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Rights of Entry and Possibilities of Reverter-The Perpetual Little Cloud-A Need for Legislative Limitation

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RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER —THE PERPETUAL TITLE CLOUD—A NEED FOR LEGISLATIVE LIMITATION

The subject of future interests does not command the interest and attention that personal injury law or criminal law commands. In consequence, while injustices in the law of torts or in the criminal law may result in public clamor, the anomalies of the law of future interests go unnoticed except for the occasional comments of legal scholars and specialists in the field.[1]

Although there are a number of areas in the law of future in terests where doctrines held over from feudal times create absurdities an anomalies,[2] this article will be confined to two future interests which have particularly undesirable characteristics, the possibility of reverter which follows a determinable fee[3] and the right of entry for condition broken which exists upon creation of a fee on condition subsequent.[4] It will be one purpose of this article to make members of the bar aware of the problems that arise in dealing with these interests. Through awareness of these problems it is hoped that the use of such interests will be discouraged and effective handling of those already in existence will be promoted. The ultimate solution is, of course, legislation and it will therefore be the further purpose of this article to arouse the reader toward this reproachful segment of the law in the hope that he will urge the passage of the legislation suggested.[5]

INTRODUCTION

A possibility of reverter is created by the conveyance of a determinable fee. Nothing more need be said, because the grantor having conveyed less than he had, has retained the residue and the property will revert to him or his heirs upon occurrence of the con-

1. See *e.g.*, Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1941); Ferrier, *Determinable Fees and Fees upon Condition Subsequent in California*, 24 CALIF. L. REV. 512 (1933); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940); Simes, *Elimination of State Restrictions on the Use of Land*, ABA REAL PROPERTY PROBATE AND TRUST LAW (1954); Comment, *Proposed Restrictions on Possibilities of Reverter and Rights of Entry*, 34 MISS. L. J. 176 (1963). See also SIMES & SMITH, FUTURE INTERESTS §§ 241-291 (2d ed. 1956).

2. See generally, LEACH & LOGAN, FUTURE INTERESTS AND ESTATE PLANNING (1961), which points out these absurdities quite clearly.

3. See generally, 1 AMERICAN LAW OF PROPERTY §§ 4.12-4.15 (Casner ed. 1952); RESTATEMENT, PROPERTY § 154 (1936).

4. See generally, 1 AMERICAN LAW OF PROPERTY §§ 4.6-4.11 (Casner ed. 1952); RESTATEMENT, PROPERTY §§ 24, 155 (1936).

5. See *infra*.

tingency.[6] Words such as "to the A church so long as the land is used for church purposes" represent the traditional example of the determinable fee.[7] A clause may be added specifying a reverter but this is not necessary. If a determinable fee is created but the words "and if the property ceases to be so used then to B," are added then the interest following the determinable fee becomes a form of executory interest.[8] If, however, the language is varied slightly to state "to the A church for no other purposes than church purposes and upon breach of said condition the grantor or his heirs may reenter and repossess the premises as of their former estate" a fee on condition subsequent with a right of entry for condition broken has been created.[9] In contrast to the possibility of reverter, where presumably nothing more need be said, the right of entry apparently must be reserved following a fee on condition subsequent.[10] The Pennsylvania courts and the courts of most other states are not fond of forfeiture provisions and will seize upon the failure to retain the right of entry as importing a mere covenant or equitable charge, where possible.[11] When a determinable fee is involved, the occurrence of the contingency automatically terminates the prior estate, renders the reverter or executory interest possessory, and starts the statute of limitations in ejectment running. When a condition subsequent is breached, however, the statute will not commence running untul some attempt at reentry is made.[12]

6. Institution for Savings v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923); Henderson v. Hunter, 59 Pa. 355 (1868); Peters v. East Penn Twp. School Dist., 182 Pa. Super. 116, 126 A.2d 802 (1956). The determinable fee is sometimes called a "base fee" or "qualified fee" or "fee subject to a special limitation." RESTATEMENT, PROPERTY §§ 44 comment *a*, 154 (1936).

7. It is sometimes held that a conveyance for X purposes *and no other* followed by a reverter provision creates a fee simple determinable. See Calhoun v. Hays, 155 Pa. Super. 519, 39 A.2d 307 (1944). See generally, 1 AMERICAN LAW OF PROPERTY § 4.13 (Casner ed. 1952).

8. Institution for Savings in Roxbury v. Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923); *In re* Pruner's Estate, 162 A.2d 626, 400 Pa. 629 (1960); Graybill v. Manheim School Dist., 175 Pa. Super. 415, 106 A.2d 629 (1954). See generally, RESTATEMENT, PROPERTY §§ 25(1)(b), 46 (1936).

9. RESTATEMENT, PROPERTY §§ 45, 155 (1936); 1 AMERICAN LAW OF PROPERTY § 4.6 (Casner ed. 1952). This interest is sometimes called a power of termination.

10. Commonwealth v. Delaware Canal Co., 332 Pa. 153, 1 A.2d 672 (1938). Although the general rule is that express words of forfeiture are not required, the courts will use the lack of such provision as an excuse to find that a forfeiture was not intended. This may be the case even though the words "on condition" are used. President and Fellows of Middlebury College v. Cent. Power Corp., 101 Vt. 325, 143 Atl. 384 (1928). See also Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889).

11. See cases cited *supra* note 10. The courts may even go so far as to hold that a temporary breach is not a breach. See McKissick v. Pickle, 16 Pa. St. 140 (1851). There are circumstances when the court may favor a liberal construction; see Shook v. Bergstrasser, 356 Pa. 167, 51 A.2d 681 (1947).

