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Future Interests - Effect of Change of Conditions on Rights of Entry and Possibilities of Reverter Created to Control the Use of Land

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COMMENTS

FUTURE INTERESTS—EFFECT OF CHANGE OF CONDITIONS ON RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER CREATED TO CONTROL THE USE OF LAND—The owner of land who desires to control its future use has a wide variety of legal devices available. The most familiar are the use of restrictive covenants which give rise to equitable servitudes, enforceable by injunction, the special limitation which provides for an automatic termination of the grantee's estate if he deviates from the required use, and the condition subsequent which leaves in the grantor a right of re-entry exercisable at his option if the grantee breaches the condition by putting the land to a non-conforming use. Thus, because he wanted to keep his grazing cattle in sight, the owner of a lot now lying within Boston sold it many years ago subject to the condition that the height of buildings thereon should not exceed thirteen feet. Though the cattle are no longer grazing, the condition may still prevent the erection of taller buildings.¹

There are some marked differences in the law with reference to restrictive covenants, on the one hand, and conditions and limitations on the other. One of the most significant differences rests in their potential duration. Whereas courts of equity will refuse enforcement of restrictive covenants after conditions have changed so as to make the restrictions undesirably burdensome, and law courts may give only nominal damages for breach of the covenant, a change of conditions which has eliminated the reason which prompted the creation of a right of entry or possibility of reverter is supposed to be immaterial.² The latter restrictions, in the absence of a statute limiting their duration, can be enforced, at least in theory, no matter how long after their crea-

¹ LEACH, *CASES AND MATERIALS ON FUTURE INTERESTS*, 2d ed., 50 (1940).

² For the common law background of conditional estates see Walsh, "Conditional Estates and Covenants Running with the Land," 14 N.Y. UNIV. L.Q. REV. 162 (1936); Bordwell, "The Common Law Scheme of Estates," 18 IOWA L. REV. 425 (1933). The several purposes served by possibilities of reverter and conditions subsequent are illustrated in Brake, "Fees Simple Defeasible," 28 Kx. L.J. 424 (1940).

tion the forbidden event comes to pass.³ When a change of circumstances has occurred, then, conditions subsequent and special limitations adversely affect the value of land and render the title less marketable.⁴ They also constitute a hindrance on alienability because, with the passage of time, the heirs of the grantor multiply and it becomes impossible to trace all of them to obtain a release.⁵ A second significant difference rests in the fact that restrictive covenants are frequently held void when the burden is not created for the benefit of other property.⁶ In contrast, conditions subsequent and special limitations can be created for entirely personal reasons, with the result that owners of land are often prevented from utilizing it in ways made appropriate by the passage of time and changes in the neighborhood.⁷

In only a few states is there legislation undertaking to curb the duration of rights of entry and possibilities of reverter. Even in these states, the statutes, far from striking at the root of the evil in appropriate situations, lay down only general directives.⁸ It can be stated that

³ In the United States, rights of entry and possibilities of reverter have been held not subject to the Rule against Perpetuities. One of the reasons given is that there are always persons in esse who can convey the whole fee and therefore the power of alienation, at least in theory, is not suspended. But the Rule against Perpetuities strikes down executory interests at least even though they do not suspend the power of alienation. See SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 375 (1951). Professor Simes suggests that the reason is purely historical. On the subject see CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND*, 2d ed., 197 (1947); 28 *MICH. L. REV.* 1015 (1930); 133 *A.L.R.* 1476 (1941).

⁴ *Van Vliet and Place, Inc. v. Gaines*, 249 N.Y. 106, 162 N.E. 600 (1928).

⁵ Restrictive covenants also designed to control the use of land nevertheless come to an end when the original purpose cannot be enforced either because of impossibility or change of conditions. *Jackson v. Stevenson*, 156 Mass. 496, 31 N.E. 691 (1892). They can also be removed as a cloud on title. *McArthur v. Hood Rubber Co.*, 221 Mass. 372, 109 N.E. 162 (1915).

⁶ 5 *PROPERTY RESTATEMENT* §537(a) (1940); *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885).

⁷ For other objectionable features of these interests in land see Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 *HARV. L. REV.* 248 (1940). Some decisions hold that since the enactment of the Statute *Quia Emptores*, determinable fees cannot be created. 1 *TIFFANY, REAL PROPERTY*, 2d ed., §93 (1920). The reason is that such fees imply tenure which was abolished by the statute. But generally in the United States possibilities of reverter have been recognized. Eminent writers have, however, expressed the view that the statute forbids determinable fees. See 1 *SIMES, THE LAW OF FUTURE INTERESTS* 321 (1936).

⁸ Ill. Rev. Stat. (1953) c. 30, §§37b,d,e,f. This statute makes possibilities of reverter inalienable and not devisable, limits their duration to fifty years. Such interests are extinguished on the dissolution of a corporation when the corporation reserves them. See comment, 43 *ILL. L. REV.* 90 (1948). Mass. Laws Ann. (1933) c. 184, §23, limits the restrictions on land to a thirty-year period, but only where a longer period is not specified in a deed or will. Mich. Stat. Ann. (1937) §26.46 forbids frivolous or trivial conditions attached to the conveyances. Wis. Stat. (1951) §230.46 is similar to the Michigan statute. Minn. Stat. Ann. (1947) §500.20. This statute covers conditions by devise as well as by grant and limits the duration to the time they are of substantial benefit to the owners. The duration of these interests is also limited to thirty years, but here, regardless of the grantor's

until the present time the task of mitigation and adaptation to modern exigencies in this field has been left largely to the courts:

Because the right of entry and the possibility of reverter are legal interests in land that can be enforced by a simple ejectment action, courts of equity have not been able to apply any doctrine of change of conditions to prevent enforcement. As a result, the traditional aversion to forfeitures has constantly taxed the courts' ingenuity in coping with situations where the divesting of estates would be unconscionable.⁹

It is the purpose of this comment to examine the skills which courts have developed to avoid inequitable results which might arise from forfeiture of estates, and, further, to attempt to demonstrate that judicial opinion may be in a transitional stage, tending to incorporate into law the equitable doctrine of change of conditions in disposing of cases involving rights of entry and possibilities of reverter.¹⁰

I. *Constructional Preferences*

This paper will not deal separately with the two interests in land, as the courts have generally leaned toward construing a deed as creating a condition rather than a limitation and there is a dearth of cases dealing chiefly with possibilities of reverter. Apparently the courts have preferred to meet the challenge of forfeitures at the constructional level, finding possibilities of reverter only when they would not entail inequitable results.¹¹ An estate on condition subsequent terminates only

intent to prolong his interest. A six-year statute of limitations is set for assertion of a right of re-entry.

