would be unable to finance its acquisition by using the land as security.[124] All but one of the judges agreed that the restraint would be invalid if it were unreasonable, but valid if it were reasonable and justified by the legitimate interests of the parties.[125] In determining whether the restraint was reasonable, the Court had to balance the benefits and costs of enforcing the restraint as contemplated by § 3.4 of the American Law Institute's *Restatement (Third) of Property: Servitudes* ('*Third Restatement*').[126]

The majority concluded that the restraint was reasonable and in the legitimate interests of the parties.[127] The purpose of keeping the land in the ownership of the family for the lives of the Albys did contradict the goal of keeping property freely alienable, but the former should not always be subordinated to the latter. The land was long-held in the Alby family and had been sold at a substantially reduced price. The restraint was limited in both its

[123] Ibid 83 [8] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing).

[124] Ibid. The dissenting judges saw the restraint not simply as limiting the marketability of the land, but as 'effectively render[ing] the property unalienable': at 85 [18] (Alexander CJ, Madsen and Bridge JJ agreeing). Chambers J, in dissent, saw the restraint as 'seriously discouraging disposition of the property': at 86 [23].

[125] Ibid 82 [1], 83–4 [9] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing), 84 [13] (Alexander CJ, Madsen and Bridge JJ agreeing), 86 [23] (Chambers J).

[126] *Third Restatement* (n 3), discussed in ibid 83–4 [9]–[12] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing), 84–5 [14] (Alexander CJ, Madsen and Bridge JJ agreeing). See above n 97.

[127] *Alby* (n 122) 82 [1] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing).

duration and the types of dealing prohibited. Prospective purchasers of the land were put on notice of the restraint because it was recorded in the registered deed of conveyance. These factors meant that the utility of enforcing the limited restraint and thus keeping the property in the family outweighed the potentially injurious effects of the prohibition upon mortgaging or encumbering it and thus limiting its marketability.[128] The majority also largely repeated these factors in concluding that enforcing the restraint would be in the interests of the parties.[129] In this regard, the majority emphasised that, because of the restraint, the Brashlers had acquired every aspect of ownership of the land, other than the ability to mortgage or encumber it, at a substantially reduced price.[130] Finally, the majority advised caution in employing the common law principles antagonistic to restraints to strike down contracts freely entered into by the parties.[131]

Alexander CJ, in dissent, had a different construction of the facts in two respects. First, his Honour did not see the incorporation of the restraint and the reduced purchase price as causally related so as to make the imposition of the restraint freely bargained for.[132] Second, Alexander CJ saw the restraint as not simply limiting the marketability of the land during the lives of the Albys, but as leaving the owner during that period without any meaningful power of alienation at all. His Honour saw the Brashlers as, in effect, 'relegated to the status of leaseholders of the property, with the right of possession only' for that period.[133] However, the starkest distinction between the judgments of the Chief Justice and the majority was in the relative weight they attributed to the goal of free alienability of property and the desire to keep property in the family. Alexander CJ explained that a major reason for the existence of the common law doctrine against restraints on alienation was to prevent property being retained within the family and away from the distributive power of the market.[134] The emotional attachment of the Albys to the property had to give way to the economic needs of society, which had a stronger interest in protecting the operation of the market than in fostering dynasties.

[128] Ibid 84 [10] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing).

[129] Ibid 84 [11] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing).

[130] Ibid.

[131] Ibid 84 [12] (Johnson J, Owens, Sanders, Fairhurst and JM Johnson JJ agreeing).

[132] Ibid 85 [17].

[133] Ibid 85 [18].

[134] Ibid 86 [19].

The outcome of the calculus of benefits and costs showed the restraint to be unreasonable.[135]

Chambers J also dissented. His Honour noted that the restraint prohibited dealing with the property in a very common way and that it also seriously discouraged the sale of the property.[136] Chambers J then rejected the view expressed by all other members of the Court that the validity of the restraint should be based upon a test of reasonableness predicated on a balancing of the interests served by the restraint against the norm of free alienability.[137] Such an approach was antithetical to the need for the law to be clear and predictable. Having to send every contested restraint to court to determine whether it meets a standard of reasonableness in this manner would produce neither clarity nor predictability. These ends could only be achieved by holding that such a restraint is unreasonable per se, or unreasonable as a matter of law. In this way, the balancing task could be avoided altogether.[138] Another way of expressing this would be to say that it could be determined from the outset that the restraint was repugnant to the Brashlers' ownership.

In *Alby*, the interest that justified the finding that the restraint was reasonable was extremely tenuous. It was clearly not financial. Nor was it related to the quality of an owner's enjoyment of their occupation of the land, by avoiding being saddled with an unwanted co-owner or preventing an unwanted use of other nearby land. In this way, the case represents a high-water mark in the type of interest that can be used to uphold restraints on alienation. If the reasoning and outcome are accepted, one must question whether it would be better to jettison the principle that restraints on alienation should be held invalid unless justified. Such a jettisoning would overcome Chambers J's objection to the uncertainty that can arise because of the need to balance benefits and costs. Restraints on alienation imposed by transfers could be held to be per se valid, or valid as a matter of law. The certainty desired by his Honour would be achieved, but in the form of the diametrically opposed substantive result.

This case shows that the task of balancing the costs and benefits of enforcing a restraint can be a fraught one. It also provides support for the view that the best way to balance the ideals of party autonomy (in upholding the restraint) and free alienability (invalidating the restraint) in a way that

[135] Ibid 86 [19]–[20] (Madsen and Bridge JJ agreeing).

[136] Ibid 86 [23].

[137] Ibid 86–7 [24].

