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THE QUEST FOR CLEAR LAND TITLES— WHITHER POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY?

JAMES A. WEBSTER, JR.*

The future interests in real property known as “possibilities of reverter” and “rights of entry for condition broken” may not cause nightmares to title lawyers and their clients—but they well might.¹ This article is intended to espouse the idea that possibilities of reverter and rights of entry for condition broken are often unreasonable and undesirable impediments to the free alienation of land and are in need of legislation to curb their harmful effects.

So long as a law permits the creation and existence of a particular type of interest in land and so long as it serves a socially valuable purpose, it should be retained. When, however, limitations on the use or alienation of land cease to be beneficial and socially desirable such limitations should be curbed or prohibited. In most cases, perhaps, the individual landowner should be given the widest latitude of freedom to make his land usable and salable and to promote its value in the manner that he deems best. As to his own land the individual landowner is probably as knowledgeable as anyone concerning the way the land should be developed, what restrictions, servitudes, covenants, or conditions should be created to maximize its potential profitable utilization and value. The home-made, self-taught “expert” in land development is not a rarity. When the landowner’s ideas of making his lands usable, productive or profitable to their maximum extent do no real violence to society and its needs, he should be given the broadest leeway in efforts to achieve the total advantages deriving from his ownership.

The total advantages of the ownership of land should include the right to impose reasonable and desirable safeguards curtailing, di-

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¹ Possible liability threatens title lawyers if they do not exclude from their certificates of title potential possibilities of reverter and rights of entry for condition broken arising in the record at a point of time beyond that covered by title searches. Possible loss threatens clients if they know their title-searching lawyer has not certified against the existence of claims under possibilities of reverter and rights of entry for condition broken beyond the period included in the title examination.

recting or restricting the methods and purposes for which the lands might be used by purchasers and subsequent owners when he makes a conveyance or devise of his land. The landowner, in imposing restrictive devices circumscribing the extent of subsequent ownership of "his" land because of restrictions, servitudes, covenants or conditions, can usually be relied upon to act rationally. He places a given restriction or limitation on the land for what he conceives, in the exercise of his best judgment, to be to his own economic benefit and to the economic benefit of the land, to promote and improve its usefulness and value. On the whole, his expertise and foresight in accurately predicting future needs and values is perhaps not substantially inferior to that of any other group. In addition, the landowner using restrictive devices as a private land use planner can usually be relied on for rationality because of his own peculiar economic relationship to the land which is too often lacking in official and professional land use planners. There is a strong public interest under the free enterprise system in the preservation of each individual landowner's control over the terms of the transfer and devolution of his property, both by inter vivos transfers and by testate succession.

An equally important public policy is that property should be freely alienable and usable, *i.e.*, capable of being transferred for utilization to meet society's demands. Free alienability is based on the policy that land assets, as other assets, should be largely manipulable by the "living" and not unreasonably immobilized by the "dead."²

As both policies are designed to maximize the benefits of land ownership for a particular generation, they inevitably conflict. If a present landowner has power to dispose of his land under any conditions or restrictions designed to increase its value and utility to him and his successors, the conditions or restrictions may operate to render the land inalienable by future generations.

It is the purpose of this paper to inquire, in light of these conflicting policies, as to the social utility of the land restricting devices which allow the creation of possibilities of reverter and rights of entry for condition broken. Are there positive beneficial reasons for the retention of these common law future interests? Do the ad-

² Each generation should have the power of providing for subsequent ones as it thinks best, but it should not encroach on succeeding generations' free use of land. GRAY, *THE RULE AGAINST PERPETUITIES* § 268 (4th ed. 1942).

vantages from the legality of these interests to individual landowners outweigh the possible harm done to society generally by creating clogs on otherwise good real estate titles? Is there a feasible way to preserve the grantor's or devisor's freedom of disposition and accomplish his immediate objectives, and yet limit these interests so as to assure future generations' freedom to use and alien the land without the controls, which may be completely useless, imposed by a former owner perhaps long dead?

I. THE INTERESTS DESCRIBED

It is no longer debatable in most jurisdictions, including North Carolina, that the future interests in realty known as the possibility of reverter³ and the right of entry for condition broken⁴ can be created as concomitant by-products existing whenever the possessory estates known as the determinable fee simple estate or the fee simple estate subject to a condition subsequent, respectively, are granted or devised.

A. Possibility of Reverter

A possibility of reverter is an untransferred potential residuum of an estate remaining in a grantor and his heirs or in a devisor's heirs when an estate of fee simple determinable is created in real property either by deed or will. The estate of fee simple determinable is created when apt and appropriate words are used by a grantor or devisor indicative of an intent on the part of the grantor or devisor that a fee simple estate conveyed or devised will expire *automatically* upon the happening of a certain event or upon the discontinuance of certain existing facts.⁵ Typical language creating such estates may specify that a grantee or devisee shall have land "until" some event occurs, or "while," "during" or "for so long as"

³ SIMES & SMITH, FUTURE INTERESTS § 283 (2d ed. 1956) [hereinafter cited as SIMES & SMITH]; McCall, *Estates on Condition and on Special Limitation in North Carolina*, 19 N.C.L. REV. 334, 338-39 (1941) [hereinafter cited as McCall]. See, e.g., *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956); *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950).

⁴ SIMES & SMITH § 251; McCall 346-48. See, e.g., *Brittain v. Taylor*, 168 N.C. 271, 84 S.E. 280 (1915).

⁵ RESTATEMENT, PROPERTY § 44 (1936), provides: "An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land

(a) creates an estate in fee simple; and

(b) provides that the estate shall automatically expire upon the occurrence of a stated event."

some state of facts continues to exist. This interest reposes in the grantor or his heirs or in a deviser's heirs from the effectiveness of the deed or will creating a determinable fee simple estate until the occurrence or non-occurrence of whatever limits the duration of the estate granted or devised. Upon the occurrence of the event or the cessation of the state of facts limiting the determinable fee simple estate, the possessory estate of the grantee or devisee terminates and the reposing interest in the grantor, his heirs or the deviser's heirs is immediately converted and activated from a mere future possibility of an estate to an existing possessory estate. The possibility of reverter operates automatically, without the necessity of any act of re-entry, the institution of any lawsuit or the intervention of any court to re-vest the possessory title into the grantor, his heirs or the deviser's heirs.⁶

B. Right of Entry For Condition Broken

The future interest in real property known as the right of entry for condition broken⁷ arises after the creation of the possessory estate known as the fee simple estate subject to a condition subsequent.⁸ Typical language for the creation of a fee simple estate subject to a condition subsequent specifies that a grantee or devisee shall have a fee simple estate "on condition that," "provided that," but "to be null and void if" a certain event occurs, or to be forfeited upon the happening or failure of continuance of certain facts. This interest is the retention of a "right," or more accurately a "power," to re-enter the premises or to institute an action to terminate the grantee's or devisee's possessory estate when the forfeiting event occurs. Unlike the possibility of reverter, it does not operate automatically to terminate and divest the existing possessory estate in order to re-vest the possessory title in the grantor or his heirs or into the heirs of a deviser creating the interest. In order to convert the

⁶ RESTATEMENT, PROPERTY § 56 (1956); SIMES & SMITH § 293. See, e.g., *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956); *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950).

⁷ The right of entry for condition broken is more accurately called a "power of termination." RESTATEMENT, PROPERTY § 155 (1936).

⁸ RESTATEMENT, PROPERTY § 45 (1936), provides: "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land,

(a) creates an estate in fee simple; and

(b) provides that upon the occurrence of a stated event the conveyer or his successor in interest shall have the power to terminate the estate so created."

interest into a possessory estate in the grantor, his heirs or in the heirs of a devisor, there must be positive action on the part of the owner of the right of entry interest.⁹ He must re-enter the lands upon the happening of the event entitling him to forfeit the possessory estate of the grantee or devisee and their successors or he must bring an action at law evincing an election to forfeit the possessory estate.¹⁰ Until the grantor, his heirs or the devisor's heirs manifest an election to terminate the estate of the grantee or devisee, by making an entry on the land and actually taking it, or by bringing an action at law to recover the land from the holder of the possessory estate, the possessory estate will continue even after occurrence of the event giving rise to a power of forfeiture.¹¹

C. Comparison

While there are technical distinctions between possibilities of reverter and rights of entry for condition broken these are often unrecognized by the practicing bar and the courts. These differences arise out of the "automatic time bomb"¹² characteristic attributed to possibilities of reverter which serves to terminate the estate of fee simple determinable ipso facto upon the occurrence of the limiting event. This "automaticity" of the possibility of reverter is to be contradistinguished from the necessity for affirmative action required of the owner of a right of entry to terminate a fee simple estate on condition subsequent upon the occurrence of a specified event and to get back the possessory title. While in a particular case the nomenclature of the future interest involved is important and may be determinative of rights in particular property,¹³ for most

⁹ 1 AMERICAN LAW OF PROPERTY § 4.9 (Casner ed. 1952).

¹⁰ RESTATEMENT, PROPERTY § 57 (1936).

¹¹ *Brittain v. Taylor*, 168 N.C. 271, 84 S.E. 280 (1915). "The law books teem with cases fixing the principle that an estate once vested cannot be defeated by a condition or forfeiture without some act on the part of the grantor or his heirs by which to take advantage of the condition or forfeiture, even when the words of the condition are 'the estate shall therefore be void and of no effect,' which words have the same legal import as '*ipso facto* void.'" *Phelps v. Chesson*, 34 N.C. 195, 199-200 (1851).