In general as to statutory provisions concerning the duration of these interests in land, see CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND*, 2d ed., 197 et seq. (1947); SCURLOCK, *RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND* 236 (1953); Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 (1940).

⁹ As an example of the strict views taken by the courts in general, it may be stated as a proposition needing no citation of authority that the absence of a re-entry clause today may by itself be sufficient to avoid the finding of a condition subsequent. Yet in Littleton's time express language of condition was given effect as a condition subsequent subject to forfeiture whether or not a clause of forfeiture was used. LITTLETON, *TENURES* (Wambaugh ed.) §§328-330 (1903). At that time, however, restrictive covenants were unknown.

¹⁰ For examples of capricious conditions imposed in deeds of grant, and for examples of estates created in favor of one without any interest deserving protection, see Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 527 (1917). Valid social purposes, however, may still be served by these interests in land in some cases. See Brake, "Fee Simple Defeasible," 28 KY. L.J. 424 (1940). In England, rights of re-entry are subject to the Rule against Perpetuities. Law of Property Act of 1925, 15 Geo. 5, c. 20, §4(3) (1925).

¹¹ E.g., in *Johnson v. Lane*, 199 Ark. 740, 135 S.W. (2d) 853 (1940), the grantor had donated land worth \$20,000 on the condition that \$250,000 was to be spent to build a schoolhouse on it, the deed to be absolute so long as the land was used for school purposes. After three years, there was still no school. The plaintiff was a creditor of the

by election of the grantor or his successors,¹² and not automatically, as in the case of a determinable fee.

One of the major difficulties encountered by the courts in attempting to prevent unwarranted forfeitures stems from the fact that if a possibility of reverter is declared extinguished, the estate of the grantee becomes ipso facto enlarged beyond the grant. Moreover, doctrines of waiver and estoppel cannot easily be applied to one who holds a possibility of reverter, since the fee is supposed to revert back to him automatically on the happening of the contemplated event. Out of this largely doctrinal difficulty,¹³ the courts have developed a disregard for distinctions and shown constructional preferences among the several possible interests created or reserved.¹⁴

In *Sanford v. Sims*¹⁵ the court stated: "Technically, perhaps, there is a distinction between a possibility of reverter and a right of re-entry for breach of condition subsequent; but the distinction is usually not observed and the possibility of reverter and right of re-entry for condition broken are treated as the same."¹⁶ The court then found a condition subsequent but it concluded that it was ineffective after the running of the statute of limitations.¹⁷ In *Priddy v. School District*¹⁸ the habendum clause read: ". . . as long as used for a school house site. If it is ever abandoned as a school house site, said land shall revert to. . ."¹⁹ The possibility of a determinable fee was not even discussed, and a condition subsequent was found instead.²⁰

grantor. No changes in circumstances appeared. A determinable fee was found. In *Stewart v. Blain*, (Tex. Civ. App. 1913) 159 S.W. 928, deed shall be "void and inoperative" in the event of removal of the schoolhouse. Held to create a determinable fee. The court, again, rejected fine distinctions and was content to point out that the parties must have meant to create a possibility of reverter.

¹² As between a fee on condition subsequent and a condition precedent, the courts favor the former, as it permits the early vesting of estates. *De Conick v. De Conick*, 154 Mich. 187, 117 N.W. 570 (1908); *Gordon v. Whittle*, 206 Ga. 339, 57 S.E. (2d) 169 (1950).

¹³ Dunham, "Possibilities of Reverter and Powers of Termination—Fraternal or Identical Twins?" 20 UNIV. CHI. L. REV. 215 (1953).

¹⁴ See 15 L.R.A. 231 (1908); 47 A.L.R. 1174 (1927).

¹⁵ 192 Va. 644, 66 S.E. (2d) 495 (1951).

¹⁶ *Id.* at 648.

¹⁷ For further material on the disregard of the distinction between possibilities of reverter and conditions subsequent, see 33 AM. JUR., Life Estates, Remainders, and Reversions §§205, 208 (1941); 16 A.L.R. (2d) 1246 (1951).

¹⁸ 92 Okla. 254, 219 P. 141 (1923).

¹⁹ *Id.* at 265.

²⁰ The same was held in *Bay City Land Co. v. Craig*, 72 Ore. 31, 143 P. 911 (1914), where the deed contained language of reverter and provided that grantor shall become owner "as fully and absolutely as if this deed had not been made." In *Stewart v. Blain*, (Tex. Civ. App. 1913) 159 S.W. 928, the distinction between possibilities of reverter and conditions subsequent was called "largely fanciful."