12. 1 AMERICAN LAW OF PROPERTY § 4.113 (Casner ed. 1952). The

Hence continuing and successive breaches may occur, beyond the normal period of limitation, and ejectment may still be brought.[13]

These interests serve similar purposes and are generally found in gifts to charities and public concerns, or in commercial conveyances, buttressing land use restrictions by covenant. They all have the same ultimate effect upon the estates they encumber, *i.e.*, forfeiture. The most objectionable feature of these interests, however, is their unlimited duration. The Rule Against Perpetuities applies to executory interests, but the possibility of reverter and the right of entry are, illogically, exempt from the rule and thus may last forever.[14] Such a result is hard to reconcile with the policy of the rule as promoting the free alienability of land, since all these interests are equally pernicious in their effect when allowed an unrestricted existence.[15] They make titles unmarketable, lower the tax base of encumbered land and create enormous problems of distribution when they become possessory several generations from their creation.[16] Moreover, the courts have added to these undesirable social-economic consequences by confusing the nature of the interests themselves[17] and allowing technical reasoning to prevail over common sense, as the following cases illustrate.

In *Brown v. Independent Baptist Church of Woburn*[18] the Supreme Court of Massachusetts produced a classic of judicial hocus-pocus. The testator created a determinable fee with a gift over to

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election to forfeit may be exercised by a notice to vacate, by an action of ejectment, or even by an actual entry on to the land evidencing an intent to take possession.

13. *Ibid.*

14. Graybill v. Manheim Cent. School Dist., 400 Pa. 629, 106 A.2d 629 (1960).

15. This has apparently been recognized by the English courts which have on occasion refused to exempt these interests from the rule. See Hopper v. Liverpool, 88 Sol. J. 213 (V.C. Lanc. 1944), Re Trustees of Hollis's Hosp., [1899] 2 Ch. 540. The grantor of a determinable fee who wishes to give the forfeiture to another may easily evade the rule by conveying his reverter instead of creating an executory interest, since the reverter is completely alienable by devise or inter vivos conveyance. London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951); Calhoun v. Hays, 155 Pa. Super. 519, 39 A.2d 307 (1944).

16. See LEACH & LOGAN, CASES ON FUTURE INTERESTS 45, 46, 58 n.24 (1961) [hereinafter LEACH & LOGAN].

17. The courts are especially confused by terminology, and in many cases it is difficult to ascertain exactly what the court holds the interest to be. See Jones v. Oklahoma City, 193 Okl. 637, 145 P.2d 971 (1943), an example of confusion between a fee simple determinable and a fee on condition subsequent. The prize winning statement, however, comes from the dissent in *Jones*: "I agree with the majority opinion that the estate conveyed . . . was a determinable fee upon condition subsequent leaving in Wallace and his heirs a mere possibility of reverter upon re-entry." 193 Okl. at 648, 145 P.2d at 976. The Pennsylvania courts are not without confusion. See In re Pruner's Estate, 400 Pa. 629, 162 A.2d 626 (1960), discussed in the text.

18. 325 Mass. 645, 91 N.E.2d 922 (1950).

ten named persons. The same ten persons were also named as residuary legatees. The court voided the gift over to the ten persons as too remote, then decreed that the possibility of reverter, supposedly remaining and not affected by the Rule Against Perpetuities, passed through the residuary estate to the same ten persons. In effect the court allowed the policy of the Rule to be defeated merely by naming the beneficiaries of the gift over as residuary devisees. The interest in question was created in 1849, the contingency occurred in 1939 and the litigation resulting therefrom finally terminated in 1950. This oft-told tale of the Woburn Church ended with the estate being decimated by administration expenses including counsel fees and a large fee to a geneologist hired to track down the heirs of the ten named residuary legatees. It was an unhappy ending for all but the real beneficiaries of the estate, the geneologist and counsel.[19] Moreover, the testatrix in the long run may have destroyed rather than benefited the object of her charitable intent. When the character of the neighborhood changed, members of the church began to go elsewhere for spiritual guidance. The church itself, however, could not relocate without losing its property entirely. Thus these forfeiture provisions do not always accomplish their intended purposes.

The precise situation could not arise in Pennsylvania, at least not in an instrument taking effect after January 1, 1948.[20] Void interests following valid interests of fee simple determinable or fee on condition subsequent are dealt with by Section 5b of the Estates Act of 1947[21] which provides: "Void interests on condition subsequent and special limitation. A void interest following a valid interest on condition subsequent or special limitation, shall vest in the owner of such valid interest."[22] Section 5b, however, does not affect possibilities of reverter that arise without an intervening void interest, since the possibility of reverter is not void under the Rule Against Perpetuities.[23]

In another Massachusetts case, *Proprietors of the Church in Brattle Square v. Grant*[24] decided a century before *Woburn*, property was devised to the deacons of the church on express condition that the minister reside therein, with a gift over to a nephew upon breach of the condition. The court declared the gift over void under

19. See LEACH & LOGAN 45, 46.

20. The effective date of the Estates Act of 1947. PA. STAT. ANN. tit. 21, §§ 301.1-301.21 (1950).

21. PA. STAT. ANN. tit. 21, § 301.5(b) (1950).

22. See also the general provisions of Section 5(c).

23. It would also not be applicable to a conveyance or devise by A, "to B and his heirs so long as the premises are used for residential purposes. If they cease to be so used then to the heirs of A." The doctrine of worthier title, which apparently has never been abolished in Pennsylvania, would probably operate to create a possibility of reverter in A. Hence the Rule Against Perpetuities could not operate to void the executory interest and bring section 5(b) into play.