¹² *McCall* 335.

¹³ For instance, the distinction between a possibility of reverter and a right of entry for condition broken may create different rights and liabilities. If the contingent event occurs whereupon a determinable fee expires or a fee simple subject to a condition subsequent is rendered terminable, and an entry or action to effect re-entry is pending, it may be legally material to determine which of the future interests is involved:

(a) Where taxes imposing personal liability are assessed on the land.

Dunham, *Possibilities of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 U. CHI. L. REV. 215, 220 (1953).

(b) Where a third person is injured on the land due to negligent omission to maintain the premises in a safe condition. See *Cassity v. Welsh*, 319 Mass. 615, 67 N.E.2d 226 (1946).

(c) Where some third person commits a tort injuring the premises or takes possession of the premises, in determining the proper party plaintiff to bring an action to redress the wrong or to recover possession. See *Barren County Bd. of Educ. v. Jordan*, 249 S.W.2d 814 (Ky. 1952); *Webster County Bd. of Educ. v. Gentry*, 233 Ky. 35, 24 S.W.2d 910 (1930).

(d) Where the specified event determining or making the possessory estate terminable is illegal or against public policy. See *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), involving the grant of a golf course to a city under circumstances creating a possibility of reverter in the event the golf course was used by other than white persons. The North Carolina Supreme Court held that since the city took a determinable fee simple estate, and since the grantor retained a possibility of reverter, the city's possessory estate would terminate ipso facto in the event that Negroes used the course. The court reasoned that since the reverter provision operated automatically and without the necessity of any judicial enforcement by the state courts of North Carolina (without any "state action"), there was no violation of the first section of the fourteenth amendment of the United States Constitution nor of the principles relating thereto set forth in *Shelley v. Kraemer*, 334 U.S. 1 (1948). *But see Robinson v. Mansfield*, 2 RACE REL. L. REP. 445 (Ariz. Super. Ct. 1956); *Capitol Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957). See generally SIMES & SMITH § 285 at nn.42.5, 42.10; 8 HASTINGS L.J. 96 (1956); 9 VAND. L. REV. 561 (1956). There the authors conclude that a possibility of reverter predicated to take effect upon use of land by members of a particular race would not withstand the challenge of constitutionality, their theories apparently being that the state court's failing to prevent the reversioning of title constitutes at least "passive state action" or "state sanction" of a state of law allowing a discriminatory practice. It is their view that whenever a determinable fee is based on an invalid limitation, illegal or against public policy, such limitation is inoperative and the estate should become an absolute fee simple.

(e) Where the doctrine of waiver is raised as a defense against termination of the possessory estate after the occurrence of a specified event. In the case of a right of entry for condition broken, the person who has the power to terminate the possessory estate may be held to have waived his option of forfeiture if he fails to take action to terminate the possessory estate within a reasonable time. SIMES & SMITH § 258. Since no affirmative action is required to re-vest the possessory title into the holder of a possibility of reverter, he is not put to any election and mere inactivity should not constitute a waiver. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 272 (1940).

(f) Where the right to mesne profits accruing between the date of the happening of the terminating event and any re-entry or assertion of right of re-entry is involved. Dunham, *supra* at 219.

(g) Where, as in some jurisdictions, the question of alienability depends on whether the future interest is a possibility of reverter or a right of entry for condition broken, the former being held alienable more frequently. In 1961, North Carolina provided for the alienability of both in N.C. GEN. STAT. § 39-6.3 (Supp. 1963). For discussion of the alienability of these interests prior to 1961, see McCall 361.

(h) Where, as in some jurisdictions, the applicability of longer or shorter statutes of limitations for acquiring title by adverse possession may depend

purposes the practicing title lawyer considers all possibilities of reverter and rights of entry for condition broken collectively as "reverter rights." For most title purposes it is immaterial whether a possessory estate is subject to automatic termination or merely subject to divestment in the hands of the owner of the possessory estate by entry or suit upon the happening of some specified event. From the point of view of the title lawyer *either* presents the same danger—the potential destruction of the possessory estate. For this reason problems relating to these interests, the needs for limiting them, and the solutions available to minimize their continuation when they become useless are not dissimilar and will be treated alike in this paper.

II. CLOGS ON ALIENABILITY

A. *The Title Searcher's Problems*

At the outset it will be well to set the problems concerning the evils of unregulated possibilities of reverter and rights of entry for condition broken into the context of the title searcher's practice to determine if real problems exist.¹⁴ What are the problems caused by possibilities of reverter and rights of entry for condition broken to the practicing lawyer engaged in real property conveyancing and title searching?

upon whether the rights asserted are under a possibility of reverter or a right of entry for condition broken. Dunham, *supra* at 229.

For enumeration of the differences, see LEACH, *CASES ON FUTURE INTERESTS* 21 (2d ed. 1940); 2 POWELL, *REAL PROPERTY* ¶ 191 (1950); Williams, *Restrictions on the Use of Land: Condition Subsequent and Determinable Fees*, 27 TEXAS L. REV. 158 (1948). For suggestion that practically all these so-called differences have no real basis, see Dunham, *Possibilities of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 U. CHI. L. REV. 215 (1953). It is suggested that the illusory doctrinal distinctions between possibilities of reverter and powers of termination are a result only of semantic labels often conveniently manipulated by the judiciary to achieve desired, if unpredictable, results. Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land*, 31 FORDHAM L. REV. 303, 320 (1962). It is further suggested that there should be no real difference in treatment of these two types of future interests. By converting all determinable fee simple estates into estates fee simple subject to condition subsequent, Kentucky recently abolished the doctrinal distinction. KY. REV. STAT. § 381.218 (1962).

¹⁴ If anything is to be done about present evils of unregulated possibilities of reverter and rights of entry for condition broken, property lawyers will have to take the initiative. No lay emotion or voter appeal can be stirred sufficiently to induce sponsorship and passage of legislation concerning subjects about which the lay public knows so little. The initial appeal must be to title searching attorneys.

An ordinary title search may not necessarily disclose a possibility of reverter or right of entry for condition broken. A simple illustration of this assertion may be desirable:

In 1864, *O* deeded land to *A* and his heirs on the express condition that the land was to be used only for residential purposes. It was provided that in the event the land is ever used for other than residential purposes, the grantor and his heirs shall have the right to re-enter the land and terminate the estate of *A* and his heirs.

Assume the deed to *A* and his heirs was duly recorded in 1864 when executed, which would include recordation of the condition creating the right of entry (power of termination). Assume further, however, that there were subsequent conveyances by *A* and his successors in 1874, 1884, 1894, 1904, 1914, 1924, 1934, 1944, and in 1954, all of these subsequent deeds omitting the condition that the land is to be used only for residential purposes. A client wishes to buy the land from the 1954 grantee and while the land has been used for all these years for residential purposes the current prospective buyer wishes to use the land for commercial or manufacturing purposes. He employs an attorney to search the title.

In the foregoing illustration the title searching attorney will not discover through an ordinary title search the right of re-entry provision and its vital limitation on the use to which the land may be put, although it appears as a matter of record in 1864.¹⁵ When he locates the chain of title of the current prospective grantor and no liens or encumbrances existing within the thirty, forty or sixty-year period of his title search appear, he will certify an indefeasible record title. But when his client, the purchaser, starts building a commercial building on the land, the numerous heirs of the grantor (or their grantees now under section 39-6.3 of the General Statutes¹⁶) may come in and elect to exercise their power to terminate the possessory estate of the purchaser. Unless the attorney limits the period of time covered by the certificate of "record title" which he furnishes to a purchaser or lender for whom he searches the title, he would be

¹⁵ An empirical jaunt by the writer to a number of real estate specialists in North Carolina elicited the information that an ordinary title search covers a period varying from twenty to forty years. For title insurance companies to insure a title to real estate, a search for a minimum of sixty years is required by the principal companies doing business in North Carolina. The minimum is usually also the maximum unless special circumstances warrant a search for a longer period.

¹⁶ N.C. GEN. STAT. 39-6.3 (Supp. 1963). This statute permits inter vivos and testamentary conveyances of future interests.

liable to the purchaser or lender if the title certified is terminated by the occurrence of some specified forfeiting condition subsequent. In the event the lawyer does limit the period of time covered by his certificate of title, and thus certifies his responsibility only for the accuracy of the title certificate for the period covered therein, the purchaser or lender is then relegated to the position of having no protection at all against forfeiting conditions created perhaps only one link of title beyond that covered by the title searcher's search and his certificate. In short, under current real estate title practices, there is an existing gap in the protection afforded by an ordinary title search under the recording statutes of North Carolina.

There is another alternative to this "gambling" by either the lawyer or his client, the purchaser or lender. That alternative is for the title attorney to check all records relating to a particular piece of land back to the origin of the title. This latter suggestion is ridiculously impractical, of course, as the title search may cost the client more than the value of the land on which the search is made.¹⁷

B. Reasons Possibilities of Reverter and Rights of Entry Are Problems to Title Searchers

1. *Rule Against Perpetuities.*—The basic reason that anciently recorded possibilities of reverter and rights of entry for condition broken constitute a problem to title searchers (as well as to purchasers and lenders), is that these interests are not generally subject to the Rule Against Perpetuities.¹⁸ Thus, such interests reserved in the grantor and his heirs or in a devisor's heirs have unlimited potential vitality. Once duly recorded, they are potentially destructive of possessory estates hundreds of years after their creation upon the

¹⁷ To check a title to its origin in North Carolina would be difficult because the passage of time has seen new counties carved from older, larger counties. As new counties have been added, new land registries have been added. These new registries date only from the formation of the new counties. Thus a complete title search to the time of origin would necessitate not only a search of the record books in the county where the land lies but also a search of all land registries in the counties from which the more recently formed counties were carved. Both cost and time consumption prohibit such a title search.

