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Terminating Conditions Unlimited in Time

TERMINATING CONDITIONS UNLIMITED IN TIME

While public planning has replaced individual freedom in the allocation and utilization of resources in many areas of the economy, land use in the United States remains primarily subject to private con-

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61. The SEC is permitted under the Investment Companies Act of 1940, 15 U.S.C. § 80a-35 (1946), upon showing gross misconduct or abuse of trust, to obtain an injunction against any officer, director, member of advisory board, investment advisor, depositor. etc., from continuing to so act, either permanently or for such period as the court, in its discretion, shall deem appropriate. The SEC might also be used as an advisory body to the judiciary in derivative action cases.

62. *E.g.,* Fair Labor Standards Act, 29 U.S.C. § 216(b) (Supp. 1951) (double damages, plus attorney's fees and costs); Housing and Rent Act of 1947, 50 U.S.C. APP. § 1895 (Supp. 1951) (treble damages, plus attorney's fees and costs).

63. The average stockholder does not desire liquidation, as he is likely to receive more for his stock on the market than by dissolution. For a complete discussion of the judicial power to wind up a corporation see Hornstein, *A Remedy For Corporate Abuse—Judicial Power to Wind Up A Corporation at the Suit of a Minority Stockholder,* 40 COL. L. REV. 220 (1940); REUSCHLEIN, SCHOOLS OF CORPORATE REFORM 151 *et seq.* (1950).

ditions or restrict the duration of privately imposed use restrictions.[55] The weakness of legislation is that its retroactive effect may be limited. Hence, while statutes may constitutionally terminate conditions which have become obsolete because of changes in the character of the neighborhood or other similarly altered circumstances, the validity of an attempt to legislate an existing condition unlimited in time into one of definite duration is questionable. Such legislation probably can have only prospective effect.[56] The existing judicial techniques for terminating conditions subsequent are commendable and reasonably effective devices in avoiding harsh forfeitures and preventing past actions from controlling land use indefinitely. However, the traditional judicial reluctance to override precedent, the uncertainties of litigation, and the present inviolability of determinable fees often result in the continuance of unwarranted restrictions long after the required use has become uneconomical and without present value to anyone. While legislation could remedy many of these defects, statutes have been infrequent and may well be constitutionally inapplicable to those restrictions in effect at the time of enactment.

Transferors of land desiring to place reasonable restrictions upon its future use should consider carefully the implications of the device selected. Unless a future windfall in the form of a forfeiture is contemplated, a covenant will ordinarily suffice and will avoid needless penalties on the transferee. Moreover, in jurisdictions where rights of re-entry and possibilities of reverter are non-alienable[57] a covenant will usually more nearly effectuate the transferor's intent and will redound to his greater benefit. Restrictions beneficial to the land expressed in terms of covenant will survive conveyance to a stranger,[58] thus, often increasing the value and marketability of the retained estate.

trol.[1] A significant part of this control is exercised through the transfer of land upon a condition subsequent, either by deed or will. These conditions may require affirmative or negative conduct and single or successive acts. Upon the breach of a condition, its creator or his heirs[2] accrues a present right of re-entry, the exercise of which results in a forfeiture.[3]

Since conditions subsequent are frequently unlimited as to time, either expressly or because there is no reference to duration, literal enforcement might well restrict land use forever. Inevitably, alienability is impaired and, in many instances, these conditions prevent the most economical use of the land. Moreover, few remedies are more severe than forfeiture. Alleviation of these undesirable results[4] has been a matter of concern to most courts and a few legislatures.

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1. See McDOUGAL AND HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 113 (1948).

2. 1 TIFFANY, THE LAW OF REAL PROPERTY § 208 (3d ed., Jones, 1939). About one fourth of the states have, by statute, made rights of re-entry transferable *inter vivos*. 2 POWELL, THE LAW OF REAL PROPERTY 486 (1950). There is a conflict of authority in the United States as to whether rights of re-entry are devisable. See 1 TIFFANY, *op. cit. supra*, at 354.

3. 3 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 14, 15 (1947); RESTATEMENT, PROPERTY § 45(b) (1936). The Restatement uses the term "power of termination" instead of "right of re-entry." As to the respective merits of these terms, *compare* RESTATEMENT, PROPERTY § 24, comment *b* (Special note), *with* 3 WALSH, *op. cit. supra*, at 57, 58.

