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A MODEST PROPOSAL FOR TRIMMING THE CLAWS OF LEGAL FUTURE INTERESTS

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The thesis of this article is that legal, as distinguished from equitable, future interests in land, as presently permitted and enforced in the United States, prevent the use of land in the manner most suited to current economic and social needs, to the detriment of the owners of present and future interests in the land and of the community. This thesis will be developed by the presentation of an example involving the four varieties of legal future interests which cause the most trouble—the possibility of reverter, the right of entry on breach of condition subsequent, the contingent remainder and the executory interest—followed by discussions of the problems created by each and descriptions of some solutions which have been attempted. A modest proposal for ameliorating the situation will then be presented with hesitation and in the hope that some reader will propose a better solution to the evils of legal future interests.

THE TYPE EXAMPLE: ASHLAND IN FETTERS[1]

At the beginning of 1860 Abraham Clay owned, in fee simple absolute, two hundred acres of farm and woodland located about a mile northwest of the village of Clayton, in Clay County, near the

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1. This caption is borrowed from the title of Lord Justice Sir Thomas Edward Scrutton's notable essay, LAND IN FETTERS (1886), which, by describing their evil effects, helped to bring about the English statutory abolition of legal future interests.

THE FOLLOWING HEREINAFTER CITATIONS WILL BE USED IN THIS ARTICLE:

W. BLACKSTONE, COMMENTARIES (1770) [hereinafter cited as BLACKSTONE];

C. FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVISES (4TH ED. 1795) [HEREINAFTER CITED AS FEARNE];

A. SCOTT, THE LAW OF TRUSTS (3d ed. 1967) [hereinafter cited as SCOTT];

L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS (2d ed. 1956) [hereinafter cited as SIMES & SMITH];

L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960) [hereinafter cited as SIMES & TAYLOR];

RESTATEMENT OF PROPERTY (1936) [hereinafter cited as RESTATEMENT OF PROPERTY].

western border of the state.[2] This tract was, and still is, known as "Ashland." During 1860 Abraham Clay executed three conveyances. The first conveyed a right of way over the easterly five rods of Ashland to the Columbia, Clayton and Maryville Railroad Company, its successors and assigns, "so long as used for railroad purposes." The second conveyed the northwesterly acre of Ashland to trustees for Oak Grove Church, their heirs and assigns, "so long as church services are conducted there at least weekly." The third conveyed the southwesterly acre of Ashland to the Clay County Rural School District and its successors, "but if the land conveyed shall cease to be used for public school purposes, the grantor or his heirs may reenter and terminate the estate hereby conveyed."

Abraham Clay died in 1870, leaving a will by which he devised all of his estates and interests in lands in Clay County to his eldest son, Isaac. Isaac Clay died in 1900, leaving a will by which he devised all of his estates and interests in lands in Clay County to his eldest son, Jacob. Jacob Clay died in 1930, leaving a will by which he devised all of his estates and interests in lands in Clay County to his eldest son, Reuben. Reuben Clay died early in 1960, survived by his four sons: Hanoch, a bachelor aged forty; Phallu, a bachelor aged thirty-eight; Hesron, a married man aged thirty-six with four children; and Charmi, a married but childless man aged thirty-four. By his will, which was duly admitted to probate, Reuben Clay devised all of his estates and interests in lands in Clay County to

> my eldest son, Hanoch Clay, for and during the full term of his natural life, remainder, if he dies survived by issue, to his issue per stirpes in fee simple absolute and, if he dies without issue him surviving, to my second son, Phallu Clay and his heirs; but if both my said sons shall die without issue them surviving, the said estates and interests shall pass, upon the death of the survivor of them, to the issue then living of my third son, Hesron Clay, per stirpes in fee simple, subject to a charge in the amount of $10,000 in favor of my fourth son, Charmi Clay, if he is then living, or in favor of his issue per stirpes, if he is then dead and issue of his survives.

In 1969 the Columbia, Clayton and Maryville Railroad Company stopped using the right of way over Ashland for railroad purposes. In 1970 Oak Grove Church ceased to conduct services and its members joined the Truett Memorial Church in downtown Clayton. In 1971 the Clay County Rural School District ceased using the southwesterly acre of Ashland for public school purposes and began

2. The state is Georgia, Indiana, Iowa, Minnesota, Missouri or North Carolina, as the reader prefers.

busing children to the consolidated school in Clayton. Recent establishment of industry in Clayton has changed it from a sleepy country village to a booming, expanding city.