¹⁸ SIMES & SMITH §§ 1238-39. The rule in England is different, it being held there that possibilities of reverter and rights of entry for condition broken, like any other contingent future interest, are subject to the Rule Against Perpetuities. *Hopper v. Corporation of Liverpool*, 88 Sol. J. 213 (1944), 62 L.Q. REV. 222 (1946) (possibility of reverter); *In re Trustees of Hollis' Hosp. & Hague's Contract*, 2 Ch. 540 (1899) (right of entry); Law of Property Act, 1925, 15 Geo. 5, c. 20, § 4(3).

happening of a specified event. Anyone who certifies the title, purchases the possessory estate, or lends money on the title, no matter how remote from the time of the creation of the right of entry for condition broken or possibility of reverter, takes subject to recorded notice of the possibility that the possessory estate will be terminated upon the occurrence of the event, though created at a remote time, by a remote grantor long dead.

2. *Statute of Limitations.*—Nor will the title searchers' staunchest friends, the statutes of limitations currently in force, simplify their task in making land titles which are potentially subject to these interests any more secure. There are two reasons for this assertion. First, existing adverse possession statutes of limitations which bar rights in land and create title in the adverse possessor do not become operative and do not start to run against the owner of an interest in land adversely held until the owner of the interest has a right to possession of the land.¹⁹ In addition, even *after* the occurrence of the condition or event terminating or making terminable the possessory estate, the adverse possession statutes do not aid the title searcher in making his decision to give or refuse a certificate of indefeasible title to land. Facts passing title to land by adverse possession are not self proving. The question of whether there has been an occurrence of an event, or breach of condition which will start the adverse possession statutes to run is not easy to ascertain. Further, such questions as what in fact constitutes a sufficient act to forfeit the estate or whether the event renders the estate merely "subject to forfeiture," must be ascertained. What a court will say about all these matters is often discoverable only from facts outside the title record books, after evidence, extrinsic to any record, has been introduced in a full dress lawsuit which is tried to completion. It would seem obvious that the title lawyer should be loathe to state that an interest has been extinguished because of any adverse possession statute, even if the facts are unequivocal.

3. *Changed Circumstances.*—The doctrine of "changed circumstances" gives no help or encouragement to the title attorney. While many jurisdictions have held that covenants in conveyances which

¹⁹ Adverse possession will not run against the owner of a future interest in land unless he has a legal power to stop it. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950); *BASYE, CLEARING LAND TITLES* § 55 (1953) [hereinafter cited as *BASYE*]; 2 *POWELL, op. cit. supra* note 13, ¶ 301; *RESTATEMENT, PROPERTY* § 222 (1936); *SIMES & SMITH* § 1962.

impose restrictions in the form of equitable servitudes on land become unenforceable when changed circumstances make their enforcement inequitable,²⁰ there has been traditionally little inclination on the part of the courts to apply this equitable doctrine to terminate possibilities of reverter or rights of entry for condition broken even though the limitations on which they are based have become obsolete or worthless.²¹ Even if the courts adopt the liberal view declaring conditions on which these interests are predicated void and inoperable, the question of whether a particular court would declare a particular limitation or condition to be inoperable to terminate or to warrant forfeiture of an existing possessory estate could not be positively answered by a title attorney. Instead, he would be forced to wait until a title clearing action in the nature of a quiet title suit has been properly brought and the facts of obsolescence, worthlessness and unconscionableness in enforcing the limitation or condition has been judicially determined with finality. That "changed circumstances" may render a condition or limitation obsolete and unenforceable is thus of little assistance to the title attorney in his prophecy of title unless he wishes to gamble on facts outside the records or on what a court *may* find.

The same reasoning applies to dispel any comfort that a title searching attorney may take from the incontrovertible assiduousness of courts generally²² to exercise resourcefulness in finding restrictions on the use of land to be mere covenants and not forfeiting conditions or limitations. This resourcefulness of the courts, though perhaps salutary in particular cases, is inadequate to aid title searchers because until the court has spoken finally in a lawsuit in which all necessary interested parties have been joined, there is only a guess as to whether or not some court in the future will declare a particular

²⁰ Logan v. Sprinkle, 256 N.C. 41, 123 S.E.2d 209 (1961); Shuford v. Asheville Oil Co., 243 N.C. 636, 91 S.E.2d 903 (1956); Muilenburg v. Blevins, 242 N.C. 271, 87 S.E.2d 493 (1955); Bass v. Hunter, 216 N.C. 505, 5 S.E.2d 558 (1939); Elrod v. Phillips, 214 N.C. 472, 199 S.E. 722 (1938); Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927).

²¹ SIMES & SMITH § 192. See Murray v. Trustees of Lane Seminary, 1 Ohio Op. 2d 236, 140 N.E.2d 577 (C.P. 1956). *But see* Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937); Letteau v. Ellis, 122 Cal. App. 588, 10 P.2d 496 (1932); Cole v. Colorado Springs Co., 381 P.2d 13 (Colo. 1963).

²² These courts include North Carolina. McCall 360-61. See, *e.g.*, Carolina & N. W. Ry. v. Carpenter, 165 N.C. 465, 81 S.E. 682 (1914); Saint Peter's Church v. Bragaw, 144 N.C. 126, 56 S.E. 688 (1907).

clause to be forfeiting. Title searching attorneys should not take this risk.

4. *Doctrines of Waiver and Substantial Compliance.*—While the doctrine of waiver may aid in a case in which the breach of a condition subsequent is alleged to vitiate the consequences of a breach of condition, and may ultimately clear a land title,²³ the possibility that a given state of facts constitutes such a waiver cannot be relied upon in the quest for marketable title until a court has made a final judicial determination of such fact.²⁴ Likewise, the equitable doctrine that “substantial compliance” with the terms of the condition will excuse eventual misuse of the land or violation of the condition²⁵ does not solve the problems of the title searcher. Obviously, the determination of whether there has been a “waiver” or “substantial compliance,” as in the case of possible “changed circumstances,” which may make conditions no longer effective to forfeit or render a possessory estate terminable, cannot be ascertained by a title searcher except by recurrence to data outside real estate records. In order to make a clear record title and for the title searcher to certify the existence of such facts that may make a condition no longer viable to destroy an estate, something in the nature of a quiet title action will almost always be necessary.²⁶

²³ See note 22 *supra*.

²⁴ Waiver of the condition giving rise to the right of forfeiture may be found in a multiplicity of circumstances: acts, conduct, inaction, lapse of time, or other facts evincing relinquishment of the right of forfeiture. Actual intent to relinquish rights does not control. See *Bernard v. Bowen* 214 N.C. 121, 198 S.E. 584 (1938); *Huntley v. McBrayer*, 172 N.C. 642, 90 S.E. 754 (1916). See generally Annot., 39 A.L.R.2d 1116 (1955).

²⁵ The doctrine of “substantial compliance” is that a court may not grant the drastic result of forfeiture for breach of a condition subsequent if it finds that the purposes for which the condition was created have been substantially complied with. In determining what is substantial compliance, the courts consider the nature and objects of particular conditions and the situations of the parties involved in determining the meaning and purposes of the conditions. See *Lassiter v. Town of Oxford*, 234 F.2d 217 (4th Cir. 1956), where land had been conveyed to a town so long as it maintained a golf course thereon. The town leased the golf course to private individuals, but the court held that the estate of the town was not forfeited or made terminable even though private persons controlled the course, fixed charges, determined eligibility of members, and passed by-laws regulating their conduct. The court found substantial compliance with the condition.

²⁶ For possible approaches to relieve property from the effects of possibilities of reverter and rights of entry, see LEACH & LOGAN, *CASES ON FUTURE INTERESTS & ESTATE PLANNING* 64-68 (1961) [hereinafter cited as LEACH & LOGAN]. In practically all cases in which the land can be unburdened of these restrictions, the status of the title and its marketability is uncertain

III. THE LARGER PUBLIC PROBLEM—HEREIN OF MARKETABILITY

While too many title lawyers are totally unconcerned with the policies of the law which make a title marketable or unmarketable, it is submitted that the public generally has a vital interest in some modification of the laws relating to possibilities of reverter and rights of entry for condition broken. An example of the harm to the public by these interests in their unregulated present status can be readily demonstrated by a problem brought to the writer by members of a small church in a small town in North Carolina. In 1890 a member of the *W* Church deeded a plot of land to the *W* Church; the deed contained the following clause:

The said land shall be used for church purposes only and when it ceases to be used for church purposes, this deed shall be null and void and it shall be lawful for the said grantor, his heirs, executors or administrators to re-enter the said premises.

At the time of the conveyance the land was in the center of an unincorporated, sparsely settled community. A small church was built on the land with sufficient room and space to accommodate the parishioners in that horse and buggy era. By 1957, however, the situation was entirely changed. The pleasant surroundings of the former village had become a melee of service stations, commercial garage buildings, television repair shops, grocery and furniture stores. Further, the plot itself had become unsuitable for church purposes for it was too small for a larger church or for present parking needs. Thus, the church members directed a building committee to sell the old site, purchase new land in a more suitable location, and build a new church of adequate size and with adequate parking area to meet current and anticipated needs.