Estates on a condition subsequent should be distinguished from determinable estates, which terminate automatically upon the occurrence of the event stipulated in the instrument creating the estate. RESTATEMENT, PROPERTY § 44(b) (1936). Whether the "possibility of reverter" remaining in the grantor is alienable *inter vivos* depends upon whether a court views it as a reversion or as a mere possibility of reverter. The former view seems more sound, see RESTATEMENT, PROPERTY §§ 159, 163 (1936); however, it has not been widely accepted by the courts. See Roberts, *Assignability of Possibilities of Reverter and Rights of Re-entry*, 22 B. U. L. REV. 43, 48 (1942). Whether a possibility of reverter is devisable apparently depends upon the construction of the local wills statute. 2 TIFFANY, *op. cit. supra* note 2, at 12 n.34.

4. There are additional reasons why these conditions should not continue indefinitely. The successor of a grantee or devisee may be unaware of the condition, see Ferrier, *Determinable Fees and Fees Upon Condition Subsequent in California*, 24 CALIF. L. REV. 512, 516 (1936), or the breach may be unintentional or uncontrollable. See Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 TEXAS L. REV. 158, 160 (1948). Also, it may become difficult to locate the numerous heirs who may have become holders of the right of re-entry in order to obtain a release, and the release will probably have to be purchased when such heirs are found. Compliance with the condition may have ceased to be of any benefit to the holders of the right of re-entry. Yet, the heirs may seek a forfeiture when the creator of the condition would not have done so. Holders of a right of re-entry are usually eager to participate in any compensation involved when the government exercises its power of eminent domain, even though the exercise of the right of re-entry has been waived upon numerous prior breaches. *E.g.*, Santa Moncia v. Jones, 232 P.2d 55 (Cal. App. 1951). Finally, conditions of unlimited duration seriously impede the creation of planned communities. See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 197, 204 (2d ed. 1947).

Language which purports to create a condition is often construed as establishing a covenant, especially where no right of re-entry is expressly reserved.[5] Nevertheless, if the language employed indicates a clear intent to create a condition subsequent, a court, generally, will so interpret it.[6] If the condition contains no limitation as to time, or specifies perpetual existence, it becomes important to examine the devices which have been, or may be, used to limit the condition when it ceases to serve a justifiable purpose.

Title which vests under a condition subsequent is not divested when the condition becomes impossible of performance.[7] Further, courts do not hesitate to refuse their aid in the enforcement of covenants,[8] easements,[9] or trusts[10] when changed conditions render their continuance useless. There is clearly nothing illogical in subjecting restrictive conditions to similar standards, since the common purpose of these creations is to restrict the future use of property. Conditions subsequent, even though technically permanent, could well be terminated when the purpose which they were intended to achieve is no longer feasible. This would obviously dispose of obsolete conditions whether created by will or deed.

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5. For examples of language construed as a covenant rather than a condition subsequent, see the cases cited in 2 POWELL, *op. cit. supra* note 2, at 41 n.16; 1 TIFFANY, *op. cit. supra* note 2, at 310 n.58. This is probably the most widespread means of avoiding the declaration of a forfeiture.

Courts also frequently interpret doubtful language as creating a trust, 2 POWELL, *op. cit. supra* note 2, at 41 n.18; TIFFANY, *op. cit. supra* note 2, at 311 n.59; equitable charge, 1 *id.* at 311 n.60; easement, 2 POWELL, *op. cit. supra* note 2, at 41 n.17; or merely a statement of the creator's motive which creates no obligation whatever, 2 *id.* at 42 n.19.

The only significant exception to this policy of strict construction against the creator is a body of cases involving conditions which provide for the support of the grantor, or of some person designated by the grantor or testator. *See* Sheets v. Vandalia Ry., 74 Ind. App. 597, 606, 127 N.E. 609, 612 (1920); 1 TIFFANY, *op. cit. supra* note 2, § 216.

6. Certain words and phrases such as "upon condition," "so that," "provided," or words of similar import, are peculiarly adapted to express such intention, particularly when they are accompanied by an express reservation of a right of re-entry. *See* Brady v. Gregory, 49 Ind. App. 355, 361, 97 N.E. 452, 454 (1911); RESTATEMENT, PROPERTY § 45, comment *j* (1936).