In *Houston & T. C. R. Co. v. Ennis-Calvert Compress Co.*,²¹ the grantee had built a cotton compress on the land and maintained it from 1877 to 1892. Suit was brought in 1900. The deed contained the following language: ". . . on the happening of any one of said several contingencies . . . title and possession of the tract herein conveyed shall . . . by force thereof, and without the necessity of a reconveyance, ipso facto revert to and vest in said [grantor] its successors and assigns. . . ."²² The court found that only a condition subsequent was created and saved the remote grantee's title despite a breach of condition by holding a corporation as not the successor to the right of grantor corporation. In *Wagner v. Wallowa County*²³ one of the reasons why the court refused to find that clear words of reverter created a determinable fee was that if the title was to revert back, the whole fee passed to the grantee. This reason would make reverter clauses inadequate to create special limitations in all cases.²⁴

The constructional preference for conditions as opposed to limitations, on the surface, does not show anything more than dislike of forfeitures because the condition subsequent is less drastic. One may argue that it does not alleviate the change of conditions problem because forfeiture is still possible. But a close scrutiny of the cases will show that the constructional preference for conditions is often only the first step in the process of clearing title in meritorious cases. A further finding of expiration of the condition for performance, or waiver, or mere substantial delay in pursuing the remedy of re-entry often follows. This second step is effective in forever freeing land of conditions and will be taken in cases where a change of circumstances has made the second finding equitable. Illustrations of this proposition can be found in a study of the facts of the cases cited in this section as well as in cases cited in section IV of this comment. Very often the delay necessary to induce the court to declare a condition extinct is not even the period required for the statute of limitations to run. In these cases the courts do not say "laches" only because a court in a legal action of ejectment is not supposed to apply equitable doctrines. The fourth

²¹ (Tex. Civ. App. 1900) 56 S.W. 367, error refused.

²² Id. at 368. Emphasis added.

²³ 76 Ore. 453, 148 P. 1140 (1915).

²⁴ *Bernard v. Bowen*, 214 N.C. 121, 198 S.E. 584 (1938). See also *Williams v. Box Church Baptist Church*, (Tex. Civ. App. 1934) 75 S.W. (2d) 134 ("so long as said premises are used as agreed herein" and reverter clause; held, a condition subsequent. One strong dissent). *Priddy v. School District*, 92 Okla. 254, 219 P. 141 (1923); *Jones v. McLain*, (Tex. Civ. App. 1897) 41 S.W. 714; *Dyer v. Siano*, 298 Mass. 537, 11 N.E. (2d) 451 (1937).

section of this comment will again touch on this point with citation of authorities.

II. *Total Disregard of Distinctions between Restrictions on Land*

So far, only one case has bluntly rejected all kinds of distinctions and held that a change in the neighborhood would deprive the owner of a power of termination of the right to enforce a forfeiture of the grantee's estate. In *Letteau v. Ellis*²⁵ the defendant breached the condition by allowing Negro occupancy of the premises. The neighborhood had become largely inhabited by Negro families since the time of conveyance. In denying the forfeiture of defendant's estate, the court declared:

"We find it needless to follow appellant's arguments on the technical rules and distinctions made between conditions, covenants, and mere restrictions. . . . 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. The only obstacle met has been . . . the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly labeled as property rights by a process of academic relation are now considered merely personal and have been subjected to the common good."²⁶

This case has met with the approval of learned writers,²⁷ but unfortunately it is ignored by the courts of jurisdictions other than California.

This disregard of distinctions between legal future interests and the equitable servitude represents a true incorporation of the equitable doctrine of change of conditions into law. Authority for it is still scant and that is the reason why it is more nearly accurate to say that the courts are now in a stage of transition rather than having accepted the equitable doctrine of change of conditions.

²⁵ 122 Cal. App. 584, 10 P. (2d) 496 (1932), hearing den. by California Supreme Court, June 13, 1932. *Accord*, *Forman v. Hancock*, 3 Cal. App. (2d) 291, 39 P. (2d) 249 (1934), hearing den. by California Supreme Court, Feb. 18, 1935.

²⁶ *Letteau v. Ellis*, 122 Cal. App. 584 at 588-589, 10 P. (2d) 496 (1932). The court found support in a dictum found in *Koehler v. Rowland*, 275 Mo. 573 at 587, 205 S.W. 217 (1918): "If the court . . . had found . . . that the conditions had so changed since the conveyance was made . . . that an enforcement of the restriction no longer could serve the original purpose, then it would have been improper to allow the forfeiture."

²⁷ Walsh, "Conditional Estates and Covenants Running with the Land," 14 N.Y. UNIV. L.Q. REV. 162 at 191 (1937); Ferrier, "Determinable Fees and Fees upon Condition Subsequent in California," 24 CALIF. L. REV. 512 at 516 (1933); Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 at 268 (1940).

III. *The Courts' Main Weapon: Constructional Devices to Avoid Conditions and Limitations*

One need cite no authorities for the proposition that the courts look upon forfeitures with disfavor and will consequently construe strictly all clauses pointing to the creation of rights of re-entry and possibilities of reverter. Literally any of the cases cited in this paper can be found to contain a reference to this judicial attitude. Thus a mere recital of purposes, even to the exclusion of all other uses, is generally inadequate to create such interests. The courts' strictness has in some instances reached astounding proportions. It is difficult to ascribe some results to anything but change of circumstances and passage of time concurring to make the recognition of future interests most inequitable.

In *Storke v. Pennsylvania Mutual Life Insurance Co.*²⁸ a deed dated 1889 conveying property, then outside Chicago, included anti-saloon restrictions and the following language: ". . . in case of breach in these covenants or any of them said premises shall immediately revert to the grantors, and the said party of the second part shall forfeit all right, title and interest in and to said premises."²⁹ By 1945, sixteen more saloons were operating in the neighborhood and a saloon had been kept on the premises for eleven years. The tract is now a business section in Chicago. The defendant insurance company, lessor of the saloon keeper, had paid \$42,500 for the premises. In trying to deny the plaintiff's argument that a determinable fee had been created, the defendant himself was at such a loss that he argued that a condition subsequent was created instead and that it had been waived. The court relieved the defendant in an ingenious fashion: since the plaintiffs sued for a partition as successors of the grantor, they must show title in themselves to succeed. There was no language of limitation in the deed, therefore a determinable fee was not created, and the plaintiffs did not yet have title. At this point the courts normally find a condition subsequent as the alternative to a possibility of reverter barely missed. Such a conclusion would, however, have left the defendant still open to possible attacks on his title. But the court went on to point out that if a condition subsequent was created, the plaintiffs must make re-entry to get title. However, plaintiffs were precluded since there was no re-entry clause in the deed. The court seemed to be saying that the defendant had a fee simple on condition

²⁸ 390 Ill. 619, 61 N.E. (2d) 552 (1945).