The old church site was found to have considerable value because it could be utilized as commercial property. But when negotiations with a particular buyer reached the point where the title was checked, the forfeiture provision in the church's deed was discovered. The prospective purchaser then informed the committee that he could not purchase the land unless the forfeiture provision was released. Thus, the church was faced with the seemingly simple task of finding the owners of the right of entry for condition broken and buying them out.²⁷ But was it that simple?

until a court has put the matter at rest by deciding a lawsuit in the nature of an action to quiet title.

²⁷ Possibilities of reverter and right of entry for condition broken are

If the grantor is dead, who and where are the proper persons to execute quitclaim deeds of release? In the absence of a will or other valid alienation, this interest descends as any other interest in real property, and is enforceable by those persons who happen to be the heirs of the grantor as of the time of the happening of the event on which the possessory estate is conditional.²⁸ Since the period which has passed covers several generations, there will probably be a very large multiplicity of heirs of the creator of the interest who would be proper parties to enforce the forfeiture provision.²⁹ This multitude of heirs—most likely scattered to the four winds—may never be found.³⁰ Those found may be minors, in insane asylums

releasable to the holder of the possessory estate. Such a release, however, must be made by an instrument in writing and under seal in North Carolina. See *Sharp v. North Carolina R.R.*, 190 N.C. 350, 129 S.E. 826 (1925); *Huntly v. McBrayer*, 172 N.C. 642, 90 S.E. 754 (1916).

²⁸ *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950); *Methodist Protestant Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902); 1 *AMERICAN LAW OF PROPERTY* § 4.74 (Casner ed. 1952); *RESTATEMENT, PROPERTY* § 164 (1936).

Since the Rule Against Perpetuities does not apply to limit the duration of these interests, they may restrict the use of land to uneconomic uses for hundreds of years. The classic case is that of a particular lot located in the heart of the Beacon Hill district on Mt. Vernon Street in Boston, Massachusetts. A condition was put into a deed in 1806 which provided that no building higher than thirteen feet could be built on the lot. *Jeffries v. Jeffries*, 117 Mass. 184 (1874). It has been said that the purpose for imposition of this restrictive condition was to enable the owner of a building on the opposite side of the street to keep her cattle in view as they grazed on the Boston Common. *LEACH & LOGAN* 58 n.24; *Leach, Perpetuities in Real Estate: Let's Get The Rule On The Rails*, A.B.A. Sec. of Real Property, Prob. & Trust Law 20, 21 (1960).

²⁹ While the Bureau of the Census of the U.S. Department of Commerce has no direct statistics on the average number of lineal descendants surviving a man upon his death, an unofficial approximation derived from available data places the average number at ten descendants. Letter from Chief, Population Division, Bureau of the Census, U.S. Department of Commerce, Jan. 29, 1964. When this figure is multiplied by the number of generations that may pass pending termination of the possessory estate, the number of persons who must be contacted or whose interests must be pre-empted increases greatly.

³⁰ In *Brown v. Independent Baptist Church*, 325 Mass. 645, 91 N.E.2d 922 (1950), a professional genealogist and searcher for missing heirs was hired by order of court in an action to determine ownership of land subject to a possibility of reverter. *LEACH & LOGAN* 46.

The problem of a multiplicity of claimants and their location can be far worse if the possibility of reverter or right of entry has been created by a corporation as grantor at a remote time and the corporation has been dissolved. In such case all of the stockholders of the defunct corporation, their heirs, devisees or their representatives, perhaps decades later, would be entitled to share in the possibility of reverter or right of entry as assets of the erstwhile corporation just as any other assets omitted from final distribution upon dissolution of a corporation. See *Addy v. Short*, 47 Del. 157,

or married women whose husbands' signatures may be necessary to validate any deeds they may execute. Further, since the holder of the possessory estate cannot insure that he has procured the release of all the necessary heirs, there will be no record on which the buyer can rely without gambling that some necessary heir has not been contacted. And even if all the proper heirs have been given adequate notice, there is no assurance that each will consent to release or waive his interest. Each has been given by the grantor a "privilege of extortion,"⁸¹ a blackmailing club which may be held over the head of the owner of the possessory estate to compel payment of a possibly exorbitant price. Nor is this power of extortion limited to the grantor's heirs in North Carolina, for the General Assembly has recently passed a statute making possibilities of reverter and rights of entry for condition broken alienable by both inter vivos conveyance and by will.⁸² This statute, the principles of which have

89 A.2d 136 (1952); *Saletri v. Clark*, 13 Wis. 2d 325, 108 N.W.2d 548 (1961). The writer has been reliably informed of just such a situation in North Carolina, as yet unlitigated. A corporation conveyed land to a municipality as a gift upon a condition subsequent which provided that if the land was ever used for purposes other than those specified (for a public park for recreation purposes for white persons only), title would either revert to the corporation or be terminable by the grantor corporation. After several decades the corporation was dissolved. The municipality, in the meantime, improved the land, increasing its value by the construction of a swimming pool and other recreational facilities making it very valuable. With the occurrence of the United States Supreme Court integration decisions, the municipal fathers decided to sell the land to private individuals rather than to operate an integrated public park at the site. In the words of one of the lawyers who observed the transaction, all the representatives of the stockholders of the dissolved grantor were "out in the wild blue yonder." No attempts were made to secure releases of the possibility of reverter or right of entry from the heirs or representatives or the stockholders of the defunct corporation, the purchasers and their counsel electing to "chance" the purchase, notwithstanding the fact that the municipality executed its deed without warranty. The observer of this transaction stated: "After all, lawyers have to be practical about these things!" It is submitted that the purchasers of this land may find themselves with an unmarketable title, and perhaps no title at all, if another careful, "practical" title lawyer discovers these circumstances.

⁸¹ 45 CORNELL L.Q. 587, 588 (1958).

⁸² N.C. GEN. STAT. § 39-6.3 (Supp. 1963) provides: "(a) The conveyance, by deed or will, of an existing future interest shall not be ineffective on the sole ground that the interest so conveyed is future or contingent. All future interests in real or personal property, including all reversions, executory interests, vested and contingent remainders, rights of entry both before and after breach of condition and possibilities of reverter may be conveyed by the owner thereof, by an otherwise legally effective conveyance, inter vivos or testamentary, subject, however, to all conditions and limitations to which such future interest is subject.

(b) The power to convey as provided in subsection (a), can be exercised

been advocated as salutary by some writers,³³ serves to rejuvenate these interests. It can create a market in these assets in that they empower the owner to blackmail the possessory estate title holder or prospective purchaser thereof who wishes to use the land in a method or for a purpose which does not conform to a specified condition. Thus, a prospective purchaser of such an interest can look up breached conditions, buy it for a song, and exert his extortion.³⁴

We see now that the "dead hand" of the grantor has inserted a clause which operates *in terrorem* to compel the use of land for which it is no longer suited on pain of forfeiture if used for any other purpose. And what of the persons who take upon such forfeiture? These will most probably be complete strangers to the grantor who

by any form of conveyance, inter vivos or testamentary, which is otherwise legally effective in this State at the date of such conveyance to transfer a present estate of the same duration in the property.

(c) This section shall apply only to conveyances which become operative to transfer title on or after October 1, 1961."

³³ See, e.g., McCall 361-63.

³⁴ See, e.g., *Faus v. Pacific Elec. Ry.*, 146 Cal. App. 2d 370, 303 P.2d 814 (Dist. Ct. App. 1956). In that case the enterprising plaintiff discovered numerous existing rights of entry conditioned upon a railway company's ceasing to carry both passengers and freight over lots acquired by the railway for its tracks in 1906. The plaintiff purchased the rights of entry from the heirs of the various grantors under an arrangement whereby the heirs would get 50% and the plaintiff would get 50% of the proceeds of actions brought by Faus to enforce reverter rights or alternatively to compel the railway company to pay the present value of the interest granted in 1906 by "inverse condemnation" upon cessation of use of the land for passenger (but not freight) traffic. LEACH & LOGAN 71; Leach, *supra* note 28, at 21. So far as can be determined by the writer, Faus has succeeded in his objective. See *Faus v. City of Los Angeles*, 195 Cal. App. 2d 134, 15 Cal. Rptr. 783 (Dist. Ct. App. 1961). In the latter case Faus was held to have acquired 288/360 undivided interest in two ten foot strips which passed to him upon cessation of use of the land for railroad purposes.

For an indication that this is being done, it is not necessary to look to California cases. See the record and briefs filed in *In re Burris*, 261 N.C. 450, 135 S.E.2d 27 (1964), which involved the legality of the discharge of a municipal employee by the city council and the municipality's civil service commission. Land had been conveyed to a church and its trustees on condition that if the property should cease to be used for church or school purposes the title to such property would revert to the original grantors or their heirs. The city needed to acquire the land for its adjacent airport. But before it could negotiate to purchase the land or institute condemnation proceedings, it was alleged that the employee, with notice of the city's need, purchased the reversionary interests from forty heirs of the original grantor of the land for \$1,000. It was asserted that the employee also made an agreement with the holders of the possessory fee simple estate subject to a condition subsequent that he would share with them the proceeds from the sale or condemnation of the land by the city. The city discharged the employee for a conflict of interest because his acquisition of the reversionary interests hampered its negotiations for the purchase of the land.

happen to be his heirs several generations after his death and who may now live on the other side of the earth. Their shares are likely to be fractionalized to a point where they are practically worthless.³⁵ The ultimate result is that an unregulated legal sacred cow has hampered alienability of the land and denied prosperity³⁶ to the church, the primary beneficiary of the grantor.