But even where the court finds that the language creates a condition subsequent, a breach will not result in a forfeiture if it is found that the holder of the right of re-entry has waived its exercise, 1 TIFFANY, *op. cit. supra* note 2, §§ 204-207; 3 WALSH *op. cit. supra* note 3, § 276; or has contributed to the breach, see 19 AM. JUR. 545 n.10; or that the condition is illegal, 1 TIFFANY, *op. cit. supra* note 2, § 196; or impossible of performance, 1 *id.* § 195. Similarly, equity will relieve a forfeiture if the condition requires only a payment of money, or the breach is unintentional and harmless. 1 *id.* § 215; 3 WALSH, *op. cit. supra* note 3, § 279.

7. Lutheran Church v. Lutheran Church, 316 Ill. 196, 147 N.E. 53 (1925); Hoss v. Hoss, 140 Ind. 551, 39 N.E. 255 (1894); Parker v. Parker, 123 Mass. 584 (1878).

8. See Notes, 54 A.L.R. 812 (1928); 76 A.L.R. 1358 (1932); 85 A.L.R. 985 (1933).

9. 2 WALSH, *op. cit. supra* note 3, § 253.

10. RESTATEMENT, TRUSTS § 335, comment *a* (1935).

Accordingly, in *Letteau v. Ellis,*[11] the court, in refusing to allow a forfeiture for breach of condition, declared the condition terminated solely on the basis of changed conditions. The court expressly refused to consider the "arguments on the technical rules and distinctions between conditions, covenants, and mere restrictions," saying that: "A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights."[12] Most writers agree that the case is sound,[13] but few courts are likely to follow it expressly, in light of the years of precedent to the contrary. However, other doctrines have been applied to prevent harsh forfeitures under similar circumstances.

One such possibility is suggested by the decision in *Meade v. Ballard,*[14] where the deed stated that an institute "shall be permanently located" upon the land within one year. The condition was construed as one which might be fully performed within a year. It was sufficient that the building be located upon the land with the intention that the location should be permanent—even though the building burned ten years later and was rebuilt elsewhere.[15] This approach, unfortunately, confuses the proper *time* within which the grantee must perform with what constitutes a reasonable *life* for a condition. Its application may deny the reasonable expectation of the creator.

Similar to the *Meade* case, though of differing effect, are those decisions implying a condition of reasonable time where the duration is unspecified in the language of the instrument creating the condition.[16]

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11. 122 Cal. App. 584, 10 P.2d 496 (1932).

12. *Accord,* Forman v. Hancock, 3 Cal. App.2d 291, 39 P.2d 249 (1934). *See* Koehler v. Rowland, 275 Mo. 573, 587, 205 S.W. 217, 221 (1918); *cf.* Trustees of Calvary Presbyterian Church of Buffalo v. Putnam, 129 Misc. 506, 221 N.Y. Supp. 692, 698 (Sup. Ct., 1927).

13. See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 197, 198 (2d ed. 1947); Ferrier, *supra* note 4, at 516; Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 268-276 (1940); Walsh, *Conditional Estates and Covenants Running with the Land,* 14 N.Y.U.L.Q. REV. 162, 191-194 (1937); White, *Reversionary Restrictions,* 14 U. OF CIN. L. REV. 524, 552-554 (1940); Note, 17 MINN. L. REV. 227 (1933).

14. 74 U.S. 29 (1869).

15. The Supreme Court has also held that "permanent" does not mean "forever" when used in covenants by grantees. Texas & P. Ry. v. Marshall, 136 U.S. 393 (1890); Newton v. Commissioners, 100 U.S. 548 (1879).

In Booth v. Los Angeles County, 124 Cal. App. 259, 12 P.2d 72 (1932), the deed stated that it was granted for the purpose of a road or highway, and that the land was to "revert" if not so used. After thirty-two years, the road was removed. The court refused to enforce the condition, stating that its sole purpose had been realized when a road or highway was established and accepted by the public.

16. The use of the reasonable time concept in this context should not be confused with its use in the sense of requiring that performance of a condition prescribing an affirmative act must be within a reasonable time, or that performance of a condition

The most articulate decision on this basis indicates that the reason for limiting the condition subsequent is that its performance was a part of the consideration for the grant to which it was attached.[17] Enforcement of the condition may be denied if the grantee or his successor has performed for a time sufficient to constitute payment of the consideration,[18] and conversely, the forfeiture will be permitted if the court finds the consideration has not been fully realized.[19]