²⁹ *Id.* at 621.

subsequent, but that no one had a right of re-entry for condition broken. It is perhaps significant that the court points out that if the clause had created a restrictive covenant, it would be unenforceable now because of change of circumstances in the subdivision, which by this time had become valuable business property.

In *In re Copps Chapel Methodist Episcopal Church*³⁰ the deed conveyed a lot in 1871 "so long as said lot is held and used for church purposes." The court found in 1929 that an absolute fee was transferred. It was the opinion of the court that since the limiting words appeared only in the habendum, they could not reduce the grant. A strong dissent pointed out that determinable fees have often been recognized though the limiting words appeared only in the habendum. The majority distinguished an earlier conveyance solely because of lack of the words "and no longer" at the end of the clause introduced by "so long as."³¹ It does not seem unreasonable to conclude that the court felt it would be unfair to let a remote successor or heir get a church building with all the additions after a long time following the grant.

When rights of re-entry and possibilities of reverter are created to prescribe or forbid certain uses of land, the similarity they bear to real covenants has offered the court the most widely wielded weapon of defense in the struggle against the draftsman. It has been stated that "a clause in a deed will be construed as a covenant, unless apt words of condition are used, and *even then it will not be held to create a condition*, unless it is apparent from the whole instrument and the circumstances that a strict condition was intended."³² In *St. Peter's Church v. Bragaw*³³ the deed contained clear language of condition and reverter in case of breach. The court said, "There is no interest which is not adequately protected by regarding the clause as intended to create a

³⁰ 120 Ohio St. 309, 166 N.E. 218 (1929). Cf. *Schurch v. Hanaman*, 47 Ohio App. 383, 191 N.E. 907 (1933).

³¹ In *Chouteau v. St. Louis*, 331 Mo. 781, 55 S.W. (2d) 299 (1932), words of condition were held unavailing. More than a century after the conveyance, the heirs of the grantor sued to recover the land since it was no longer used as a site for a courthouse. The court held that since words of condition introduced a new clause, they expressed a limitation of the estate granted, and since no forfeiture clause or re-entry clause was inserted, no right of re-entry was created. The court at the same time declared that the grantee's having lived up to the condition for more than a century was perhaps nothing less than what the grantor anticipated. See also *Sapper v. Mathers*, 286 Pa. 364, 133 A. 565 (1926), 47 A.L.R. 1172 (1927) (use as a cemetery discontinued after 100 years. No condition or limitation because of lack of words of forfeiture. The court points out that the plaintiffs had no equity). *Lynch v. Melton*, 150 N.C. *595, 64 S.E. 497 (1909).

³² *Hinton v. Vinson*, 180 N.C. 393 at 396, 104 S.E. 897 at 899 (1920). Emphasis added.

³³ 144 N.C. 89, 56 S.E. 688 (1907).

covenant or limitation in trust that the property shall not be used for the one certain purpose mentioned."³⁴ Land was conveyed in *Gordon v. Whittle*³⁵ ". . . upon the express condition that the second party shall lay out and set aside and dedicate . . . [land] for a park and recreation center, and to be forever maintained as such for the benefit of the residential and philanthropic enterprises of the *second party* on said St. Simon's Island."³⁶ The condition remained unperformed for more than 22 years, when a grantee sued to clear title. The court took three steps to accomplish that end in view of grantors' long acquiescence. First, as no one can dedicate land without owning it, the condition, if any, must have been subsequent. Secondly, lack of words of defeasance or forfeiture rule out a condition subsequent, and a covenant must be found instead. Thirdly, the grantor himself could not enforce the covenant because it is declared to be for the benefit of the grantee. In short, the words quoted were mere surplusage. It is hard to believe that if the suit had been brought shortly after the conveyance, when conditions had not yet changed so much, the court would have reached the same result in the face of a clear breach.

A forfeiture in *W. F. White Land Co. v. Christenson*³⁷ would have injured the holder of a mortgage on the lot, the holder of a mechanic's lien, and the remote grantee himself. It does not seem improbable that the change of condition, even in this respect, carried some weight with the court. The building of a house worth less than \$5,000 and closer to the curb than specified were conceded to be breaches. The deed read, "In case the said grantee . . . shall . . . violate any one of said conditions . . . the said land and all improvements . . . shall immediately revert to and become the property of the grantor . . . and it shall be lawful for said grantor . . . to re-enter said premises *as in its first and former estate*."³⁸ Another clause gave the grantor as well as neighboring landowners the right to enforce the conditions whether breached or about to be breached. Clearly one provision was intended to reserve to the grantor a "gambler's chance of recovering the property," and the other was in the nature of a restrictive covenant. Despite the strong language pointing to a possibility of reverter, the court concluded that the latter clause and the circumstances pointed to a covenant to benefit adjoining land. The court seemed aware of its startling inter-

³⁴ Id. at 94. The word "abandonment" was construed not to include a sale of the land.

³⁵ 206 Ga. 339, 57 S.E. (2d) 169 (1950).

³⁶ Id. at 339.

³⁷ (Tex. Civ. App. 1928) 14 S.W. (2d) 369.

³⁸ Id. at 370. Emphasis added.

pretation when it said: "In view of the right so given [to enjoin breaches], the grantor is in no position to claim the harsher remedy of forfeiture of title."³⁹ Obviously the court imposed an election of remedies on the grantor.⁴⁰

The expressed or unexpressed intent to benefit adjoining property may of itself spell defeat for the draftsman, and be seized upon by the courts to find a covenant despite strong language of condition, forfeiture, and re-entry. Land was conveyed in *Post v. Weil*⁴¹ in 1807 upon the special condition that no part of the land or buildings should ever be occupied as a tavern. Since it appeared that the original plan was to benefit adjoining property, only a covenant running with the land was found to exist 80 years after the conveyance. The court rather openly declared that, "Although the words of the clause . . . are apt to describe a condition subsequent, . . . we are in no wise obliged to take them literally."⁴² The case makes specific reference to change of circumstances and the injustice that would follow if a condition were recognized.