In April, 1972 the President of the Clayton Chamber of Commerce, the Chairman of the City Planning Commission and the General Manager of Clayton Promoters, Inc. held a conference with Hanoch, Phallu, Hesron and Charmi Clay. The Clay brothers were told that Clayton is in urgent need of a new residential subdivision and shopping center complex; that Ashland is the ideal site for it; that Clayton Promoters, Inc. will pay them $10,000 an acre for Ashland if they can furnish merchantable title to the entire two hundred acres by October 1, 1972; and that the city's expansion will be onto less suitable sites southeast of the present city if the Clay brothers cannot furnish merchantable title by that date. The Clay brothers, who are on excellent terms with each other, are anxious to accept this offer of two million dollars for Ashland. Can they furnish merchantable title to Ashland by October 1, 1972? If they cannot, the expansion of Clayton will be to the southeast, to the detriment of both the Clay family and the community.

The Former Railroad Right of Way

Whether it was a possessory estate in fee simple determinable or a mere determinable easement of right of way, the interest of the Columbia, Clayton and Maryville Railroad Company in Ashland has terminated; nevertheless, present ownership of the five-rod strip along the easterly edge of the tract may be dependent upon the classification of the railroad company's expired interest. If the railroad company had a possessory estate in fee simple determinable from 1860 until 1969, the interest retained by Abraham Clay after his 1860 conveyance to the railroad was a possibility of reverter which may not have been devised effectively either by his will or the wills of Isaac, Jacob and Reuben Clay.[3] If, on the other hand, the railroad had only an easement of right of way, Abraham Clay retained seisin of the present estate in fee simple, subject to the easement, and this present estate in fee simple unquestionably passed under his will and those of Isaac, Jacob and Reuben Clay.[4]

From a very early period, the English common law of servitudes

3. See notes 8-30 *infra* and accompanying text.

4. E. WASHBURN, EASEMENTS AND SERVITUDES 228-29 (3d ed. 1873).

recognized a non-exclusive right of passage over land in the possession and control of another as an easement of right of way which could be acquired by prescription or grant.[5] A right of passage entitling the holder to exclusive possession and control of the surface over which it extended was not deemed a servitude under the English common law, but rather was considered a possessory estate.[6] In this country, however, a deed conveying a "right of way" over land to a railroad is usually held to give the railroad only an easement, leaving seisin of the present fee simple in the grantor.[7] This being so, the easterly five rods of Ashland passed under the wills of Abraham, Isaac, Jacob, and Reuben Clay, and its present ownership is now the same as that of the portions of Ashland which were not affected by the conveyances made by Abraham Clay in 1860.

The Possibility of Reverter in the Oak Grove Church Site

The interest in the northwesterly acre of Ashland conveyed to the trustees of the Oak Grove Church by the 1860 deed was an estate in fee simple determinable which terminated automatically when church services ceased to be conducted there in 1970. The deed left a possibility of reverter in Abraham Clay which became a possessory estate when the estate in fee simple determinable expired.[8] But who owned the possibility of reverter in 1970?

At common law, contingent future interests, including contingent remainders, executory interests, possibilities of reverter and rights of entry on breach of condition subsequent, could not be conveyed inter vivos or devised by will.[9] The Statute of Wills of 1540 permitted devise by will of "manors, lands, tenements or hereditaments, or any

5. Collicum v. Tucker, 2 Bulst. 121, 80 Eng. Rep. 1000 (1613); Alban v. Brounsall, Yelv. 163, 80 Eng. Rep. 109 (1609).

6. Rex v. Bell, 7 T.R. 598, 101 Eng. Rep. 1152 (1798); Reilly v. Booth, 44 Ch. D. 12 (C.A. 1890); Metropolitan Ry. v. Fowler, [1893] A.C. 416.

7. Browne v. Weare, 348 Mo. 135, 152 S.W.2d 649 (1941); University City v. Chicago, R.I. & P. Ry., 347 Mo. 814, 149 S.W.2d 321 (1941); St. Louis County v. Delbet Inv. Co., 469 S.W.2d 951 (Mo. Ct. App. 1971); Beasley v. Aberdeen & Rockfish R.R., 145 N.C. 272, 59 S.E. 60 (1907); Seaboard Air Line Ry. v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903); Annot., 6 A.L.R.3d 973, 1013 (1966). *Cf.* SIMES & SMITH § 290 (Supp. 1972).

8. Donehue v. Nilges, 364 Mo. 705, 266 S.W.2d 553 (1954); Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950); 2 BLACKSTONE *155; SIMES & SMITH §§ 282, 293; RESTATEMENT OF PROPERTY § 44.