Whether sufficient consideration has been received seems to depend, primarily, upon the length of the compliance, and the surrounding circumstances. Thus, in *Railway Co. v. Birnie*,[20] the grantee was to build and maintain a railroad depot, which was the only express consideration. Finding that the language employed created a condition subsequent, the trial court charged that the railroad was "required to locate its depot . . . in good faith, and to keep it there for a reasonable length of time—that is for such time as would give [plaintiffs] ample time and opportunity to realize whatever benefit they expected, at the time of the donation, from the location."[21] The upper court reversed a judgment for the plaintiffs for failure to prove that they had not received sufficient consideration when the depot was removed after eleven years. The court said: "Eleven years, falling within this era of the city's growth, would seem to be a sufficient period in which to obtain all the benefits constituting the inducement to the plaintiffs' donation."[22]

If no reference to time is made in the language creating the condition, it may logically be inferred that the intention of the parties was that the condition should last only for a reasonable time. Such an inference is more debatable where the language specifies that the condition is to last forever, since the apparent intention was to create a perpetuity.[23]

An analogous approach, employed by some courts to frustrate the possibility of a perpetuity by way of condition subsequent, is to deny

requiring successive or continuous acts must begin within a reasonable time, where the time for such performance is not stated. *E.g.*, Trustees of Union College v. City of New York, 173 N.Y. 38, 65 N.E. 853 (1903).

17. Railway Co. v. Birnie, 59 Ark. 66, 26 S.W. 528 (1894).

18. Railway Co. v. Birnie, *supra* note 17; Coffin v. Portland, 16 Ore. 77, 17 Pac. 580 (1888); *see* Summer v. Darnell, 128 Ind. 38, 47, 27 N.E. 162, 165 (1890); Hunt v. Beeson, 18 Ind. 380, 388 (1862); Stansbery v. First M. E. Church, 79 Ore. 155, 178, 154 Pac. 887, 894 (1916).

19. Indianapolis, P. & C. Ry. v. Hood, 66 Ind. 580 (1879); Leach v. Leach, 4 Ind. 628 (1853); Ralston v. Hatfield, 81 Ind. App. 641, 143 N.E. 887 (1924).

20. 59 Ark. 66, 26 S.W. 528 (1894).

21. *Id.* at 72, 26 S.W. at 530.

22. *Id.* at 81, 26 S.W. at 532.

23. In many instances the grantor or testator probably had no intention. Undoubtedly, many conditions subsequent are only the products of lawyers' ingenuity and not the result of the directions of grantors or testators.

enforcement of the condition, after it has been in effect for many years, by applying a doctrine of substantial compliance.[24] This doctrine is to be distinguished from the implication of a condition of reasonable time, since, in the latter situation, compliance which prevents a forfeiture is complete performance of the implied condition, rather than mere substantial compliance.[25] The substantial compliance cases suggest that when the circumstances have so changed that further compliance ceases to benefit the public in general, and the grantor or his heirs in particular, the condition will be held to have been substantially performed. Again, whether, or how much, consideration was paid by a grantee is considered material in determining whether the grantor is entitled to further benefit.[26]

The Indiana courts have frequently applied this test.[27] In the leading case of *Sheets v. Vandalia R. Co.*,[28] the deed was executed solely in consideration of the permanent location of a depot on the conveyed lot, the performance being expressly for the benefit of the public. After a doubtful construction of ambiguous language as creating a condition subsequent, the court held that the erection and maintenance of the depot for sixty-five years constituted substantial compliance with the condition. The "conveyance was undoubtedly made subject to the general exigencies of business and public interest, and the change, modification and growth of

24. Substantial compliance, as employed in this context, should be distinguished from the substantial performance doctrine as applied when a mere technical deviation from the terms of a condition is held to be no breach. For illustrations of the latter, see Santa Monica v. Jones, 232 P.2d 55 (Cal. App. 1951); Carter v. Branson, 79 Ind. 14 (1881); Crane v. Hyde Park, 135 Mass. 147 (1883); Osgood v. Abbott, 58 Me. 73 (1870); Rose v. Hawley, 141 N.Y. 366, 36 N.E. 335 (1894); Hardy v. Wiley, 87 Va. 125, 12 S.E. 234 (1890).