In *Scaling v. Sutton*⁴³ the deed recited that "In order to secure the erection of private residential buildings of a good grade . . . and to carry out a general plan for the . . . benefit . . . of each . . . purchaser of lots . . . this deed is made upon the following express conditions, the violation of any one of which by the grantee . . . shall give the right to said Clover Land Co. to reenter upon said premises . . . and terminate all of the rights of grantee. . . ."⁴⁴ The court held that a covenant enforceable by adjoining owners was created. An amusing feature of this case is that, in order to escape the force of a covenant, the grantee himself argued that a condition subsequent had been created, but even he argued to no avail. The deed in *Carruthers v. Spaulding*⁴⁵ also recited that the conditions were for the benefit of the entire tract and that on failure to observe them the land would revert to the grantor. The court avoided a forfeiture by declaring that the

³⁹ *Id.* at 372.

⁴⁰ That the grantor may elect: *Munro v. Syracuse L. & N. R. Co.*, 200 N.Y. 224, 93 N.E. 516 (1910). It may not be without significance, as reflecting a lack of faith in the force of the forfeiture clause, that in the *White Land Co.* case the grantor, while electing to forfeit the grantee's estate, added also a prayer for an injunction as an alternative relief. For other examples of utilization of the technique of finding a covenant to avoid conditions and limitations, see *Carolina & N.W. Ry. Co. v. Carpenter*, 165 N.C. 465, 81 S.E. 682 (1914); *Hawkins v. Third*, 244 Ala. 534, 14 S. (2d) 513 (1943).

⁴¹ 115 N.Y. 361, 22 N.E. 145 (1889).

⁴² *Post v. Weil*, 115 N.Y. 361 at 369, 22 N.E. 145 (1889).

⁴³ (Tex. Civ. App. 1942) 167 S.W. (2d) 275.

⁴⁴ *Id.* at 277.

⁴⁵ 242 App. Div. 412, 275 N.Y.S. 37 (1934).

recital of benefit to the tract was consistent only with construction of the language as of an equitable restriction resulting from a covenant.⁴⁶

Trusts or equitable charges are also resorted to by the courts as alternatives to conditions or limitations on the fee, in the process of construction of language indicating possibilities of reverter or rights of re-entry. Despite the use of clear words of condition in *MacKenzie v. Trustees of Presbytery of Jersey City*,⁴⁷ the court announced that words seemingly appropriate to a condition may operate to create other rights and that ". . . the absence of words of determination or reverter being noted, the intent of the parties . . . will be best subserved by holding the clause to be a declaration of trust."⁴⁸ Although the courts are astute in finding equitable charges on land conveyed or devised rather than conditions or limitations, such cases, while reflecting the same judicial abhorrence for forfeiture of estates, do not generally spring from a desire to control the use of land but rather to insure the payment of a money or other obligation.⁴⁹

When there has been a sufficient change of circumstances, a court may refuse to recognize a condition subsequent because the original plan of the vendor was not included by him in subsequent sales of land. In *Brown v. Wrightman*⁵⁰ a 45-acre tract was conveyed in 1886 "upon the following expressed condition subsequent, to-wit: . . . [there follow restrictions against selling liquor and maintaining bawdy houses] . . . and in case of the happening of either of said events then this grant to cease and be void."⁵¹ The grantor later sold lots of another tract without including in the deed the condition subsequent. The court pointed out that by the time the defendant acquired his lots the

⁴⁶ On similar language another New York court had found a clear condition subsequent in *Schulman v. Ellenville Electric Co.*, 152 Misc. 843, 273 N.Y.S. 530 (1934). In this case, however, no danger of forfeiture was present, as the owner of the right of re-entry had released his interest.

⁴⁷ 67 N.J. Eq. 652, 61 A. 1027, 3 L.R.A. (n.s.) 227 (1905).

⁴⁸ *Id.* at 661. For other examples of the utilization of the trust device, see *President and Fellows of Middlebury College v. Central Power Corp. of Vermont*, 101 Vt. 325, 143 A. 384 (1928) ("it is a condition of this devise," etc.); *Delaware Land & Development Co. v. First & Central Presbyterian Church of Wilmington*, 16 Del. Ch. 410, 147 A. 165 (1929) (land to be used for certain purposes, "and to no other use, intent or purpose whatsoever").

⁴⁹ *Daly v. Wilke*, 111 Ill. 382 (1884) ("subject, however, to the terms and conditions herein limited" held a charge). The same in *Parsons v. Millar*, 189 Ill. 107, 59 N.E. 616 (1901) ("provided that"); *Spangler v. Newman*, 239 Ill. 606, 88 N.E. 202 (1909) ("on the condition that he pay to"); *Canal Bank v. Hudson*, 111 U.S. 66, 4 S.Ct. 303 (1884) ("under penalty, in case of non compliance, of loss of the above property").

⁵⁰ 5 Cal. App. 391, 90 P. 467 (1907).

⁵¹ *Id.* at 392.

neighborhood had ceased to be a respectable residential neighborhood and had become a place devoted to lewd resort and retail of liquor, and ruled that the defendant's clear breach of condition could no longer entitle grantor to a recovery of the property. The court explained the result by displaying a wholesome (in this case) confusion of contract law with property law. Since the plaintiff (grantor) had himself contributed to the change of the neighborhood in other lots, he had waived the condition as to the original 45 acres and estopped himself. Counsel's argument that the grantor's conduct with respect to other land could have no effect on his property rights in the first tract conveyed was met by the court with a quotation from a Kentucky case⁵² denying a right to enforce a covenant to one who had contributed to rendering performance of the contract unreasonable. The court treated the grantor's right as a restrictive covenant although the validity of the condition subsequent in its inception was not doubted in the least.⁵³