24. 3 Gray 142 (Mass. 1855).

the Rule Against Perpetuities, but instead of decreeing a right of entry in the testator's heirs, they sensibly granted the church a fee simple free from the divesting limitation, thus upholding the policy of the rule.

Although the practical result may be the same, there is a difference in legal result depending upon whether the prior estate is a determinable fee or a fee simple subject to a divesting executory interest on condition subsequent. In light of the policy of the Rule Against Perpetuities there is no justification for such a distinction.[25] Invalidating an executory interest following a determinable fee, and then validating the possibility of reverter supposedly remaining, serves only to defeat the intent of the transferor while accomplishing no public good, since the reverter will still burden the title.

In a Pennsylvania case, *Pruner's Estate*,[26] there was a devise of certain realty to the Boroughs of Tyrone and Bellefonte in trust for a home for friendless children of those communities. A codicil added that in the event there should be a failure to carry out said provisions then the property should go to a niece of the testator. The testator died in 1904 and in 1949 the home ceased to house children.[27] In 1960 the court held the gift to have failed. In an opinion confusing base or determinable fees and fees on condition subsequent, the court apparently concluded that it was immaterial which interest was created:

> [I]rrespective of the exact name of the interest or estate which the testator gave to the home for friendless children; it is well settled that upon the occurrence or happening of the stated event (or upon the happening or breach of the condition or limitation, or as some authorities express it 'if the condition subsequent is broken') or if the purpose fails the estate given to the home determines and is automatically terminated.[28]

Whether a determinable fee was created is doubtful.[29] It is not clear whether the court has hopelessly confused the fee on

25. When a condition subsequent burdening a fee is of the type that creates upon its breach a right of entry for condition broken the estate is called a fee on condition subsequent. RESTATEMENT, PROPERTY § 45 (1936). However, when the breach of a "condition subsequent" results in divestment in favor of a third party, the estate is termed a fee subject to an executory interest. Section 5(b) of the Estates Act, PA. STAT. ANN. tit. 21 § 301.5(b) (1950), makes such distinctions immaterial.

26. 400 Pa. 629, 162 A.2d 626 (1960).

27. Apparently there were no children within the geographic area specified by *Pruner* that qualified. This inherent narrowness of charitable intent prevented the use of cy pres.

28. 400 Pa. at 639, 162 A.2d at 632.

29. There are three types of executory interests, the springing type that divest an interest in the transferor, the shifting type that divest an interest in a person other than the transferor, and the type that follow a fee simple determinable. The interest in *Pruner* appears to be of the divesting type. See Betts v. Snyder, 341 Pa. 465, 19 A.2d 82 (1941).

condition subsequent and the fee subject to an executory limitation with the determinable fee or simply attempted to abolish the distinction between them.

The court concludes that the property reverted to Pruner's heirs, apparently relying at least partially upon *Woburn* (although reference to *Brattle Square* appears in the opinion). It is difficult to understand why the court chose to apply the *Woburn* result[30] especially since in a prior Pennsylvania case, *Betts v. Snyder*,[31] the court had applied *Brattle Square* to a devise very similar to *Pruner*. In *Betts*, the court interpreted *Brattle Square* as holding that the forfeiture provision was not a true limitation on the duration of the fee. Hence the devise was a fee simple subject to an executory limitation, the entire fee passed, the executory interest was void and there was no reverter or right of entry left in the heirs.[32] Whether the language be construed as creating a fee on condition subsequent with the fee becoming vested in the first taker upon voiding of the executory interest, or as a fee simple subject to an executory limitation, it is clear that the result reached in *Brattle Square* and *Betts v. Snyder* is to be preferred.

Moreover the *Pruner* court made no attempt to apply the sound policy enunciated in Section 5(b) of the Estates Act[33] and thus missed another opportunity to eliminate some of the undesirable effects of pre-1948 forfeiture provisions. Thus *Pruner's Estate* casts some doubt upon the efficacy of the comment to Section 5(b) which states that:

> special provision for estates on condition subsequent or special limitation is necessary in order not to change the very sensible results reached by the common law in cases of remote conditions subsequent followed by void gifts over.

It may be that a void gift over following a determinable fee created before 1948 will not vest in the owner of the determinable fee, but will revert to the transferor or his heirs.[34]

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30. *Woburn* involved a determinable fee created by the proper technical words. *Pruner* involved language, which were it not for the executory interest would not have manifested sufficient intent to cause a forfeiture, but with the addition of the executory interest it became a fee simple subject to an executory limitation and not a determinable fee. The court may have been influenced by the existence of the trust, but did not so indicate.

31. 341 Pa. 465, 19 A.2d 82 (1941). See also Smith v. Townsend, 32 Pa. 434 (1859).

32. There is language to support this construction: "The devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will." However, it is stated further on: "When a subsequent condition or limitation is void . . . the estate becomes vested in the first taker." 3 Gray at 156. The American Law Institute appears to support the view taken in Betts v. Snyder. See RESTATEMENT, PROPERTY § 45 Comment (a) (1936).

33. PA. STAT. ANN. tit. 20, § 301.5(b) (1950).

34. The situation is further complicated since the intent of the legislature, as evidenced by Comment (b) of Section 5, is open to interpretation.