9. 2 BLACKSTONE * 290, 374. With exception under the custom of Kent and some towns, even present estates and vested remainders in fee simple were not devisable by will at common law. *Id.* at * 311, 314, 348, 361, 374.

of them."[10] The statute enacted two years later to explain the 1540 Act permitted devise by will of an "estate or interest in fee-simple, . . . in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, remainder, or of rents or services incident to any reversion or remainder."[11] A seventeenth-century lord keeper held that this legislation did not permit devise of an equitable contingent remainder.[12] In the next century, however, the Court of King's Bench affirmed a judgment of the Court of Common Pleas holding that an executory interest was devisable by will.[13] The language of the opinions in this case was broad enough to suggest that all contingent interests, including contingent remainders, executory interests, possibilities of reverter and rights of entry on breach of condition subsequent, were devisable by will. The English Wills Act of 1837 made this clear.[14] An 1845 English statute permitted conveyance of contingent remainders, executory interests, possibilities of reverter and rights of entry on breach of condition subsequent by deed.[15]

In the absence of express statutory provision, American authority is fairly evenly split on the question of whether a possibility of reverter is alienable inter vivos.[16] As the common law did not recognize wills of real property, the power to devise possibilities of reverter must arise, if at all, from statute. In the absence of express statutory provision, probably a majority of American states have construed their statutes of wills as permitting devise of a possibility of reverter.[17] The Missouri[18] and North Carolina[19] statutes could easily be con-

10. Stat. 32 Hen. 8, c. 1, § 1 (1540).

11. Stat. 34 & 35 Hen. 8, c. 5, § 4 (1542).

12. Bishop v. Fountaine, 3 Lev. 427, 83 Eng. Rep. 764 (1696). The rule in this case was assumed, but not applied, by Lord Chancellor Hardwicke *in* Ives v. Legge, 3 T.R. 488 n., 100 Eng. Rep. 692 n. (1743). The decision in that case held that the remainder in question was vested and had been effectively devised.

13. Jones v. Roe *ex dem.* Perry, 3 T.R. 88, 100 Eng. Rep. 470 (1789).

14. Stat. 7 Will. 4 & 1 Vict., c. 26, § 3 (1837).

15. Real Property Law Amendment Act, 8 & 9 Vict., c. 106, § 6 (1845).

16. SIMES & SMITH § 1860. The *Restatement of Property* favors inter vivos alienability, RESTATEMENT OF PROPERTY § 159, comment *a*, at 570. There are dicta to the contrary in Missouri and North Carolina. Polette v. Williams, 456 S.W.2d 328, 331 (Mo. 1970); Blue v. City of Wilmington, 186 N.C. 321, 323, 119 S.E. 741, 743 (1923). Both states have statutes permitting conveyance of land by deed in lieu of the livery of seisin required by the common law for transfer of present freehold estates. VERNON'S ANN. MO. STAT. § 442.020 (1952) could easily be construed to permit conveyance of a possibility of reverter by deed; however, N.C. GEN. STAT. § 47-17 (1966) is not so broad.

17. SIMES & SMITH § 1903; RESTATEMENT OF PROPERTY § 165.

18. VERNON'S ANN. MO. STAT. § 474.310 (1956).

19. N.C. GEN. STAT. § 31-40 (1966).

strued to permit devises of possibilities of reverter. Nevertheless, there are dicta in both states that a possibility of reverter cannot be devised by will.[20] In 1961 North Carolina enacted legislation expressly permitting conveyance by deed or will of possibilities of reverter,[21] but, as the wills of Abraham, Isaac, Jacob and Reuben Clay became effective before 1961, this legislation does not assist in ascertaining the present ownership of the northwesterly acre of Ashland. If the possibility of reverter retained by Abraham Clay after the execution of the 1860 deed was not effectively devised by his will and those of Isaac, Jacob and Reuben Clay, its ownership in 1970 is governed by the rules of intestate descent.

Under the English common law, if the first owner of a future interest in real property died before it became possessory, without making an effective conveyance or devise of it, the interest descended to his heir, determined at the time of his death.[22] If the heir of the first owner also died before the future interest became possessory, without making an effective conveyance or devise of it, the interest then descended to the heir of the *first* owner, determined as of the death of the second owner. Similarly, if the third owner also died before the future interest became possessory, without making an effective conveyance or devise of it, it passed at his death to the heir of the *first* owner, determined as of the death of the third owner. The effect of this peculiar rule of descent was that, in the absence of an effective conveyance or devise by some owner of it, when a future interest became a possessory estate, it belonged to the person who was the heir of the *first* owner, determined at that time, which might be many years after the death of the first owner.[23] This peculiar rule governing the intestate descent of future interests in real property at common law was abrogated in 1897 by legislation which had the effect of making future interests descend like possessory estates in fee

20. Methodist Protestant Church v. Young, 130 N.C. 34, 35, 40 S.E. 691, 692 (1902). *Cf.* Polette v. Williams, 456 S.W.2d 328, 331 (Mo. 1970); Elmore v. Austin, 232 N.C. 13, 21, 59 S.E.2d 205, 212 (1950).