IV. *The Courts' Last Resort: Finding No Breach, Temporary Breach, Expiration, Waiver*

The strictness of the courts does not confine itself to the constructional question of whether conditions or limitations have been created. Where rights of re-entry or possibilities of reverter must be recognized because of unequivocal language, the courts will proceed undaunted to amazingly strict constructions of what events, if any, will cause a forfeiture, and they will also take judicial notice of changes of conditions for the purpose of limiting the scope of the condition and finding that it has exhausted its force. A recent case is particularly illustrative of the techniques of the courts, since the majority opinion had to make use of a number of them. For the consideration of \$1, land was conveyed to a city in *J. M. Carey & Brother v. City of Casper*,⁵⁴

" . . . upon the express condition that a City Hall building . . . is to be erected . . . and that said Block is to be used thereafter for the maintenance thereon of such City Hall . . . and also for the maintenance of a Public Park and for no other purposes . . . in case said . . . property is disposed of for any other purposes . . . then . . . title to said . . . property shall revert to [grantor] . . . its successors or assigns."⁵⁵

⁵² *Duncan v. Central Pass. R. Co.*, 85 Ky. 525 at 535, 4 S.W. 228 (1887).

⁵³ The same doctrine was applied in *Hanna v. Rodeo-Vallejo Ferry Co.*, 89 Cal. App. 462, 265 P. 287 (1928), and *Wilshire Oil Co. v. Star Petroleum Co.*, 93 Cal. App. 437, 269 P. 722 (1928).

⁵⁴ 66 Wyo. 437, 213 P. (2d) 263 (1950).

⁵⁵ *Id.* at 448.

The city performed for twenty years. Then, contemplating erecting a county building jointly with the county, the city induced the grantor to change the conditions in order to permit the joint undertaking. New conditions were drawn which read in part:

“Provided that said real property . . . shall be used for the maintenance thereon of a City Hall Building . . . or for the construction and maintenance thereon of a City-County building . . . or for public park purposes, and for no other purpose whatsoever . . . in the event said property, or any part thereof, is disposed of or used for any other purpose than those herein provided, title to said property shall revert to [grantor, successors, and assigns]. . . .”⁵⁶

The plan for a county building on the block was abandoned and a new building erected one-half mile away. The city then moved its offices to the new building and rented most of the old City Hall to businesses and even to one United States agency, although the conditions specified that they were intended to exclude especially state or federal uses of the premises. The court needed so much subtlety in this case that the opinion ran to 35 pages. The possibility of a determinable fee was not even considered, as that would have made it impossible to free the land of all burdens. A condition subsequent could not be avoided. The court conceded that the second set of conditions had been violated, since they forbade any use of any part of the premises for other purposes. Therefore these conditions had to be made inoperative. They were held to be “executory,” i.e., contingent on the actual erection of a county building by the city and county jointly, and thus brushed aside unceremoniously since the contingency never arose. This was a remarkable achievement on the part of the court, because the new agreement contained no hint of being contingent on anything; it was an executed substitution of one set of conditions for another. This technique opens new vistas. Any conditions might be found impliedly contingent on some event at any time and be held to live only until a sufficient change of circumstances makes them unreasonable. But the court seemed hardly convinced of the soundness of its own exploit, as it hastened to caution that in case of error on this score the violations would be held to be only transitory and not sufficient to work a forfeiture anyway. This explanation falls a little short of rationality too, since the violations had been carried on for seven years and the city was making a business use of the premises for all practical purposes. As for the first set of conditions, the court decided that “to dispose of”

⁵⁶ *Id.* at 450.

meant here only "to alienate." Even if leasing could be considered a sort of alienation, the city had leased only most of the building, not all. Besides, it was impossible for the court to define "City Hall purposes," and apparently so long as anything connected with the municipality was being done in any corner of the building, there was a use for City Hall purposes. But the court did not stop here, since so far the conditions would still be in force, even if in a much weaker form, and could still endanger the city's title in the future. The court took notice of the substantial growth of the city which had doubled its population since the time of the conveyance and decided that even a condition so hard to breach would be an unwarranted burden on the city. Thus it proceeded to free the defendant city of any worry for the future. The court held that a condition not specifying a period of time for its duration, or a perpetuity, did not call for operation in perpetuity, but was complied with by performance over a long term of years. The reason was that conditions are presumed to be made on the theory that they are subject to the exigencies of the grantee's development. In this case the city had substantially complied long enough.⁵⁷ This seems to import the doctrine of change of circumstances squarely into the legal structure of these interests, but only for the cases where there is no express recital that a condition is to last in perpetuity. While this may be very effective in practice since express recitals of perpetuity are not common in existing conditions, still draftsmen could avoid this pitfall in the future by merely inserting the needed recital. It thus becomes apparent that the incorporation of the equitable doctrine of change of conditions into this case was the result of a conscious process of judicial innovation tailored to fit only one situation, albeit a common one.

Where even a covenant might prove unreasonable because of the passage of time and the change in circumstances, a court may even

⁵⁷ For other cases in which courts have refused to find a breach though conceding the validity of the condition subsequent, see *Mills and Wife v. Evansville Seminary and Others*, 58 Wis. 135, 15 N.W. 133 (1883) (grantees sold the land to a shoe manufacturing business; when grantor threatened action, they had land reconveyed to themselves, hastily repaired the premises and began to use it as a seminary anew for a few pupils by the time grantor sued). *Carpenter v. Graber*, 66 Tex. 465, 1 S.W. 178 (1886) (language of special limitation restricting land to street purposes; held, obstruction by building erected by third party, no forfeiture unless grantee delayed unreasonably in preventing forbidden use). *Dagget v. Fort Worth*, (Tex. Civ. App. 1915) 177 S.W. 222 (grantor must prove abandonment besides non-user). *Gleghorn v. Smith*, (Tex. Civ. App. 1901) 62 S.W. 1096 ("solely for the purpose of a gin, and to be solely and only used for a gin site; and in the event said real estate is not used for such purposes, then . . . said property is to revert to me"; held, even though parts of the tract are used for other purposes, no forfeiture so long as a gin was operated on the premises; reason: no forfeiture provision specifically for additional uses). *Skipper v. Davis*, (Tex. Civ. App. 1932) 59 S.W. (2d) 454.