25. See GAVIT, THE INDIANA LAW OF FUTURE INTERESTS, DESCENT AND WILLS 133 (1934).

26. Actually, the courts utilizing the substantial compliance theory have, in general, failed to specify what elements must be present before the doctrine will be invoked. However, an analogy is often made to the application of the doctrine in cases involving covenants. See Texas & P. Ry. v. Scott, 77 Fed. 726 (5th Cir. 1896), and cases cited in Sheets v. Vandalia Ry., 74 Ind. App. 597, 613-614, 127 N. E. 609, 614-615 (1920); *cf.* Cunningham v. New York Central R. R., 114 Ind. App. 90, 95, 48 N.E. 2d 176, 178 (1943).

27. Jeffersonville M. & I. Ry. v. Barbour, 89 Ind. 375 (1883); Railway Co. v. Cross, 87 Ind. App. 574, 162 N.E. 253 (1928); Sheets v. Vandalia Ry., 74 Ind. App. 597, 127 N.E. 609 (1920). *See* Higbee v. Rodeman, 129 Ind. 244, 247, 28 N.E. 442, 443 (1891). See Brooks v. Kimball County, 127 Neb. 645, 256 N.W. 501 (1934); Hasman v. Elk Grove Union High School, 76 Cal. App. 629, 245 Pac. 464 (1926). Jordan v. Hendricks, 91 Ind. App. 678, 173 N.E. 288 (1930), speaks of *full* compliance, though the facts are analogous to the substantial compliance cases. *Accord,* Board of Commissioners v. Russell, 174 F.2d 778 (10th Cir. 1949). See Notes, 6 IND. L. J. 452 (1931): 31 COL. L. REV. 509 (1931); 3 OKLA. L. REV. 311 (1950).

28. 74 Ind. App. 597, 127 N.E. 609 (1920).

transportation routes. . . ."[29] However in *Ralston v. Hatfield*,[30] and in *Indianapolis, P. & C. Ry. v. Hood*.[31] the Indiana courts refused to treat the conditions as performed after eighteen years. In each case the court emphasized that the condition's performance was the sole consideration for the deed,[32] and the opinions are devoid of discussion concerning possible justification of the breach as a result of changed conditions.

While the doctrine of substantial compliance may be invoked in cases involving changed circumstances, the cases indicate that, even though circumstances are unchanged except as to time, the condition may not be enforced simply because the grantor has reaped a sufficient benefit from the compliance, in view of the consideration originally paid.[33] But, it does not logically follow that a condition unlimited in time is substantially complied with by the mere passage of time.

To the extent that the cases which apply the doctrine of substantial compliance or imply a condition of reasonable time rest upon the fulfillment of long-term consideration, it is difficult to apply their reasoning to conditions subsequent created by will.[34] This suggests that courts actually consider more than merely the amount of consideration originally paid by the grantee.[35] The question of whether the grantor has received all

29. *Id.* at 617, 127 N.E. at 616, citing Railway Co. v. Birnie, 59 Ark. 66, 26 S.W. 528 (1894).

30. 81 Ind. App. 641, 143 N.E. 887 (1924).

31. 66 Ind. 580 (1879).

32. The *Hood* case was distinguished four years later in Jeffersonville M. & I. Ry. v. Barbour, 89 Ind. 375 (1883). The *Barbour* case involved a deed specifying that the grant was made "expressly for the use and purpose of depot grounds for the M. and I. railroad" and for a consideration of five dollars. A right of re-entry was expressly reserved. The court held that thirty-three years occupancy was a substantial compliance with the condition, stating that: "It is not . . . unreasonable to suppose that the grantors received . . . all the benefits and advantages which they anticipated when they made the conveyance." *Id.* at 379. In Sheets v. Vandalia Ry., 74 Ind. App. 597, 127 N.E. 609 (1920), the *Hood* case was said to have been discredited as authority in Indiana. Nevertheless, the *Hatfield* and *Hood* cases are distinguishable from the *Barbour* and *Sheets* decisions on the question of whether the long-term consideration had been fully received.

For a collection of cases discussing the period covered by a covenant or condition subsequent for the maintenance of a railroad, see Note, 7 A.L.R. 817 (1920).

33. Indianapolis, P. & C. Ry. v. Hood, 66 Ind. 580 (1879); Ralston v. Hatfield, 81 Ind. App. 641, 143 N.E. 887 (1924).

34. The similarity between covenants and conditions subsequent, see note 26 *supra*, ceases at this point. Even though the acceptance of land devised on a condition subsequent is regarded as an implied promise to comply with the condition, it is evident that no contract exists for the death of the testator terminates the "offer." RESTATEMENT, CONTRACTS § 35(f) (1932). Hence, it is unsound to argue that the condition's performance is a part of the consideration for the devise, unless there has been an exchange of promises between the testator and devisee during the former's lifetime.