[138] Ibid 86–7 [23]–[24], 87 [28] (Chambers J).

would achieve a minimum level of certainty may be to adopt a hard and fast rule. Contrary to the views of the majority in *Alby*, and instead adopting those of Chambers J, such a rule should be one of repugnancy, but one that strikes down any restriction that imposed a substantial restriction on the right to alienate.

The other American case to be considered is *Carma Developers (California) Inc v Marathon Development California Inc* ('*Carma*').[139] This case involved a dispute between a landlord and tenant under a commercial lease. The lease of office premises provided that the landlord was entitled to terminate the lease if the tenant sought the landlord's permission to assign the lease or to sublet any part of the premises. The purpose of the clause was to allow the landlord to 'recapture' the increased rental value of the premises if the tenant sought to deal with the lease. When the tenant relocated its operations interstate, it negotiated to sublet the premises to a third party for a rent greater than that payable by the tenant under its lease. The landlord terminated the lease in accordance with the recapture clause, and the tenant challenged the validity of the termination, arguing that the recapture clause constituted an unreasonable restraint on alienation. The Supreme Court of California upheld the validity of the clause on the basis that, as a practical matter, it did not in fact constitute a restraint on alienation.[140]

First, the Court concluded that where the sole motivation for the lessee subleasing the premises was to realise the appreciation in its rental value, this would be offset by the lessee having to find substitute premises in the same rising market. Any potential gain would be neutralised.[141] Second, if the lessee intended to cease or transfer its operations altogether, the clause would only operate as a restraint where the profit that would be made through subletting would be greater than the benefit of ceasing or transferring its operations.[142] Third, if the tenant wished to discontinue or transfer part of its operations only, then a further restraining factor is relevant: the risk that the landlord would terminate the lease in its entirety, even though the tenant was only seeking to sublet part of the lease.[143] The magnitude of loss to the tenant were this risk to materialise would depend upon the proportion of the premises the tenant wished to retain, the value of any tenant's improvements and the size of

[139] *Carma* (n 12).

[140] Ibid 725, 726 (Puglia ACJ, Blease, Sparks, Sims, Marler, Scotland and Nicholson JJ agreeing).

[141] Ibid 719 (Puglia ACJ, Blease, Sparks, Sims, Marler, Scotland and Nicholson JJ agreeing).

[142] Ibid.

[143] Ibid.

the increase of market rents.[144] Taking these factors into account, the Court found that the restraint was not unreasonable. This was because

> the lessor is only likely to exercise its right of termination when it can benefit thereby, the restraint only affects alienation in a rising market. Even then, alienation is impeded only when the lessee desires to relocate or curtail operations and the benefit[s] of doing so are outweighed by the risk of lost profits and lost use of whatever portion of the premises the lessee desires to retain. In all other instances, the inability of the lessee to profit from a transfer should not affect its decision to do so.[145]

This is indeed a potentially complicated calculus. The need to engage in such analysis to determine the validity of the restraint is not conducive to a system of principle designed to produce certainty. The District Court of Appeal of Florida, Fourth District has held that

> [t]he rules for land titles are not meant to be applied in ways sowing doubts about their application and outcomes. Buyers and sellers of land must be able to know and predict what they may do and what they should avoid.[146]

The Court's analysis in *Carma* in attempting to determine in minute detail whether the ability to alienate would be adversely affected by the restraint is not an encouraging spectacle for those seeking a law of restraints that is predictable in its operation. This is another example of how a doctrine based upon reasonableness cannot be regarded as a panacea for the task of determining the validity of a restraint.

VI Conclusion

It is easy to appreciate why the doctrine of repugnancy has been subject to criticism in the context of restraints on alienation. In some ways, it is a circular argument to say that a restraint on alienation is bad because alienation is an essential element of the relevant interest. However, we have seen that it is an organising principle of our legal system — with its closed number of proprietary interests — that the various forms of property are distinguished between themselves, and from non-proprietary rights generally, by specific inherent and defining characteristics. It makes sense

144 Ibid.

145 Ibid.

146 *Old Port Cove Condominium Association One Inc v Old Port Cove Holdings Inc*, 954 So 2d 742, 746 (Farmer J) (Fla Ct App, 2007).

for those proprietary interests for which there is a realistic prospect of a market to have alienability as one of those characteristics. We have seen that Anglo-Australian law and the *First Restatement* in the United States take this position.

Of course, to the modern observer of property law, an approach to the resolution of a legal problem based explicitly upon rules that embody policy goals, rather than perceived metaphysics, will be more appealing. Yet, authority in Australia and England shows that the doctrine of repugnancy is still being used to test the validity of restraints on alienation that are imposed as a condition in the transfer of the asset, as opposed to those subsequently entered into by way of contract. The maintenance of the distinction between determinable and defeasible interests is evidence of this. Further, we have seen two examples from the American cases that tested a restraint's validity against policy and reasonableness. In *Alby*, the result favoured freedom of an owner to tie up property for a potentially lengthy period over freedom of alienation without any insightful policy analysis. In *Carma*, the Court went to the opposite extreme, testing the restraint against various possible factual situations that were unlikely to have been within the contemplation of the parties at the time of its creation. Neither case gives the observer much certainty as to whether a restraint will be held valid or void.

Given these factors, it would be premature to expel the doctrine of repugnancy from the law of restraints on alienation. Instead, just as the doctrine can be used to determine whether restrictions on rights of use and enjoyment are valid (as in *Re MacKay*),[147] repugnancy can be used to test whether an owner has, in substance, been deprived of the right of alienation. It can do so in a manner that is consistent with the societal goal of maintaining the general alienability of property and providing sufficient a priori certainty to the transacting parties.

[147] See above nn 59–60 and accompanying text.