DEVICES IN PENNSYLVANIA TO ELIMINATE THESE INTERESTS

Having already met one method lessening the effect of these interests, we shall proceed to examine several methods of eliminating them entirely. The most common method is to construe them out of existence. Thus a devise or conveyance to a school district for "school purposes only" reserving no reverter or right of entry[35] was held in *Phillips Gas & Oil Co. v. Lingenfelter*[36] to pass the fee simple because

> the words upon which appellant relies as debasing the fee are merely superfluous and not expressive of any intention . . . the words 'for school purposes only' was a needless admission by them [the school directors] that they were acting within the powers conferred upon them by the act of assembly.[37]

Whether it was the absence of a right of entry (or other provision indicating forfeiture) or the supposedly superfluous character of the words which moved the court to hold that a fee simple absolute was conveyed, is not entirely clear. The language in this case, if construed as to create a future interest appears to indicate a determinable fee.[38] If the conveyance were to the school district "so long as used for school purposes" a forfeiture provision would not be necessary, as the reverter would arise automatically. Hence, if the potential words of limitation were construed as superfluous a significant number of these troublesome interests could be eliminated. A conveyance to a church "so long as used for church purposes" would, under this construction, pass the fee simple, unless a reverter is specifically reserved. The superior court, however, appears to have rejected such a construction when the technical

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The words of the statute are plain enough but the comment cites Bilyeu's Estate, 346 Pa. 134, 29 A.2d 516 (1943), which involved what is termed a fee simple subject to an executory interest. Such an interest is not a "special limitation." If the executory interest is held void what remains is a fee simple absolute. Naturally in that situation the first taker has the entire interest, a fee simple, but not because the void interest vested in him. There would appear to be a distinction between a divesting executory limitation which denotes automatic *expiration* rather than divestment. See RESTATEMENT, PROPERTY § 23 comment *b* (1936). The *Restatement*, however, appears to include only the limitation which causes expiration in the term "special limitation." RESTATEMENT, PROPERTY § 23 provides:

> The term 'special limitation' denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event and thus provides for a terminability in addition to that normally characteristic of such interest.

Thus the *Restatement* interpretation contemplates a determinable fee. *Cf.* Randalls Estate, 341 Pa. 501, 19 A.2d 272 (1941).

35. See Calhoun v. Hays, 155 Pa. Super. 519, 39 A.2d 307 (1944).

36. 262 Pa. 500, 105 Atl. 888 (1918).

37. *Id.* at 503, 105 Atl. at 890.

38. This language apparently may create a determinable fee if coupled with a reverter provision. Calhoun v. Hays, 155 Pa. Super. 519, 39 A.2d 307 (1944).

words "so long as" creating a determinable fee, are used.[39] It appears that such a device is limited solely to situations where the technical words creating a determinable fee are *not* used and where no right of entry or possibility of reverter is reserved.[40]

Rights of entry and possibilities of reverter are very often used to buttress covenants between private individuals restricting the use of land. When these interests are so used, it has occasionally been urged that the same equitable doctrines applicable to the enforcement of covenants are applicable to the forfeiture provisions which bolster them.[41] Thus in the California case of *Hess v. Country Club Park*[42] in a proceeding for a declaratory judgment that the restrictions and forfeiture provisions accompanying them were no longer in force due to the changed conditions in the neighborhood, the court apparently voided both the restrictions and the forfeiture provisions. However desirable such a result might be, at present it probably does not represent the general law and may not even represent the law in California.[43] If, however, one wishes to void restrictions and forfeiture provisions badly enough and can make out a genuine case of hardship this method of attack appears to be at least worth a try.

In order for these devices limiting the ill effects of forfeiture provisions to be useful, there must be a method of determining their validity without violating the condition or limitation. Otherwise title to the land would remain unmarketable, because the possibly invalid condition remains as a cloud on the title, and the land itself would remain limited in use through fear of possible forfeiture.

There are two possible methods of ascertaining the validity of the future interest. One method is by bringing an action under the declaratory judgment act.[44] There is dicta to the effect that such

39. Peters v. East Penn Twp. School Dist., 182 Pa. Super. 116, 126 A.2d (1956).

40. See *supra* note 35.

41. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 53 HARV. L. REV. 248 (1940).

42. 213 Cal. 613, 2 P.2d 782 (1931). See also Forman v. Hancock, 3 Cal. App.2d 291, 39 P.2d 249 (1934); Letteau v. Ellis, 22 Cal. App. 584, 10 P.2d 496 (1932); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918).

43. See Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1920), holding that the right of entry exists independent of the covenant.

44. PA. STAT. ANN. tit. 12, §§ 831-846 (1953). Section 836 provides:
Relief by declaratory judgment or decree may be granted where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which he has a concrete interest and that there is a challenge or denial of such asserted relation status right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied that a declaratory judgment or decree will serve to terminate the uncertainty or controversy giving rise to the pro-

an action is proper to determine the validity of a forfeiture provision if the occurrence of the contingency or breach of the condition is imminent.[45] The courts, however, have been generally unfriendly toward the act, and have given it an extremely narrow interpretation contrary to the obvious intent of the legislature to confer broad jurisdiction. Undoubtedly the court would require clear and convincing proof of the imminence of the forfeiting contingency before accepting jurisdiction and even then their acceptance would be uncertain. The better method for determining such rights is found in Rule 1061 of the Pennsylvania Rules of Civil Procedure which establishes the action to quiet title. The rule states that:

> (b) [T]he action may be brought . . .
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> (2) where an action of ejectment will not lie, to determine *any* right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land;[46]

This broad language appears to encompass a determination as to the validity of a possibility of reverter or right of entry,[47] indeed it is difficult to see how the language could have been made any broader, or its purpose any clearer. The relief granted under Rule 1061 is essentially declaratory. The courts, however, have favored it with a liberal interpretation. Why the pill of declaratory relief is easier to swallow when called an action to quiet title remains a mystery.