35. "It may be . . . that $5,700 was the full value of said real estate, still it would not follow that the restrictive condition was without consideration. The fact that they were permitted to purchase the same, even at its full value, affords a legal consideration

of the performance for which he bargained is usually highly speculative. Generally, the presence or absence of consideration merely supplies a convenient verbal test for a decision on the merits. Basically, those decisions which terminate conditions appear to rest upon sound equity. The most important factor is the existence and extent of changed conditions in the neighborhood, in view of the consequent severity of a forfeiture. Evidence of whether, or how much, money consideration was paid by the grantee, as well as the extent to which he has improved the land, are additional considerations in evaluating the severity of a forfeiture.

Courts are not disposed to view favorably the continuance of a requirement that land be devoted to an uneconomical use. Such evidence may often be a determinative factor in a court's decision to relieve a forfeiture. In addition, the length of performance alone undoubtedly is influential. Similarly, the courts are likely to look with disfavor at the unreasonableness of the restraint upon alienation where the creator has expressly attempted to establish a perpetuity by the use of a condition.

If the public ceases to derive advantages from a condition created expressly for its benefit,[36] there is justification for denying forfeiture. When the purpose of a condition is to enhance the value of adjacent land, its observance is of benefit to the holder of the right of re-entry only so long as he retains rights in that adjacent land.[37] Thus, when he ceases to own the protected property, the condition, notwithstanding its unlimited character, may be held to have been performed.[38] Even though the grantor retains adjacent land, the condition may be terminated when it ceases to be of any benefit.[39] Judicial conversion of a fee on condition subsequent into a fee simple absolute constitutes no

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which is sufficient, since we will not inquire into its adequacy in the absence of a charge of fraud or overreaching." Boonville Milling Co. v. Roth, 73 Ind. App. 427, 435, 127 N.E. 823, 826 (1920).

It is true, however, that language is more readily construed as creating a condition subsequent in the case of a voluntary deed than in one given for valuable consideration. Olcott v. Gabert, 86 Tex. 121, 23 S.W. 985 (1893). See RESTATEMENT, PROPERTY § 45, comment *p*. (1936). This is also true where the land use specified in the deed is the sole consideration. Cleveland C. C. & I. Ry. v. Coburn, 91 Ind. 557 (1883); Indianapolis P. & C. Ry. v. Hood, 66 Ind. 580 (1879).

36. See Sheets v. Vandalia Ry., 74 Ind. App. 597, 127 N.E. 609 (1920). However, if the use prescribed by the deed is solely for the benefit of the public at large, and does not inure to the benefit of the grantor, it is less likely to be construed as a condition. Downen v. Rayburn, 214 Ill. 342, 73 N.E. 364 (1905).

37. Walsh, *Conditional Estates and Covenants Running with the Land,* 14 N.Y.U.L.Q. REV. 162, 176 (1936).

38. Steven v. Galveston H. & S. A. Ry., 212 S.W. 639 (Tex. Comm. App. 1919); Maddox v. Adair, 66 S.W. 811 (Tex. Civ. App. 1901); *See* Summer v. Darnell, 128 Ind. 38, 47, 27 N.E. 162, 165 (1890); First Christian Church v. Spinks, 260 S.W. 1073, 1075 (Tex. Civ. App. 1924). This assumes the non-alienability of a right of re-entry. See note 2 *supra.*

39. Daggett v. Fort Worth, 177 S.E. 222 (Tex. Civ. App. 1915).

hardship upon the holder of the right of re-entry in such circumstances. Nor is the reasonable expectancy of the grantor denied by judicial refusal to enforce a condition because of materially altered circumstances.

The common weakness of judicial techniques for refusing to enforce forfeitures is that usually an alleged breach must have occurred prior to court determination of the validity of the condition subsequent.[40] The holder of the fee on a condition subsequent may thus feel constrained to continue a relatively uneconomical use of the land rather than risk the uncertainties of judicial decision. Should a court's denial of forfeiture be the equitable ground of changed conditions or the substantial compliance formula, nominal damages may still be available to the holder of the right of re-entry, if that right be construed as a legal interest. This limited right may be held to constitute a cloud on title which would impair the marketability of title.[41] In such circumstances, the cloud should be removable in a suit brought for that purpose. This necessity would not arise under legislative termination of obsolete restrictions.