strive to construe a clause as creating a condition subsequent and then strike it down by finding it extinguished because of lapse of time. A deed conveyed land to a railroad in 1878 strictly for railroad purposes and included words of reverter in case of breach.⁵⁸ The clause, however, recited that the grantee covenanted and agreed to perform. In 1926 the grantee moved to another depot and kept only a track on a small strip of the land. Then it built a filling station on the property and leased it. In 1938 it conveyed the land outright to the plaintiff, who kept an auto repair shop and a gasoline station on the land and sued in 1949 to clear title. The presence of a covenant for railroad purposes might prove very burdensome, since the land was now in the hands of a non-railroad enterprise. The court found a condition subsequent despite words of covenant, and held that it had been breached in 1926, and that grantor's successors were now barred by a fifteen-year statute of limitations. The court resorted in this case to a kind of reverse doctrine of "substantial compliance," as it held that the maintenance of a roadbed on a small strip was not sufficient to prevent a breach in 1926 (substantial breach doctrine?). On the basis of the *City of Casper* case,⁵⁹ could anyone doubt that if lack of a breach had been necessary to prevent an inequitable result the same facts would have been held to constitute substantial compliance? The hopelessness of the grantor's successor's case is further brought out later in the opinion. Counsel argued that a breach occurred in 1938 only when the land was conveyed to plaintiff, since until then the land was held under the same deed of conveyance and the railroad had only leased the premises, no adverse possession being shown. Thus in 1949 the statute of limitations would still be running. The court's answer is a masterpiece of inconsistency, but it served to relieve a party from an unconscionable forfeiture more than 70 years after the conveyance. It stated that if there was no breach in 1926, there was still no breach in 1950, since a railroad line was still crossing a small segment of the land, and consequently the land was still being used for railroad purposes. Nothing but change of conditions would seem to induce the court to strain its analysis to this extent.

In one case the court refused to enforce a forfeiture purely and simply on the ground of laches although the plaintiff had brought an ejectment action, and the statute of limitations had not run. The validity of the condition was not questioned. The plaintiff did nothing

⁵⁸ *Sanford v. Sims*, 192 Va. 644, 66 S.E. (2d) 495 (1951).

⁵⁹ See note 55 *supra*.

to estop himself. Improvements had been built on the land. As the grantor had notice of the violation since its inception, the fact that he waited eleven years to sue caused the court to reject his claim, saying, "This is peculiarly a case for the application of equitable principles."⁶⁰ What else but the change of conditions brought about by the improvements made the case peculiarly one for the application of equitable principles?

Often if the consideration for the condition is found to have been appreciation of remaining land of the grantor, the condition will be held inoperative as soon as the purpose can no longer be carried out. Such contingency may arise either from a change in the location or from sale of adjoining property by the grantor, who thereby loses any real interest in the condition. In these cases the distinction between possibilities of reverter and rights of entry is even more baldly disregarded.⁶¹

Another technique used by the courts to prevent forfeitures even if a condition subsequent is found is to curtail its operation to a reasonable time only. The condition expressed in *Board of Commissioners of Oklahoma County v. Russel*⁶² specified that the land was to be used as a courthouse site, that trees and ornaments should be planted and cared for by annual special appropriations. A reverter clause was inserted. The condition was performed from 1910 to 1938, when the uses and appropriations were discontinued. The court seized upon the fact that the clause did not specify any length of time for the duration of the condition, took judicial notice of the fact that everyone knows that cities develop in time and that the old accommodations become inadequate. There was then full compliance in this case, since the condition was to last only a reasonable time.⁶³ As a matter of fact, sufficient changes had occurred to make further performance of the condition absurd or nearly so.

Other factors of varied nature and compelling significance may be seized upon by the courts to relieve a party. Thus, when the grantee of a fee on condition subsequent is later precluded by law from using

⁶⁰ *Lehigh Coal & Navigation Co. v. Early*, 162 Pa. 338 at 340, 29 A. 736 (1894).

⁶¹ *Stevens v. Galveston H. & S.A. Ry. Co.*, (Tex. Comm. App. 1919) 212 S.W. 639; *Maddox v. Adair*, (Tex. Civ. App. 1901) 66 S.W. 811; *Dagget v. City of Fort Worth*, (Tex. Civ. App. 1915) 177 S.W. 222. As to relevance of the consideration as indicative of intent when nominal or valuable, see 116 A.L.R. 76 (1938).

⁶² (10th Cir. 1949) 174 F. (2d) 778, cert. den. 338 U.S. 820, 70 S.Ct. 64 (1949).

⁶³ The same doctrine was applied in *Jeffersonville, M. & I. R. Co. v. Barbour*, 89 Ind. 375 (1883); *Sheller v. Tacoma Ry. & Power Co.*, 108 Wash. 348, 184 P. 344 (1919); *Little Rock & Ft. S. Ry. Co. v. Binnie*, 59 Ark. 66, 26 S.W. 528 (1894). See also 7 A.L.R. 817 (1920).

the land for the purposes designated, a forfeiture is excused,⁶⁴ and the conditions may be held enforceable only so long as one owns property in the tract supposed to benefit from them.⁶⁵

As indirectly illustrated in some of the preceding cases, a court may utilize a concept of the law of contracts and hold that substantial compliance with the condition was shown despite other forbidden users or discontinuance.⁶⁶ In *Central Land Company v. City of Grand Rapids*⁶⁷ the grantor himself, suing in ejectment only two years after the conveyance, was denied a forfeiture. The land was conveyed "upon the express condition that . . . land . . . shall be used solely for park, highway, street, and boulevard purposes; and if any part thereof be not used for any of such purposes, or at any time cease to be used for such purposes, or at any time be used for any other purpose, said part or parts shall immediately revert to the grantor. . . ."⁶⁸ Oil was discovered on the land and the city authorized drilling operations by an oil company. The court ignored the specific restrictions and held that the drilling really did not cause a substantial part of the park to be interfered with in the uses for which it was conveyed. The case is remarkable because the grantor had more than a legitimate interest in seeking a forfeiture, since it owned adjoining land, and oil taken from under the park would diminish his supply.