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ceeding. . . .

Section 842 further provides:

> This act is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.

45. See Congregational Conference Appeal, 43 A.2d 1, 352 Pa. 470 (1945), wherein two provisions of a deed were before the court for interpretation. The court rejected determination of the validity of a forfeiture provision because the occurrence of the contingency was not imminent, but interpreted a restriction because the occurrence of that condition was imminent. Thus the court clearly implied that they would entertain an action to determine the validity of a forfeiture provision if occurrence of the contingency were imminent.

46. See Keefer's Estate, 351 Pa. 343, 41 A.2d 666 (1945); School Dist. of Newcastle v. Travers, 353 Pa. 261, 44 A.2d 665 (1945); Quigley's Estate, 329 Pa. 281, 198 Atl. 85 (1938). *But see* the liberal attitude of the court in petition of Kariher, 284 Pa. 455, 131 Atl. 265 (1925), upholding the constitutionality of the act. The original act enacted in 1923, was an enactment of the Uniform Declaratory Judgments Act, but was amended in 1935 and again in 1943 in an attempt to divert the judiciary from their narrow construction. See PA. STAT. ANN. tit. 12, § 836 (1953) (historical note).

47. See Bruiker v. Borough of Carlisle, 376 Pa. 330, 102 A.2d 418 (1954); Gentile v. Badner, 13 Ches. Co. Rep. 253 (1965), wherein the court held certain restrictions invalid because of changed conditions. In applying Rule 1061 the courts never fail to stress that it is to be liberally interpreted.

The legislature has also aided in the elimination of these interests. By virtue of Section 1171 of the Municipal Code[48] "any city, county, school district, or other municipality" is given the power to obtain a fee simple in any real property in which they have previously acquired a lesser estate, "provided that such real estate shall have been used or held for a public purpose for a period of not less than 10 years," and the statutory procedures are complied with.[49] Since this is a form of condemnation the holder of the condemned interest must be compensated for the value of his interest.[50] The rule generally applicable to condemnation of possibilities of reverter or rights of entry is formed in the Restatement of Property[51] which provides that compensation is to be paid the owner of the future interest if, and only if, viewed from the time of commencement of the proceedings and disregarding any consequences of the proceedings, the occurrence of the contingency is imminent and probable. This is the rule in Pennsylvania.[52] Therefore unless the owner of the possibility of reverter or right of entry can show that the forfeiture was imminent just before the taking he is not entitled to any compensation and the school district or municipality can conceivably get the fee without paying a cent.

Another seemingly possible, but apparently untried method of getting rid of forfeiture provisions that decrease the marketability, value and usefulness of land is inadvertently provided by the legislature in the Pennsylvania Tax Sales Act[53] which provides in part:

> [If all proceedings are regular, the court] shall order and decree that said property be sold . . . freed and cleared

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48. PA. STAT. ANN. tit. 53, § 1171 (1957).

49. PA. STAT. ANN. tit. 53, § 1172 (1957). See Long v. Monongahela City School Dist., 395 Pa. 618, 151 A.2d 461 (1959).

50. PA. STAT. ANN. tit. 53, § 1173 (1957).

51. RESTATEMENT, PROPERTY § 53, comment c (1936).

52. Chew v. Commonwealth, 400 Pa. 307, 161 A.2d 621 (1960), noted in 46 CORN. L. Q. 631 (1961). Indeed, the *Restatement* position represents a change in the law. The original position was that the owner of the possibility was not entitled to share in the award. First Reformed Church v. Croswell, 210 App. Div. 294, 206 N.Y. Supp. 132 (3d Dept. 1924). The *Restatement* rule of imminency was apparently first recognized in United States v. 2,184.81 Acres of Land, 45 F. Supp. 681 (W.D. Ark. 1942). Section 53 comment c states:

> If, viewed from the time of the commencement of an eminent domain proceeding, and not taking into account any changes in the use of the land sought to be condemned which may result as a consequence of such proceeding, the event upon which a possessory estate in fee simple defeasible is to end is an event the occurrence of which, within a reasonably short period of time, is probable, then the amount of damages is ascertained as though the estate were a possessory estate in fee simple absolute, and the damages so ascertained between the owner of the estate in fee simple defeasible and the owner of the future interest in such shares as fairly represent the proportionate value of the present defeasible possessory estate and of the future interest.

53. PA. STAT. ANN. tit. 72, §§ 5860.608, 5860.612 (Supp. 1965).

> of all tax and municipal claims, mortgages liens, charges *and estate of whatsoever kind* to the highest bidder and that the purchaser at such sales shall take and thereafter have an *absolute title* to the property sold free and clear of all tax and municipal claims, mortgages, liens charges and *estates of whatsoever kind.*[54]

The owner of the defeasible fee may forfeit the land to be put up for sale for non-payment of taxes, preferably local property taxes, which land is sold at a tax sale and purchased by his confidante. By virtue of the provisions of the act, the title passed will be a fee simple free from the limitation or condition. Even if he were forced by competitive bidding to pay more than the amount of the delinquent taxes he would in most cases receive the entire sum back without payment to the holder of the possibility for the divestiture of his interest. The same principle applicable to condemnation proceedings would appear to apply,[55] and nothing (or very little) would be payable unless it could be shown that just before the sale, and ignoring the consequences of the sale, the occurrence of the contingency or breach of the condition was imminent. Thus through the vehicle of the tax sales act it appears possible that the owner of a remote possibility of reverter or right of entry could be divested of his interest and the title thereby cleared.[56] However, Pennsylvania has a statute which, contrary to the common law rule, permits the owner of a contingent interest to sue to prevent waste and recover damages therefor:

> From and after the passage of this act, it shall be lawful for any person or persons having a contingent interest in any real estate in this commonwealth, and not being in possession of the same, to commence and prosecute any suit or suits at law or in equity to prevent the commission of waste to such real estate, or to recover damages for waste committed or injury done to such real estate, in the same

54. PA. STAT. ANN. tit. 72, § 5860.612 (Supp. 1965) (Emphasis added.) Without such a paramount title provision lands subject to liens, executory interests, reverters, etc., would be unmarketable at a tax sale and the government would lose revenue.

55. See RESTATEMENT, PROPERTY § 53, comment c (1936), discussed *supra* in the text. The value of such an interest would appear to be the same whether the interest is to be condemned by the state or superseded by the paramount fee simple title of the tax deed.

56. It has been held that a tax deed of the paramount title type releases forfeiture provisions. Alamogordo Improv. Co. v. Prendergast, 43 N.M. 245, 91 P.2d 428 (1939); Alamogordo Improv. Co. v. Hennessee, 40 N.M. 162, 56 P.2d 127 (1936); N.W. Improv. Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937). However, although these interests are troublesome, and not favored by the courts, there still exists the risk that the courts will not favor the use of a state statute to divest property rights through a sham transaction. There would appear, however, to be no constitutional objections to this operation of the statute since the effect would be similar to the valid condemnation rule that the interest in a remote possibility is valueless. Indeed, the former rule was that even an *imminent* possibility was valueless.

> manner and form as they might or could do was such interest vested and the person or persons having such interest in actual possession of the same.[57]

The meager authority construing the statute has allowed a very liberal interpretation of what contingent interests are covered by its language, which may include possibilities of reverter or rights of entry.[58] If the owner of the remote contingent estate may sue to prevent waste, it is entirely possible that the court would construe the non-payment of taxes as a form of waste within the statute. The court may hesitate, however, to enforce the rights of the holder of a remote contingent interest by mandatory injunction[59] and the damages recoverable in such a situation would be nominal. Thus even if the statute is applicable and an injunction is not granted, it might still be worthwhile to pay nominal damages and rid the title of the burden.

It should further be noted that if this "waste statute"[60] is applicable to remove possibilities of reverter or rights of entry it creates a potential for harrassment litigation, the sole purpose of which is to persuade the owner of the fee to purchase the reverter at an inflated sum.

LEGISLATIVE PROPOSALS

As has been demonstrated, the law in this area is haphazard, illogical, unnecessarily complicated and totally unsuited to a rapidly changing and growing society. Obsolete forfeiture provisions which have remained dormant in a hitherto stable society, and newly created interests which appear to be on the upsurge in the area of land use planning, will cause problems and hardships as society grows and changes.[61] To fill in the gaps in Pennsylvania's haphazard future interests law, and provide an overall uniform and sensible system for regulating these pernicious interests, the following legislative proposals are offered, either cumulatively or alternatively.

First the following section should be added to the Estates Act

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57. PA. STAT. ANN. tit. 12, § 1468 (1953). A receiver is appointed to receive monies recovered.

58. See Zerbe Twp. School Dist. v. Thomas, 61 Pa. D. & C. 355 (C.P. 1948); Zerbe Twp. School Dist. v. Thomas, 18 Northumb L.J. (1947).

59. *Cf.* Gleason v. Gleason, 43 Ind. App. 426, 87 N.E. 689 (1909). However, since the statute authorizes appointment of a receiver who could collect rents or rental value and apply it to tax obligations, the actual issuance of a mandatory injunction may not be necessary.

60. PA. STAT. ANN. tit. 12, § 1468 (1953).

61. It should be noted that many of the cases in this area are found in the California Reporters. This is no accident. California's rapid growth has demonstrated that there are many such interests waiting to cause havoc in real estate transactions and many new ones produced in the course of further land development. For an example of the confusion restrictions and forfeiture provisions may cause, see Atkins v. Anderson, 139 Cal. App. 2d 918, 294 P.2d 727 (1956).

of 1947, Section 4.[62]

SPECIAL RULE AGAINST PERPETUITIES

§ 4(c) Any executory interest or possibility of reverter arising from the creation on or after—of a fee simple determinable and any right of entry arising from the creation on or after—of a fee on condition subsequent shall become void and inoperative if the specified contingency does not occur within forty years from the date when such fee simple determinable or such fee on condition subsequent becomes possessory. This section shall not apply where both the fee simple determinable and the executory interest or possibility of reverter and both the fee on condition subsequent and the right of entry are for charitable or public purposes; nor shall this section apply to a deed gift or grant of the Commonwealth or any political subdivision thereof. Neither Section 4(b) of this Act nor the common law rule against perpetuities shall apply to any interest within this section, and any interest otherwise within this section, limited to a duration of less than the period herein provided, shall take effect as limited.[63]

The above section validates possibilities of reverter executory interests and rights of entry for condition broken for a period of forty years. The forty year period should be long enough to accomplish the purposes of the forfeiture provision without unduly burdening the title. This period was chosen in lieu of the period of the Rule Against Perpetuities because (a) the period of the rule is not uniform and leads to uncertainty and (b) the period of the rule, which may be a century or more in duration due to improved life expectancy, is too long. Moreover, since possibilities of reverter, executory interests and rights of entry are almost identical in effect they should be subject to the same limitations. Hence in the interest of uniformity the executory interest of the type which follows a determinable fee is included herein and is removed from the operation of the rule.[64]