Perhaps the simplest judicial solution would be to bring rights of re-entry within the Rule Against Perpetuities. This rule of thumb could easily be applied by the courts, and, indeed, has been so used in England.[42] American courts, however, have held otherwise.[43] There are a number of suggested explanations for the rejection of this use of the Rule in this country, none of which are persuasive.[44] However, in light of the reluctance of our courts to override precedent, legislation will undoubtedly be necessary if rights of re-entry are to be brought under the Rule in the United States.

Although specific performance for breach of a covenant and forfeiture for breach of a condition are concededly penalties when changed

40. However, the validity of a condition subsequent may be attacked in an action to quiet title. *Cf.* Board of Chosen Freeholders v. Buck, 79 N.J. Eq. 472, 82 Atl. 418 (1912), involving a determinable fee. It is now settled that title may be quieted as against equitable restrictions in the event of materially altered circumstances. Clark, *Limiting Land Restrictions,* 27 A.B.A.J. 737, 740 n.20 (1941).

41. At least one important jurisdiction has so held in the case of an unenforceable covenant. Bull v. Burton, 227 N.Y. 101, 124 N.E. 111 (1919). See, Pound, *The Progress of the Law, 1918-1919,* 33 HARV. L. REV. 813, 820 (1920); Walsh, *Conditional Estates and Covenants Running with the Land,* 14 N.Y.U.L.Q. REV. 162, 178 n.42 (1936).

42. See cases cited in GRAY, THE RULE AGAINST PERPETUITIES 336 n.3-4 (4th ed., R. Gray, 1942). Rights of re-entry are now within the Rule Against Perpetuities by virtue of legislation in England. Law of Property Act., 1925, 15 GEO. 5, c. 20, § 4(3). See Bordwell, *English Property Reform and Its American Aspects,* 37 YALE L.J. 179, 197 (1927).

43. GRAY, *op. cit. supra* note 42, §§ 304-310; 2 SIMES, THE LAW OF FUTURE INTERESTS 366 n.49 (1936).

44. 2 SIMES, *op. cit. supra* note 43, at 367. For an evaluation of the various explanations, see Note, 28 MICH. L. REV. 1015 (1930).

circumstances preclude the attainment of the purposes of the restrictions, it may be argued that this is not true in the case of a determinable fee. There, it can be said, no intention of the holder of the possibility of reverter to exact the penalty of forfeiture for a "breach" is involved; instead, the estate automatically ends because it has expired under the terms of the instrument creating it—as does a life estate upon the death of the person for whose life it was given. This somewhat tenuous distinction between a fee on condition subsequent and a determinable fee would be more acceptable if the law restricted determinable fees to estates terminating on the occurrence of stipulated collateral events, beyond the control of the parties. Since termination may be dependent upon compliance with a course of action prescribed by the creators, determinable fees may presently operate to control land use continuously and indefinitely.[45] At present, courts refuse to apply the Rule Against Perpetuities to possibilities of reverter,[46] or to terminate determinable fees on the basis of changed conditions.[47]

Thus, while courts may indicate a willingness to limit conditions subsequent which are unlimited in time, the equivalent of such conditions can be created by way of determinable fee without risking future judicial interference.[48] The determinable fee, as yet, provides a "fool-proof" method for the conveyancer who would perpetuate the "dead hand" control of land use. Whether, or how long, this will remain so, depends upon the propriety with which the instruments creating these interests are drawn, and the extent to which they are employed.[49]

There have been a few legislative attempts to control the creation of perpetuities by way of condition subsequent, or to restrict the types of

45. See cases collected in 1 TIFFANY, *op. cit. supra* note 2, at 385 n.88.

46. 2 SIMES, *op. cit. supra* note 43, § 507. Tiffany has argued that it is, indeed, impossible to do so, because a possibility of reverter is the necessary legal result of the creation of a determinable fee. Since the law permits determinable fees, it cannot then intervene to destroy what it holds valid. 2 TIFFANY, *op. cit. supra* note 2, § 404. But see 2 SIMES, *op. cit. supra* note 43, § 508.

47. It has been suggested, however, that the doctrine of Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932), might well be extended to determinable fees. Goldstein, *supra* note 13, at 275.