IV. SUBVERSION OF POLICY BEHIND THE RULE AGAINST PERPETUITIES

The philosophy behind the Rule Against Perpetuities is that the "dead hand" of past generations should be allowed to control contingent devolution of land toward ultimate vesting only within the period fixed by the Rule.³⁷ Thus, if it is possible that a contingent future interest might not vest within the required period, the limitation is void.³⁸ As previously noted,³⁹ the Rule applies to

³⁵ In *Brown v. Independent Baptist Church*, 325 Mass. 645, 91 N.E.2d 922 (1950), on facts very similar to the example case, land was devised to a church "so long as they shall maintain and promulgate their present religious belief and faith and shall continue a Church..." *Id.* at 645, 91 N.E.2d at 923. When the land became so enveloped by commercial enterprises that a church could no longer be operated there, the land was given up and the possibility of reverter allowed to vest in the grantor's heirs after expiration of ninety years from the original grant to the church. Upon sale of the land for distribution of the proceeds to the heirs entitled thereto, it brought \$34,000. Over 100 shares were paid out by a receiver. They ranged from a high of \$720 to a low of \$6.25, the latter being paid to a great-great-granddaughter living in Buenos Aires. Leach, *supra* note 28, at 21. The decree of the court awarded a total of \$14,609.75 for fees and expenses of counsel, a receiver, and a genealogist. LEACH & LOGAN 46. What better case can be used to illustrate the folly, from the point of view of the grantor, of ever creating rights of entry or possibilities of reverter?

³⁶ In fact, there is a positive detriment to society generally. As a result of the limitations of available uses of land subject to a possibility of reverter or right of entry for condition broken and their *in terrorem* effect, there will likely be diminution in the value of the land for *ad valorem* tax purposes, constituting a threat to the tax base of the community.

³⁷ TIFFANY, REAL PROPERTY § 268 (abr. ed. 1940). The law abhors perpetuities, "because by perpetuities...estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." 2 BLACKSTONE, COMMENTARIES * 174. Indeed, the Rule Against Perpetuities was first developed in its modern form to check the abuses of executory interests. SIMES & SMITH § 1236. See *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620), which held that an executory interest was not destructible under the rule of destructibility of contingent remainders. SIMES & SMITH § 1213. As a result of the *Pells* decision, it became evident that some limit had to be placed on the creation of executory interests to prevent land titles from becoming inalienable for an indefinite period of time. *Ibid.*

³⁸ *E.g.*, *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952). An example of the Rule in operation would be a conveyance

executory interests and other contingent future interests but not to possibilities of reverter and rights of entry for condition broken.⁴⁰

Since the passage of section 39-6.3 of the General Statutes⁴¹ made these interests freely alienable, it is possible by employing apt phraseology in drafting to completely thwart the policy behind the Rule Against Perpetuities. For instance, instead of creating a limitation "to X and his heirs for so long as land is used for residential purposes only and no longer and upon cessation of such use, then to Y and his heirs," the draftsman could state: "To X and his heirs for so long as it is used for residential purposes only and no longer." This limitation would then create a determinable fee in X and his heirs and a possibility of reverter in the grantor and his heirs. In a concurrent or subsequently executed instrument the grantor could then transfer his possibility of reverter to Y and his heirs. While in the former case Y's interest would be executory and void because it might not necessarily vest within the period specified by the Rule Against Perpetuities, in the latter case, even though the potential perpetuities problem exists, Y's interest would be held valid.

By use of what appears to be drafting legerdemain, antics with semantics, so as to create a possibility of reverter or right of entry in the grantor and his heirs *initially*, followed by a transfer of this interest by the grantor, a future interest which in all respects is the functional equivalent of the executory interest can be created in a third party other than the grantor or his heirs, even though such future interest is contingent and will not necessarily become vested within the prescribed period of the Rule Against Perpetuities.⁴² If

"to X and his heirs so long as it is used for residential purposes only and upon cessation of such use then to Y and his heirs." This conveyance creates a defeasible fee in X and his heirs and an executory interest in Y and his heirs and since the contingency upon which Y may take will not necessarily occur within the life of lives in being and twenty-one years specified by the Rule, the limitation to Y and his heirs will be void.

³⁹ See note 18 *supra* and accompanying text.

⁴⁰ *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956); *SIMES & SMITH* §§ 1238-39.

⁴¹ See note 32 *supra* for the full text of the statute.

⁴² In *Brown v. Independent Baptist Church*, 325 Mass. 645, 91 N.E.2d 922 (1950), a deviser left land to a church "so long as they shall maintain and promulgate their present religious belief and faith and shall continue a Church . . ." *Id.* at 645, 91 N.E.2d at 923. The will then provided that of the Church should be dissolved or its beliefs changed, the property should pass to ten designated persons. The final paragraph of the will gave the residue of the deviser's estate to the same ten named persons. When the church ceased to continue as such, the question arose as to whether the

the Rule Against Perpetuities has any purpose in restricting the dead hand's control over the devolution of property and wealth, there is no justification for its being so easily thwarted. Logically there should be no distinction made in applying the Rule Against Perpetuities to functionally equivalent interests.⁴³

V. CORRECTIVE MEASURES

A. Prognosis Without Benefit of Legislation

As can be readily gathered from the preceding material, a prognosis of the ills caused to land marketability by rights of entry for condition broken and possibilities of reverter, without the benefit of effective legislation, is not hopeful. It would seem manifest that these ancient land restricting devices create, or are capable of creating, numerous problems relating to land ownership, use and conveyancing for the individual, the title lawyer and the public generally.⁴⁴ It is equally obvious that present case law and tools in most

limitation over of an interest to the ten named persons was void as an executory devise which violated the Rule Against Perpetuities. The court held that while the gift over to the ten named persons following the determinable fee was void as an executory devise, the same ten named persons would take the property as devisees of the possibility of reverter under the residuary clause of the will.

This holding allows a deviser to completely nullify the purposes of the Rule Against Perpetuities by simply creating a determinable fee without time limit and then disposing of the possibility of reverter by *another clause* in the *same* instrument. If the same clause in the same instrument were employed, orthodox doctrine dictates that the interest created is an executory interest and must be capable of vesting within the period of the Rule. First Universalist Soc'y v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Proprietors of the Church v. Grant, 69 Mass. (3 Gray) 142 (1855). Compare Fletcher v. Ferrill, 216 Ark. 583, 227 S.W.2d 448 (1950); Edward John Noble Hospital v. Board of Foreign Missions, 13 Misc. 2d 918, 176 N.Y.S.2d 157 (1958); Knowles v. South County Hospital, 87 R.I. 303, 140 A.2d 499 (1958); Pruner Estate, 400 Pa. 629, 162 A.2d 626 (1960).

⁴³ Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land*, 31 *FORDHAM L. REV.* 303 (1963); Lynn & Ramser, *Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited*, 43 *IOWA L. REV.* 36 (1957).

⁴⁴ One important aspect in which the interests of the community are involved is where the existence of the future interests interfere with land use planning which would be beneficial to the community. For instance, if there is an existent possibility of reverter or right of entry for condition broken the purpose of which has become obsolete (and experience shows that *all eventually* become so), and these interests are imposed upon urban land, their characteristic rigidity and immunity from equitable relief may play havoc with privately motivated redevelopment of urban lands, rendering governmental interference and condemnation imperative where private capital might otherwise perform this important function. "Because they are imposed by

jurisdictions are not adequate to solve these problems and that legislation will be necessary. It will then be the province of this article from this point to explore the feasibility of legislative action looking toward solutions to the problem.

Any legislation attempted should endeavor to accommodate as far as possible the interests of the person making disposition of his property, the taker of the possessory estate, the public generally, and of title lawyers and conveyancers. Its purpose should be to extract the highest value from dispositive arrangements for all concerned and to minimize so far as possible the injurious consequences resulting from land use restrictions which may operate unreasonably into the future. The different legislative approaches to the solutions of these problems will be considered first, with some analysis of their strengths and weaknesses. A specific recommendation of legislation will follow.

B. Existing Legislation

Some states have approached the solution of problems currently existing by the "substantial benefit" or "merely nominal" approach. These states have provided by statute that when a condition or limitation connected with a grant or conveyance is "merely nominal and without actual and substantial benefit to the party to whom or in whose favor it is to be performed," it may be wholly disregarded and any failure to comply with it shall not in any case operate as a forfeiture of the lands subject to such condition or limitation.⁴⁵

While the "substantial benefit-merely nominal" type statute is salutary to aid in the extinguishment of useless, outmoded possibilities of reverter and rights of entry, the relieving of a particular holder of a possessory estate from an onerous forfeiting condition or limitation can be achieved only through a lawsuit. Since there

individuals with little or no restraint, because they are often given perpetual duration, and because they can be removed in many cases only with the utmost difficulty, they are the source of increasing difficulties for city planners and others interested on over-all community growth." Payne, *Effect of Rights of Entry, Rights of Reverter and Restrictive Covenants on Marketability of Title*, A.B.A. Sec. of Real Property, Prob. & Trust Law 11, 12 (1957).