If the forfeiture provisions (generally the type used to buttress land use restrictions) create undue hardship and no longer serve their intended purpose, but the forty year period has not elapsed the following is offered:

§ ..... (a) No restriction on the use of land created at anytime by covenant, or negative easement shall be enforced by injunction if it appears that the enforcement of the restriction is of no substantial benefit to the person

62. PA. STAT. ANN. tit. 21, § 301.4 (1950).

63. This type of statute is sometimes called a *period in gross statute.*

64. The executory interest which follows a determinable fee is to be distinguished from the executory interest which cuts off a fee simple. An example of the latter interest would be, "To A and his heirs but if A dies without issue surviving him then to B." Elimination of this interest is not within the scope of the proposed statute and is left to the rule against perpetuities when applicable.

seeking the injunction.

(b) No restriction on the use of land by condition subsequent or special limitation created on or after ..... shall be enforced by judgment compelling forfeiture if it appears that the enforcement of the restriction is of no substantial benefit to the person seeking the forfeiture. The fact that the holder of the future interest will obtain ownership of the property is not to be considered in determining "substantial benefit" under this subsection.[65]

The above provisions will take care of interests created *after* the effective date of the act. Retroactive application of these provisions would probably run afoul of state and federal constitutional provisions regarding due process, impairment of the obligation of contracts and, in Pennsylvania at least, a provision against ex post facto laws.[66] When treading on the ice of retroactivity, one must tread cautiously. The following provisions are therefore designed to operate upon interests created *before* the effective date of the act and in certain instances, interests created thereafter.

LIMITATION OF ACTIONS

§ 86(a) No proceeding in law or equity shall be brought based upon any executory interest or possibility of reverter arising from the creation on or before the effective date of this act of a determinable fee or any right of entry for condition broken arising from the creation on or before the effective date of this act of a fee on condition subsequent, unless the specified contingency has occurred or the condition has been breached before the above date or within two years thereafter or unless on or before five years from the effective date the person or persons holding the right of entry, executory interest, or possibility of reverter or anyone authorized to act in his or their behalf have filed a

65. Subsection (a) enacts the general equitable principles now in force and subsection (b) applies them to forfeiture provisions.

66. See PA. CONST. art. 1, §§ 1, 7. Statutes limiting the duration of possibilities of reverter and rights of entry have been construed in some states. The Illinois fifty year limitation statute, retroactive in application, was upheld in Trustees of Schools v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955). The Illinois statute was worded to destroy any reverter that was more than fifty years old, and the act contained no saving clause. The Florida statute provided for a twenty-one year duration and contained an illusory saving clause. The Florida act, however, did contain a statement of legislative policy declaring forfeiture provisions of unlimited duration against public policy. In spite of this declaration the Florida court concluded that the statute was unconstitutional in its retroactive application. Biltmore Village v. Rotolante, 71 So.2d 727 (Fla. 1954). Moreover, the Illinois decision is weakened somewhat, since upon close examination it appears that the interest involved was an executory interest. Since executory interests are within the Rule Against Perpetuities the policy of limitation is established as to them and the legislature may validly limit their duration retroactively. See also Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND (1953).

statement of interest in the office of the recorder of deeds of the county in which the land subject to the interest is located. Said statement shall be indexed and recorded as though it were a deed conveying real estate under the name of the person or persons appearing of record to own the fee subject to the right of interest.

(b) Such statement of interest shall be duly sworn to and shall describe the land and the nature of the right to which it is subject and the deed or other instrument creating the interest and where it may be found if recorded or registered. The statement shall further name the holder or holders of the interest or one or more of them if all cannot be found, and name the record owners of the fee subject to the interest.

The forty year period appears to be reasonable as accomplishing the announced purposes of the legislation.[67] It is hoped that after the operation of the recording requirement the bulk of such interests will have ceased to cloud land titles.

Those ancient interests not disposed of by the marketable title statute, and those interests upon which the forty year rule against perpetuities has not run, may still be eliminated by a combination of procrastination or inadvertance on the part of the holder of the interests and the following:

§ ..... No action shall be maintained nor entry made to recover lands upon the breach of a condition subsequent or the happening of a specified contingency after five years from the first breach of the condition or happening of the specified contingency. This limitation shall apply irrespective of any demand or entry by the person entitled to possession and continuing and successive breaches shall not extend this limitation. Nor shall any action be maintained nor entry made to recover lands upon the termination of a determinable fee after five years from the date the contingency first occurred. Provided however, that if the condition shall have been breached, or the contingency shall have occurred three years or more before the effective date of this act then two years from the effective date of this act shall be allowed for the bringing of such action.[68]

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67. There exists the very remote possibility that this section might be considered unreasonable in its operation upon more recently created interests. Since notice is afforded by the recently filed conveyancing instrument, title searches are not rendered burdensome. A marketable title statute operates under the police power to provide rules facilitating conveyancing and title search in the interest of the public. Hence to pacify the skeptics the following could be added:

Provided, however, that if the interest shall have been created within twenty years [or whatever is considered reasonable] prior to the effective date of this act then such interest must be recorded within fifteen years from the effective date of this act.