The conduct of a grantor before and after the breach of a condition is carefully scrutinized by the courts in the search for waivers of performance of the condition. A short wait before suit may, in and of itself, bar the grantor.⁶⁹ Mere silence of the grantor, even without acts in reliance by the grantee, may constitute a waiver.⁷⁰ The "waiver"

⁶⁴ *United States v. 2086 Acres of Land More or Less, situate in Spartansburg County, S.C.*, (D.C. S.C. 1942) 46 F. Supp. 411.

⁶⁵ *Second Church of Christ, Scientist, of Akron v. Le Prevost*, 67 Ohio App. 101, 35 N.E. (2d) 1015 (1941).

⁶⁶ *Brooks v. Kimball County*, 127 Neb. 645, 256 N.W. 501 (1934) (maintenance of a courthouse for 35 years held substantial compliance freeing the fee of any burden); *McKissick v. Pickle*, 16 Pa. 140 (1851) (for schoolhouse, religious use and burying ground only, plus reverter clause. Renting to a tenant held only a temporary diversion). See also 137 A.L.R. 639 (1942).

⁶⁷ 302 Mich. 105, 4 N.W. (2d) 485 (1942).

⁶⁸ *Id.* at 107. Emphasis added.

⁶⁹ *Tough v. Netsch*, 83 N.H. 374, 142 A. 702 (1928) (slightly more than one year wait).

⁷⁰ *First Christian Church of Vera v. Spinks*, (Tex. Civ. App. 1924) 260 S.W. 1073, reversed on other grounds (Tex. Civ. App. 1925) 273 S. W. 815 (church not built in 24 months, contrary to condition, grantee conveying nine years later to third party). *Gleghorn v. Smith*, (Tex. Civ. App. 1901) 62 S.W. 1096 (court declares that if it should be mistaken in finding no breach, a waiver of performance shown anyway since the plaintiff stood by while the defendant was erecting a residence on the premises).

cases as a whole indicate a general approach of the courts to the problem more in keeping with contract principles than property law.

When the grantor or assigns may be adequately protected by compensation or damages, a court may refuse forfeiture for breach of a condition subsequent on that ground.⁷¹

The courts will be strict in deciding who is bound by a condition. If a condition applies expressly to a grantee or lessee and no mention is made of heirs, executors, or assigns, the condition subsequent may become breach-proof after the death of the grantee or lessee,⁷² or even earlier where the assignee of the grantee breaches the condition when assigns are not mentioned in the forfeiture clause.⁷³

Of course, if a condition violates public policy, it will be entirely disregarded.⁷⁴ On this score it is surprising to note that in view of the policy reflected in the rule against perpetuities and against restraints on alienation, the courts do not draw freely on the analogy and rest their decisions squarely on the ground that conditions and limitations may, in time, become violative of public policy.

Finally, plain ignorance of a breach may constitute a good defense against forfeiture.⁷⁵ In *Bonniwell v. Madison*⁷⁶ the court conceded that the condition subsequent had been breached by a failure to keep up a fence. However, the grantee's tenant had failed to inform him. The court held that to warrant a forfeiture a breach must be willful and show an intent not to comply with the condition.

IV. Conclusion

It seems reasonable to conclude from the foregoing review of authorities that a draftsman wanting to frame conditions or limitations strong enough to withstand the assault of time and changes in the circumstances of the location of the land would be confronted with an overwhelmingly difficult task. Respectable authority can be found for the most varied and unpredictable propositions. It would also seem

⁷¹ *Berryman v. Schumacker*, 67 Tex. 312, 3 S.W. 46 (1887); *Robinson v. Ingram*, 126 N.C. 197 at 200, 35 S.E. 612 (1900) (court would not aid in divesting an estate for a breach "when a just compensation can be made in money . . . but will relieve against forfeitures claimed by strict construction of any common law rule").

⁷² *Henderson v. Beaton*, (Tex. Comm. App. 1874) 1 Posey 17.

⁷³ *Ragland v. Overton*, (Tex. Civ. App. 1931) 44 S.W. (2d) 768.

⁷⁴ 83 UNIV. PA. L. REV. 670 (1935); 47 HARV. L. REV. 887 (1934).

⁷⁵ *Rose v. Hawley*, 118 N.Y. 502, 23 N.E. 904 (1890) (encroachment of adjoining building by 16 inches on land restricted to use for public monuments only; held, grantees not guilty of permitting a breach as they could not tell certainly whether there was a breach or not).

⁷⁶ 107 Iowa 85, 77 N.W. 530 (1898).

that at the present time unconscionable forfeitures of estates are possible or probable mainly in legal theory and only when and if a court is totally lacking in resourcefulness. Despite the assurance one may derive from a consciousness that the courts are ready to exert themselves to the fullest to favor a principle of justice over obsolete legal interests, it seems unjust that to the courts should be left perennially what is an unpleasant task at best. Appropriate legislation would go far in remedying the situation, at least as to future creations of rights of re-entry and possibilities of reverter. There may be a constitutional doubt, however, as to the validity of legislation depriving one of interests which are already in esse and valid despite change of circumstances or passage of time.

It may be thought that the very assiduousness of the courts in relieving threatened landowners has largely contributed to legislative inertia in this area of the law. One may even argue that the courts offer sufficient protection with the techniques at their disposal. But it seems hardly controvertible that, since attorneys are in no position to advise clients in positive terms in the present state of authority, owners may have been and may continue to be deterred from a useful and reasonable utilization of their land.

The traditional reluctance on the part of legislatures to bring about changes in property law for fear of upsetting titles has no reason to assert itself in this field. Any legislation would serve the very purpose of freeing land titles of potential or existing threats that may be brought to bear at an unreasonable time and under unreasonable circumstances.

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