⁴⁵ *E.g.*, ARIZ. REV. STAT. § 33-436 (1956); MICH. STAT. ANN. § 26.46 (1957); MINN. STAT. ANN. § 500.20 (1947); WIS. STAT. ANN. § 230.46 (1957). See N.Y. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 1951 which provides: "No restriction on the use of land... shall be enforced... if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement...."

is no satisfactory method of determining just when a condition or limitation is merely nominal and confers no substantial benefit, until litigation is concluded, the "substantial benefit-merely nominal" approach, used alone, cannot increase the marketability of land so far as the general public, prospective purchasers and title lawyers are concerned. Until full and proper litigation is completed,⁴⁶ no one can predict what will be held to constitute a "substantial benefit" or what is "merely nominal."⁴⁷

Another approach employed by a number of states to render less harmful these future interests is the "fixed period of duration approach."⁴⁸ This statutory technique provides that the restrictive condition or limitation terminates at the end of a fixed period. There is, therefore, a maximum period in gross during which possibilities of reverter and rights of entry can endure—either twenty, thirty or forty years.⁴⁹ The effect of these statutes, where applicable, is to

⁴⁶ Such litigation will include service of process on all interested persons as in the cases instituted to terminate these interests under the judicially invented "change of circumstances" doctrine. See note 21 *supra*.

⁴⁷ SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 204 (1960).

⁴⁸ While there are substantial differences in the wording of the statutes, they are alike in setting a specific time for the duration of rights of entry and possibilities of reverter. See SIMES & SMITH § 1994.

⁴⁹ *E.g.*, ILL. REV. STAT. ch. 30, § 37e (Supp. 1963) (forty years duration; applicable to terminate possibilities of reverter and rights of entry whether existing at time of enactment or created thereafter); KY. REV. STAT. §§ 381.219, 381.221 (1962) (thirty years duration; applicable to both existing and subsequently created possibilities of reverter and rights of entry, provided however, that a possibility of reverter or right of entry existing at the time of enactment of the statute may be preserved by filing for record an intention to preserve it prior to July 1, 1965); MASS. ANN. LAWS ch. 184(a), § 3 (1955) (thirty years duration; inapplicable if the specified contingency must occur within the period of the Rule Against Perpetuities); MINN. STAT. ANN. § 500.20(2), (3) (1947) (thirty years duration; ambiguous as to whether it applies to both existing and subsequently created possibilities of reverter and rights of entry; apparently applicable both prospectively and retroactively to these interests); NEB. REV. STAT. §§ 76-2,102, 76-2,103 (Supp. 1961) (thirty years duration; applicable to both existing and subsequently created interests); R.I. GEN. LAWS § 34-4-19 (1956) (twenty years duration; applicable only to interests created after effective date of the act in 1953). Compare Fla. Laws 1951, ch. 26927, §§ 1-7, which limited the duration of possibilities of reverter and rights of entry for condition broken to twenty-one years, and applied both to existing interests and to those created after enactment of the statute. The statute further provided that any existing actions available under then existing possibilities of reverter would have to be instituted within one year from the time of passage of the act or be barred. In *Biltmore Village v. Royal*, 71 So. 2d 727 (Fla. 1954), the section of the statute that cancelled all reverter provisions in plats or deeds which had been in effect for more than twenty-one years was held unconstitutional, in that it impaired the obligations of contract since no remedy was

remove the conditions and limitations from the possessory fee simple determinable and from the fee simple subject to a right of re-entry for condition broken and to convert them into estates of fee simple absolute. Upon expiration of the designated period coupled with the non-happening of the specified contingent event which would render the possessory estate terminable, the possessory estate becomes then an indefeasible and marketable estate in fee. Thus while it is still permissible to create possibilities of reverter and rights of entry, they can survive only for the period of time specified in the statutes.

The "marketable title approach," a third statutory technique, is designed primarily with the title searching lawyer in mind.⁵⁰ The theory of these statutes is that public policy does not demand that every outstanding interest in land, once it appears on the land title records, should remain as a permanent clog on title.⁵¹ To effect erasure of these interests of ancient origin, such statutes provide that unless there is a periodic re-recording of claims to preserve these interests they will be extinguished.⁵² For instance, suppose *A*

afforded in those situations where no breach of condition had occurred permitting enforcement of the right of reverter or re-entry prior to the effective date of the act. Compare *Trustees of Schools v. Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1955), which upheld the constitutionality of ILL. REV. STAT. ch. 30, § 37e (Supp. 1963).

⁵⁰ But it should be noted in this regard that what is good for the lawyers may well be good for the country. If the period required for a title search can be substantially reduced and more certainty of titles achieved, commerce in land may be facilitated and perhaps the costs of transferring and encumbering land can be reduced. In any event title lawyers definitely have a stake of time and financial interest in making title examinations as expeditious as possible and in efforts to reduce the volume of records to be inspected to a minimum.

⁵¹ *BASYE* § 171.

⁵² *Ibid.* The marketable title statutes where enacted apply not only to possibilities of reverter and rights of entry, but also to *all* interests in land of ancient origin—present and future, vested and contingent, possessory and non-possessory, genuine and technical.

While the phraseology of the statutes varies, their common thread is that the interests to which they are applicable will be extinguished if re-recording does not take place. See ILL. REV. STAT. ch. 83, §§ 10a, 12.1-12.4 (1959); BURNS IND. STAT. ANN. ch. 56-1104 (Supp. 1963); IOWA CODE ANN. § 614.17 (Supp. 1963); MICH. STAT. ANN. § 26.1273 (1953); MINN. STAT. ANN. ch. 541.023 (Supp. 1963), comprehensively discussed and approved in *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957) (applying specifically to possibilities of reverter and rights of entry); NEB. REV. STAT. § 76-290 (1958); N.D. GEN. CODE § 47-19A-03 (1960); OHIO REV. CODE § 5301.51 (Supp. 1963); OKLA. STAT. ANN. § 74(a) (Supp. 1963); S.D. CODE § 51.16B03 (Supp. 1960); WIS. STAT. ANN. ch. 330.15 (1958). See collection of statutes and commentary in *BASYE, CLEARING LAND TITLES* §§ 171-80 (1953).

has a possibility of reverter of record in land in which *B* has a determinable fee. If the particular marketable title statute requires re-recording of possibilities of reverter within fixed periods of time, failure to re-record these interests by their owners will pass them out of existence. Title searchers and prospective purchasers from the owner of a possessory title only have to check back a prescribed period of time to determine whether an existing possibility of reverter or right of entry has been recorded initially or re-recorded, with the knowledge that if it has not been properly recorded or re-recorded it no longer exists.⁵³ While these statutes seek to capitalize on the dilatoriness of human nature to extinguish ancient interests in land, and should be effective to shorten the labors of title searching lawyers, their weakness is that they permit these interests to be revitalized and continue to impair the marketability of land if re-recorded in apt time by the vigilant holder or transferee who has bought one of these interests with the design of asserting its nuisance value.⁵⁴ While title searchers are assisted, the larger objective of increased marketability of land is not adequately served because these interests can be perpetuated by re-recording.

The fourth classification of statutory methods for diminishing the adverse effects of these reversionary restrictions provides that possibilities of reverter and rights of entry cannot be transferred or alienated by their owners.⁵⁵ Because these interests cannot be otherwise conveyed, prohibition of alienation may result in easier acquisition of releases from the owners of these interests. Yet the "clogg-

⁵³ This theory has long been in effect in North Carolina as the basis of N.C. GEN. STAT. § 45-37(5) (Supp. 1963), which favors purchasers for value and creditors by providing a conclusive presumption of payment of mortgages, deeds of trust, and other instruments securing the payment of money after the expiration of fifteen years from the maturity date of such instrument or from the date when the conditions of such instrument were due to have been complied with, unless the holder of the indebtedness secured by such instrument files an affidavit with the register of deeds or makes a marginal entry on the record in accordance with the statute that payment has not in fact been made or that any other condition has not been complied with. The primary purpose of this section was to promote freer marketability of land and to facilitate the examination of titles where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transactions. *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51 (1947).

⁵⁴ Leach, *supra* note 28, at 23. See note 44 *supra*.

⁵⁵ This type statute has at least one merit; it prevents the inconsistency of allowing the Rule Against Perpetuities to be circumvented in behalf of persons other than the grantor and his heirs, achieving the effects of what would otherwise be a void executory interest via the transfer of possibilities of reverter and rights of entry to such persons.

ing potential" remains.⁵⁶ Restriction of alienability of future interests contravenes the modern trend that allows transfer of all future interests, however contingent or infinitesimal.

C. Proposed Legislation

The most effective statute that can be devised will incorporate the best features of the various statutory approaches made to solve the problems caused by possibilities of reverter and rights of entry for condition broken. The following proposals for statutes are recommended for adoption by a state which wishes to maximize the utility of these interests and to minimize the adverse effects to real property conveyancing derived from them. A commentary on the purposes and effects of the proposals will accompany the respective sections.

The title of the act should be "An Act to Limit the Duration of Rights Under Rights of Entry and Possibilities of Reverter."

The first section should set forth the policy of the state legislature in enacting the statute, and thus provide guidance for the courts in its construction and application and also to indicate the reasonableness and necessity of the legislature's action. While it is believed that the proposals are constitutional, this statement of policy will inform the courts why the legislature felt a need for regulation and thus present the best argument for their constitutionality as a valid exercise of the state's police power. Therefore, section one is included in the following recommended statute.