48. This is so, in part, because, in theory, a determinable fee is not unlimited as to time. But, if the language of the creating instrument is ambiguous, an estate in fee simple subject to a condition subsequent will be favored over a determinable fee. RESTATEMENT, PROPERTY § 45, comment *m* (1936). It has been strongly contended, but never held, that the Statute Quia Emptores renders the determinable fee invalid as a form of estate. See GRAY, *op. cit. supra* note 42, § 31 *et seq.*

49. Commenting upon those determinable fees which are created for the sole purpose of controlling land use, one writer predicted, nearly thirty years ago, that "a vast unharvested crop [of litigation concerning the validity of such estates] will soon approach the knife for judicial cutting." POWELL, *Determinable Fees*, 23 COL. L. REV.

conditions which may be created by deed. The Massachusetts statute provides that conditions unlimited as to time shall be effective for only thirty years, except in cases of gifts or devises for public, charitable, or religious purposes.[50] However, the statute does not invalidate conditions subsequent which are limited in time, even though that time be clearly unreasonable. The express exclusion of gifts or devises for public, charitable, or religious purposes suggests that the statute's chief purpose is to prevent the forfeiture of money consideration paid for grants. However, this overlooks the restraint upon alienation imposed by restrictive conditions which no longer have a justifiable purpose. Certainly many, if not most, gifts on condition subsequent are for schools, hospitals, churches, and other public, charitable, or religious purposes. As to these, the Massachusetts statute would permit perpetuities where no termination date is expressed in the instrument creating them. But perpetual dedications of land are contrary to the policy of modern land law which increasingly recognizes that land is a commercial commodity which should be capable of adaption to its most economical use and should be freely alienable at the instance of an owner when he has found a willing and able buyer.

Some statutes provide that conditions which are merely nominal and evidence no intention of substantial benefit to the grantor at the time they are created may be disregarded.[51] This leaves undetermined the question of what constitutes a "nominal" condition, as well as failing to consider conditions which become nominal subsequent to their creation.[52] Perhaps purely personal conditions could be included in the "nominal" category. However, few conditions are purely capricious at the time they are created, but usually become so only at a later time. Legislation should adequately provide for these deficiencies. At present, only the Minnesota statute[53] makes such provision. That act is also more comprehensive in its inclusion of conditions created by will.

In addition to the Uniform Estates Act,[54] limiting rights of re-entry as well as possibilities of reverter to twenty-one years, certain writers have recommended legislation which would invalidate unjustifiable con-

207, 210 (1923). Their creation in the future might well be precluded by the enactment of appropriate legislation.

50. MASS. GEN. LAWS c. 184, § 23 (1932), construed in Flynn v. Caplan, 234 Mass. 516, 126 N.E. 776 (1919).

51. MICH. COMP. LAWS § 554.46 (1948); WIS. STAT. § 230.46 (1947).

52. See Fraser, *Future Interests in Property in Minnesota,* 3 MINN. L. REV. 320, 338 (1919).

53. MINN. STAT. c. 59, § 8075 (Mason 1927), *as amended,* Minn. Laws c. 487, § 1 (1937).

54. § 15.

ditions or restrict the duration of privately imposed use restrictions.[55] The weakness of legislation is that its retroactive effect may be limited. Hence, while statutes may constitutionally terminate conditions which have become obsolete because of changes in the character of the neighborhood or other similarly altered circumstances, the validity of an attempt to legislate an existing condition unlimited in time into one of definite duration is questionable. Such legislation probably can have only prospective effect.[56] The existing judicial techniques for terminating conditions subsequent are commendable and reasonably effective devices in avoiding harsh forfeitures and preventing past actions from controlling land use indefinitely. However, the traditional judicial reluctance to override precedent, the uncertainties of litigation, and the present inviolability of determinable fees often result in the continuance of unwarranted restrictions long after the required use has become uneconomical and without present value to anyone. While legislation could remedy many of these defects, statutes have been infrequent and may well be constitutionally inapplicable to those restrictions in effect at the time of enactment.

Transferors of land desiring to place reasonable restrictions upon its future use should consider carefully the implications of the device selected. Unless a future windfall in the form of a forfeiture is contemplated, a covenant will ordinarily suffice and will avoid needless penalties on the transferee. Moreover, in jurisdictions where rights of re-entry and possibilities of reverter are non-alienable[57] a covenant will usually more nearly effectuate the transferor's intent and will redound to his greater benefit. Restrictions beneficial to the land expressed in terms of covenant will survive conveyance to a stranger,[58] thus, often increasing the value and marketability of the retained estate.