68. The Illinois Reverter Act, construed in Trustees of Schools v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955), has been amended to a forty year period (the period was fifty years), ILL. ANN. STAT. ch. 30, § 37(b)-(h)

In order to provide a sound basis in public policy and a strong manifestation of legislative intent should the constitutionality of the marketable title statute or the short statutes of limitation be questioned it might be well to include the following statement or a statement of similar import:[69]

§ ..... Declaration of Purpose

(a) Land is a basic resource of the economy and any private arrangement which prevents its most economical use, or any obsolete or unrealistic restriction which reduces its value and thus reduces the tax base requiring higher taxes on unrestricted land, or clogs the title to land with stale interests making title searches more difficult and expensive and land less alienable is hereby declared to be against the public policy of this state.[70]

(b) Land use planning, in the public interest by public authorities has reduced the need for, and the utility of, private arrangements to restrict the use of land, and therefore the existence of such private restrictions especially those of unlimited duration is declared by the legislature to be not in the public interest.

An attempt has been made in this suggested legislative scheme to provide for every possible defect, and produce an effective statute to curb the undesirable effects of these forfeiture interests.[71]

(Smith-Hurd 1966). The Minnesota Marketable Title Statute is a general curative statute which operates upon all interests over forty years old. It was held constitutional in Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957). Apparently forty years is a "reasonable" period. Illinois, in 1959, also passed a general curative statute invalidating claims more than forty years old unless recorded. ILL. ANN. STAT. ch. 83, § 12.1 (Smith-Hurd 1966). Such a statute would appear even more desirable than the suggested statute in promoting free alienability and facilitating title searches. However, such a statute might be too much for the Pennsylvania legislature to swallow in one gulp.

69. If the contingency has occurred before the effective date of the act, a reasonable time thereafter should be allowed in keeping with due process.

70. *But see*, Biltmore Village v. Rotolante, 71 So.2d 727 (Fla. 1954), where such a declaration of legislative purpose did not prevent the court from declaring the Florida statute unconstitutional.

71. Another evil of these interests not mentioned in this preamble is no less real. These interests can be the source of a form of blackmail where the owner of the land is under pressure, arising out of private circumstances, to sell the land. He may find that the burden of the forfeiture provision makes the land unmarketable and may be forced to pay the owner of the reverter or right of entry an exorbitant sum to release the interest.

There is still one loophole in the limitation provisions. A conveyance (or devise) to A for 1,000 years said term being determinable upon the premises being used for anything other than residential purposes, remainder to X would seemingly not be within the statute. Apparently the Rule Against Perpetuities would not apply either, the seisin being in the "remainderman." See Knightsbridge Estates Ltd. v. Pyrne [1938] 2 All E.R. 444, 454. Perhaps a comment to the appropriate sections would remedy

It is of course recognized that legislative proposals in this obscure area of the law will not meet with much enthusiasm among legislators unless members of the bar campaign for their adoption. On the other hand, such legislation is not likely to meet with enthusiastic opposition. Moreover, other states have been successful in placing reasonable limitations upon these interests.[72] Sooner or later Pennsylvania's rapid suburban development is going to wake up sleeping ancient forfeiture provisions and create new ones through private land use planning. A *Woburn Church* case[73] may be just around the corner. It is the type of confusion evidenced by this area of the law which causes the layman to take a dim view of the legal profession. The reader is urged, as a member of the bar, to promote the adoption of the legislation suggested herein or any part or reasonable facsimile thereof.

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the defect:

> In keeping with the policies set forth in this act [the declaration of purpose] a term of years of such length as to create essentially a fee, made determinable or subject to a condition subsequent, shall be within the operation of this act.

It is not likely, however, that many people will go so far to create valid forfeiture provisions.

72. *Adverse Possession—short statute of limitations:* ILL. ANN. STAT. ch. 83, § 1(a)(b) (Smith-Hurd 1966); MINN. STAT. ANN. § 500.20(3) (1957); MISS. CODE ANN. § 709-11 (1956) normal period—ten years adverse possession; *Period in gross statutes—limitation of duration:* CONN. GEN. REV. STAT. § 45-97 (1958); ILL. ANN. STAT. ch. 30, §§ 37(b)-(h) (Smith-Hurd, Supp. 1966); KY. REV. STAT. § 381.219 (1963); ME. REV. STAT. ch. 160, § 29 (Supp. 1963); MASS. ANN. LAWS ch. 184A, § 3 (1958); MINN. STAT. ANN. § 500.20 (1957); NEB. REV. STAT. §§ 76-299-2, 105 (1957); N.Y. REAL PROP. LAW § 345 (Supp. 1966); R.I. GEN. LAWS ANN. § 34-7-2 (1956). Some statutes abolish the forfeiture provision but continue to enforce the restriction and covenants: FLA. STAT. ANN. § 689.18(4),(7) (1944). The Massachusetts Act, MASS. ANN. LAWS ch. 184, § 23 (1958), includes restrictions, but operates only on those unlimited as to time. Apparently a restriction or condition which by its terms is to last 1,000 years is not covered, a serious defect. *Substantial Benefit—equitable principles:* Some statutes provide that when enforcement of the interest is of no substantial benefit to the holder it is void and unenforceable. ARIZ. REV. STAT. ANN. § 33-436 (1956); MICH. STAT. ANN. § 26.46 (1957); WIS. STAT. ANN. § 230.46 (1957); *Marketable Title:* MASS. LAWS ANN. ch. 260, § 31A (1958); MINN. STAT. ANN. § 541.023 (1957); N.Y. REAL PROP. LAW § 345 (Supp. 1966).

72. 325 Mass. 645, 91 N.E.2d 922 (1950).