Section 1. *Declaration of Policy*.—It is hereby declared as a matter of state policy:

- (a) That land is the basic resource of the economy and that any private arrangement that prevents its most economical use, marketability and development for the needs of the people of the state for residences, industry, agriculture and commerce is against the public interest;
- (b) That unrealistic and obsolete restrictions placed on land by private arrangements may tend to operate to reduce the tax base because their effect is a depressant on land values and thus they operate to require proportionately higher taxes on lands not so restricted and are thus against the public interest;

⁵⁶ Simes, *Elimination of Stale Restrictions on the Use of Land*, A.B.A. Sec. of Real Property, Prob. & Trust Law 4, 11 (1954). That this represents the current legislative view in North Carolina, see N.C. GEN. STAT. 39-6.3 (Supp. 1963).

- (c) That land use planning by public authorities in the public interest has reduced the need for and utility of private restrictions on the use of land for private purposes;⁵⁷ and
- (d) That reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of this state.⁵⁸

Section 2. *Thirty Year Limit on Possibilities of Reverter and Rights of Entry Created After the Effective Date of the Act.*—(a)

A special limitation or a condition subsequent, which restricts a fee simple estate in land, and the possibility of reverter or right of entry for condition broken thereby created, shall, if the specified contingency does not occur within thirty years after the possibility of reverter or right of entry was created, be extinguished and cease to be valid. Any estate of fee simple determinable or any fee simple estate subject to a condition subsequent shall become a fee simple absolute if the specified contingency does not occur within thirty years from the effective date of the instrument creating the possibility of reverter or right of entry.⁵⁹

- (b) Application of Act. This section of this act shall apply only to inter vivos instruments taking effect after its effective date, to wills where the testator dies after such effective date, and to appointments made after such effective date, including appointments by inter vivos instruments or wills under powers created before such effective date.

The provisions of section 2 are designed to operate prospectively only, *i.e.*, to limit the duration of any possibility of reverter or right of entry created *after* the effective date of the statute to a maximum of thirty years and to give the possessory title holder a fee simple estate absolute in the event of the non-happening of the specified contingency within that period. The thirty-year period, which is necessarily arbitrary, could be made a longer or shorter period but is placed at thirty years primarily for three reasons: (1) this span of time allows a deviser or grantor to control the use of land he has devised or conveyed for approximately one generation into the future from the effective date of his will or deed; (2) the maximum

⁵⁷ See LEACH & LOGAN 75.

⁵⁸ Compare Fla. Laws 1951, ch. 26927, §§ 1-7, held unconstitutional (notwithstanding such a statement of legislative purpose) in *Biltmore Village v. Royal*, 71 So. 2d 727 (Fla. 1954). ILL. REV. STAT. ch. 30, § 37e (1959) was held constitutional (even though no mention of legislative purpose was made in the statute) in *Trustees of Schools v. Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

⁵⁹ Compare SIMES & TAYLOR, *op. cit. supra* note 47, at 214.

duration of most mortgages is thirty years; and (3) because thirty years is deemed not an unreasonable minimum period of time for a title search to land and any such restriction should turn up in all ordinary title searches.

Section 3. Limitation on the Duration of Possibilities of Reverter Rights of Entry Existing at the Effective Date of the Act If Notice of Intention to Preserve Not Filed.—A special limitation or a condition subsequent, which restricts a fee simple estate in land, and the possibility of reverter or right of entry for condition broken thereby created, shall be extinguished and cease to be valid, unless within the time specified in section 3(c) of this act, a notice of intention to preserve such possibility of reverter or right of entry is recorded as provided in this act. Such extinguishment shall occur at the end of the period in which the notice or renewal notice may be recorded and any fee simple determinable or estate of fee simple subject to a condition subsequent shall become a fee simple absolute. No disability or lack of knowledge of any kind will prevent the extinguishment of such interests in the event no notice of intention to preserve is filed within the times specified in section 3(c) of this act.

- (a) *Who May Record Notice to Preserve.*—Any person having a possibility of reverter or right of entry may record in the office of the register of deeds for the county in which the land is situated a notice of intention to preserve such interest, if duly acknowledged by such person. Such notice may be filed for record by the person claiming to be the owner of such interest, or by any other person acting on his behalf if such claimant is
- (1) under a disability,
 - (2) unable to assert a claim on his own behalf, or
 - (3) one of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of intention.
- (b) *Contents of Notice; Recording; Indexing.*—To be effective and to be entitled to record, such notice shall contain an accurate and full description of all land affected by such notice, which description shall be set forth in particular terms and not be general inclusions; but if such claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the land at the time the notice is filed and the terms of the special limitation or condition subsequent from which the possibility of reverter or right of entry arises. The register of deeds of each county shall accept all such notices

presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register shall enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and filed and under the grantor indexes of deeds⁶⁰ under the names of the record owners of the possessory estates in the land to be affected against whom the claim is to be preserved at the time of the filing.

- (c) When Notice of Intention to Preserve May Be Recorded.—An initial notice may be recorded not less than twenty-eight years, nor more than thirty years, after the possibility of reverter or right of entry was created, *provided, however*, if the date when such possibility of reverter or right of entry was created was more than twenty-eight years prior to the effective date of this act, the notice may be recorded within two years after such effective date. A renewal notice may be recorded after the expiration of twenty-eight years and before the expiration of thirty years from the date of recording of such initial notice, and shall be effective for a period of thirty years from the recording of such renewal notice. In like manner, further renewal notices may be recorded after the expiration of twenty-eight years and before the expiration of thirty years from the date of recording of the last preceding renewal notice.
- (d) Applications of Section 3 of This Act.—Section 3 of this act shall apply to all possibilities of reverter and rights of entry limited on estates of fee simple, existing at the effective date of this act.

The purpose of the foregoing section is to complement proposed section 2 which deals only with interests created *after* the effective

⁶⁰ *Id.* at 216. Professor Simes' and Mr. Taylor's Model Act does not provide for indexing under the grantor indexes the name of record owners of the possessory estates in land to be affected at the time of the filing. While their statute is sufficient in a jurisdiction which has the system of tract indexing, such a statute does not seem as satisfactory as the one here proposed in a state that has only "grantor-grantee" indexing. The Committee on Improvement of Conveyancing and Recording Practices of the American Bar Association has recommended that in any case such recording or re-recording of a notice of intention to preserve must be indexed in the name of the record owners of the land at the time of such recording or re-recording so as to be effectively discoverable by attorneys employing the alphabetical system. See Committee on Improvement of Conveyancing and Recording Practices, Report, A.B.A. Sec. of Real Property, Prob. & Trust Law 73 (1957).

date of the act. Section 2 would not result in shortening the period of title search or render titles more certainly free of possibilities of reverter and rights of entry without more because *all* of these potential interests would not be barred thereby—those created in existence and recorded before the effective date of the act could effectively haunt land title searchers, purchasers and possessory title holders indefinitely. Thus section 3 seeks to provide a solution, at least for title searchers, for all potential possibilities of reverter and rights of entry, making them discoverable on any thirty-year check of the title to particular land. This method of requiring re-recording of these interests within the period specified, instead of an attempt to set a particular statutory maximum time limit on the duration of all these interests, created both prior and subsequent to the effective date of the act, is designed to prevent the act from being vulnerable to attack as being unconstitutional.⁶¹ As written, section 3 never destroys or extinguishes any existing interest; it simply provides that they will be extinguished periodically if their owners do not preserve them by recording a notice of an intention to preserve such interests within the specified times.

The re-recording provisions would not seem to be unconstitutional. Retrospective legislation does not impair property rights if a person holding such property rights is given a reasonable time within which he may assert and enforce his rights.⁶² Here the recording provisions for preserving old existing possibilities of reverter and rights of entry provide for a simple and easy method by which the owner may preserve them. If he fails to take this simple step of filing the notice of intention to preserve as provided, he has only himself to blame if his interest is extinguished. The section provides that if the interest was created within twenty-eight years of the effective date of the statute, it must be re-recorded between the twenty-eighth and the thirtieth year of its existence to continue to be

⁶¹ Otherwise, the statute would be subject to attack as an impairment of the obligation of contracts, as a deprivation of the holder of a future interest of his property rights without due process of law, and as being retroactive, *ex post facto* type legislation.

⁶² *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957); *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957). What is a reasonable time within which to enforce a right barred by a statute of limitations depends on the sound discretion of the legislature in the light of the nature of the subject and purpose of the statute, and courts will not inquire into the wisdom of the exercise of such discretion unless the time allowed is manifestly so short as to amount to a practical denial of justice.

effective and to prevent its extinguishment. If the interest has been created more than twenty-eight years before the effective date of the statute, the owner will have two years from the effective date of the statute within which to record. The result is analogous to a statute of limitations that bars and extinguishes the interest unless the affirmative action of filing the notice to preserve is taken by the owner.

Section 3(a) of the proposed statute sets out the persons who may file a notice to preserve these interests under the act. In addition to the owners of possibilities of reverter and rights of entry, it allows any person to file a notice on behalf of any claimant or owner of such interest who is under a disability or unable to assert a claim on his own behalf, or who is one of a class but whose identity is uncertain at the time of the filing of such notice. It is contemplated that the re-recording provision is to be construed strictly and that re-recording shall be positively required even if the owner of the future interest is a minor, incompetent, under disabling coverage, out of the state, unborn, or unascertained. It is provided, therefore, that persons may file the notice to preserve on behalf of these persons who may be under a disability or unknown. The decision to make the terms of the statute applicable to all persons under disability as well as to those of full legal capacity is made because of the belief that marketability of land titles should not be fettered forever by exceptions in favor of the legally disabled.⁶³ The desirable effects of quieting titles and making them marketable will outweigh the occasional losses to persons under legal disability who do not assert their rights within the specified time.⁶⁴ It will also be noted that there should be no exception made in the statute to exclude governmental, public or charitable gifts or conveyances from operation of the statute. If existing ancient interests in land are to be eliminated and land is to be made marketable, the statute should not be emasculated by any exception.⁶⁵

Section 3(b) of the proposed statute specifies what must be in

⁶³ BAYNE §§ 54, 172.

⁶⁴ *Id.* § 172. The statutes of limitations of some twenty-five states establish a maximum period for the bringing of actions by anyone, including disabled persons. In addition to increasing stability of titles, this provision will reduce the volume of litigation involving old claims.

⁶⁵ LEACH & LOGAN 79; Committee on Improvement of Conveyancing and Recording Practices, Report, A.B.A. Sec. of Real Property, Prob. & Trust Law 73 (1957).

the notice of intention to preserve these interests. The land involved must be adequately and specifically described, the notice must set forth the name of the record owner of the land against which the claim is to be continued, and it must also set forth the terms of the special limitation or condition subsequent giving rise to the claim. It is contemplated that these notices must also be properly indexed in the grantee indexes under the names of the person or persons on whose behalf the claim and notice to preserve is filed and also in the grantor indexes under the names of the record owners of the land to be affected for the purpose of giving notice to persons dealing with such lands that such claims exist.⁶⁶

In addition to the foregoing statutory provisions, another provision is recommended which will limit the period of time within which the owner of a possibility of reverter or a right of entry may re-enter or bring an action to recover land from the holder of a determinable fee simple estate or a fee simple estate subject to a condition subsequent, terminated or rendered terminable by the occurrence of the limiting event or breach of a condition subsequent.

Section 4. Limitations of Period Within Which Actions May Be Brought and Land Recovered By Reason of Termination of Determinable Fee Simple Estates or Upon Happening of Condition Subsequent.—No person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of a breach of a condition subsequent or by reason of the termination of an estate of fee simple determinable, unless the action is commenced or entry is made within seven years after breach of the condition or within seven years from the time when the estate of fee simple determinable has been terminated. Possession of land after breach of a condition subsequent or after termination of an estate of fee simple determinable shall be deemed adverse and hostile from the first breach of a condition subsequent or from the occurrence of the event terminating an estate of fee simple determinable. *Provided, however,* that where there has been a breach of a condition subsequent or termination of an estate of fee simple determinable which occurred more than five years prior to the effective date of this act, an action may be commenced for the recovery of the lands, or an entry may be made thereon by the owner of a right of entry or possibility of reverter, within two years after the effective date of this act.⁶⁷

⁶⁶ See note 60 *supra*.

⁶⁷ Compare ILL. REV. STAT. ch. 83, §§ 1(a), 1(b) (1959).

This section of the proposed statute is deemed desirable for a number of reasons. Currently it would seem that if there occurs a breach of a specified condition or a termination of a determinable fee simple estate and there is no re-entry on the land or action instituted to recover the land from the person who holds the possessory estate, there is no certainty as to when the person holding over after such breach or termination will acquire good title. While he may not have any subjective intent to hold adversely, this section of the statute ascribes an intent to him by making his holding adverse and hostile from the date of the breach or from the termination of a fee simple determinable. Another shortcoming of current law is that any holding over by a possessory title holder after a breach of condition or termination of a determinable fee simple estate is that the holding after the breach may be without color of title.⁶⁸ Even if the requisite possession, intent, and other elements for acquiring title by adverse possession can be made out, such possession *without color of title* would have to be for the period requisite for obtaining title by adverse possession without color of title.⁶⁹ In addition, if no color of title is present, the concept of constructive adverse possession imputing a possession of a whole tract from possession of part of the tract, described in the instrument that is color of title, could not be utilized. Another potential problem is that under general adverse possession principles, there is no adverse possession adequate to pass title and to bar actions to recover land unless there is a continuity of hostile and adverse acts. Under this orthodox reasoning, a single breach of a condition subsequent or limitation might not be sufficient to bar the claimant of a possibility of reverter or right of entry.

This proposed statutory section attempts to accomplish a solution of these problems. It (1) affirms that the date of the breach of condition or termination of a determinable fee is the date on which an action to recover land or a right to re-enter arises; (2) it states that any action or right of re-entry will be barred if not instituted or effected before the expiration of seven years after the breach

⁶⁸ Certainly no color of title will be found if the holder is the first taker in a deed subject to a condition subsequent or a deed conveying a fee simple determinable and he holds over after breach of the condition or after the fee simple determinable terminates by the happening of the specified limiting event.

⁶⁹ Twenty years is required in North Carolina instead of seven, which is the period of possession required when there is color of title.

of a condition subsequent or the termination of a determinable fee; and (3) it obviates concern over whether there is in fact an adverse holding over the period within which title can be acquired by a holder of a possessory estate who holds over after a breach of condition or the termination of a determinable fee and whether there must be a single or continuing violation.

The statutory section attempts to effectively relate to existing causes of action to recover land and existing rights to re-enter land. If any right to re-enter or cause of action entitling re-entry shall have arisen more than five years prior to the effective date of the statute, the holder of such right or interest will have two years from the effective date of the statute within which to bring any action or to recover the land. The statute should effectively limit the time within which future arising causes of action and rights of re-entry from the breach of conditions subsequent and the termination of determinable fees can be brought, and thus serve to quiet titles and make them more marketable at an earlier date.

Two other provisions would be desirable inclusions in a statute proposed to curb the adverse effects of possibilities of reverter and rights of entry. Since the judicial doctrine of "changed circumstances" does not generally apply to terminate and render possibilities of reverter and rights of entry unenforceable,⁷⁰ it is proposed that a statutory provision be adopted that will make removable the restrictions of possibilities of reverter and rights of entry from possessory estates when such interests become merely nominal or when they cease to be of substantial benefit to any person seeking their enforcement by re-entry or by action to effect re-entry. The proposed provisions follow:

Section 5. *Possibilities of Reverter and Rights of Entry Not Enforceable; Changed Circumstances, Substantial Accomplishment or Where Enforcement Will Be of No Substantial Benefit.*—No restriction on the use of land created by a special limitation or condition subsequent shall be enforceable by re-entry or by any action instituted in the courts to effect a re-entry or forfeiture of a possessory fee simple estate subject to a special limitation or condition subsequent where it appears that the restriction is or shall become of no actual and substantial benefit to the person or persons seeking to have it enforced, or where the court shall find that the initial purpose of the restriction has been accomplished or that the restriction is no longer of actual or substantial benefit

⁷⁰ See note 21 *supra* and accompanying text.

to the person or persons seeking to have it enforced by reason of changed conditions or circumstances.⁷¹

The foregoing section of the proposed statute will enable an owner of a possessory fee simple estate to extinguish possibilities of reverter and rights of entry when their enforcement is no longer of such substantial benefit to their owners to warrant the continuation of their impairment of practical and valuable land uses and the consequential injury to land utilization and marketability. While the primary beneficiaries of this type legislation would be the possessory estate holders, adjudications that possibilities of reverter and rights of entry are no longer enforceable against certain lands, duly docketed of record, will become very helpful to title searchers also.

Although it would have a limited application, the other proposed provision is designed to prevent the potentially necessary but ludicrous search for all the heirs of the stockholders of a corporation that retained a possibility of reverter or right of entry only to be later dissolved, thus leaving title searchers with a nearly hopeless task of clearing title to the land. The proposed section simply provides that possibilities of reverter and rights of entry cease and determine upon dissolution of any corporation to which either is reserved.

Section 6. Dissolution of Corporation; Possibility of Reverter and Right of Entry Ceases.—When a corporation is dissolved or ceases to exist, any possibility of reverter and any right of entry or re-entry for breach of a condition subsequent heretofore or hereafter reserved by or to the corporation and affecting land in this state ceases and determines.⁷²

To gain the maximum benefits of these proposed statutory sections in the event that any part of the act is declared to be unconstitutional, it is recommended that the following additional section should be included in the statute.

Section 7. Severability of Sections of Statute.—In the event any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act, which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.⁷³

⁷¹ Compare N.Y. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 1951.

⁷² Compare ILL. REV. STAT. ch. 30, § 37d (1959).

⁷³ HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 184-85 (1932).

VI. CONCLUSION

The statute herein proposed will not solve all the problems that may arise from possibilities of reverter and rights of entry, but it is submitted that the major problems which exist or which may occur are dealt with and will be eliminated by its adoption. While "the quest for marketable title" is not ended for the title lawyer, his labors and concern for certainty can be diminished by passage of the statute. In addition, the proposed statute subserves and strikes a desirable balance between the interests of transferors of land who desire to dispose of their lands as they see fit and society's need that land should be freely marketable and thus available for its most economical and effective use. While legislatures are traditionally reluctant to pass legislation which will upset land titles, this reluctance should not be observed in considering this legislation. No interest in land worthy of preservation will be destroyed nor upset in any way, and the number of threats of uncertainty and the consequent unmarketability of titles to land can be substantially diminished if this legislation is enacted.