21. Ch. 435 [1961] N.C. Laws 590; N.C. GEN. STAT. § 39-6.3 (1966).

22. Cunningham v. Moody, 1 Ves. Sen. 174, 27 Eng. Rep. 965 (1748); Kinaston v. Clark, 2 Atk. 204, 26 Eng. Rep. 526 (1741); Stringer v. New, 9 Mod. 363, 88 Eng. Rep. 509 (1741).

23. Goodright *ex dem.* Larmer v. Searle, 2 Wils. K.B. 29, 95 Eng. Rep. 668 (1756); Kellow v. Rowden, 3 Mod. 253, 87 Eng. Rep. 167 (1689); 2 BLACKSTONE *228 (E. Christian's note 13 to 12th ed., 1794); 2 FEARNE 534-36; 2 R. WOODDESON, SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 255-56 (1792). *Cf.* Jenkins *ex dem.* Harris v. Prichard, 2 Wils. K.B. 45, 95 Eng. Rep. 677 (1757).

simple to the heir of the last owner.[24]

With respect to reversions, remainders and executory interests, American courts have been unanimous in rejecting the peculiar common law rule as to descent of future interests in real property. They hold that such a future interest, like a present estate in fee simple, descends on the death of any owner of it intestate to the heirs of the last owner, determined at the time of his death.[25] However, a very few states, notably North Carolina, still followed in 1960 the peculiar common law rule of descent in the case of possibilities of reverter and rights of entry to terminate estates in fee simple on breach of condition subsequent.[26] If the peculiar common law rule governs, the northwesterly acre of Ashland is now owned by the heirs of Abraham Clay, determined as if he had died in *1970,* a century after his actual death. If the prevailing modern rule governs, the possibility of reverter descended on the death of Abraham Clay in 1870 to his heirs, determined at that time. On the later death of an heir of Abraham Clay—for example, a son—the son's share in the possibility of reverter descended to the heirs of the son, determined at the son's death. Similarly, the share of a grandson who inherited as an heir of the son passed on the grandson's death to the heirs of the grandson, determined at the grandson's death.

Under the English common law, the rules of intestate descent of real property included the doctrine of primogeniture, under which the eldest son or, if he was dead, *his* eldest son, was the sole heir.[27] If primogeniture had been in force in Clay County from 1870 through 1960, and the possibility of reverter retained by Abraham Clay passed exclusively by intestate descent, Hanoch Clay would now own the northwesterly acre of Ashland in fee simple absolute, whether the peculiar common law rule of descent of future interests or the prevail-

24. Land Transfer Act, 60 & 61 Vict., c. 65, § 1 (1897).

25. Davidson v. Davidson, 350 Mo. 639, 167 S.W.2d 641 (1943); Wommack v. Whitmore, 58 Mo. 448 (1874); Early v. Early, 134 N.C. 258, 46 S.E. 503 (1904); SIMES & SMITH § 1883; RESTATEMENT OF PROPERTY § 164. Earlier North Carolina cases followed the common law rule. King v. Scoggin, 92 N.C. 99 (1885); Lawrence v. Pitt, 46 N.C. (1 Jones' Law) 344 (1854); Exum v. Davie, 5 N.C. (1 Murphey) 475 (1810).

26. Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950) (possibility of reverter); Methodist Protestant Church v. Young, 130 N.C. 8, 40 S.E. 691 (1902) (right of entry on breach of condition subsequent). SIMES & SMITH § 1884. N.C. GEN. STAT. § 29-(2)(b)(1966) (originally enacted in the North Carolina Intestate Succession Act, ch. 879, § 1, [1959] N.C. Laws 886)(effective July 1, 1960) adopted the prevailing modern view as to possibilities of reverter and rights of entry on breach on condition subscquent.

27. 2 BLACKSTONE *212-20.

ing modern view governed. He was the heir of Abraham Clay, determined as of 1970. Isaac was the heir of Abraham, determined as of 1870; Jacob was the heir of Isaac, determined as of 1900; Reuben was the heir of Jacob, determined as of 1930; and Hanoch was the heir of Reuben, determined as of the latter's death in 1960.

All of the American states abolished primogeniture before 1870 by statutes making all the children of an intestate decedent heirs.[28] They have tended to make a surviving spouse a co-heir with the children of the intestate decedent, but most states have changed the rights of succession of surviving spouses several times since 1870. In order to simplify the problem of present ownership of the northwesterly acre, let us assume that Abraham Clay had 8 children, 48 grandchildren, and 192 great-grandchildren, all 248 of whom survived their spouses and died before 1960. This would result in the acre being owned now by the 384 living great-great-grandchildren of Abraham Clay, as tenants in common with unequal shares.

How are the title and shares of the 384 owners of this acre to be established? If the peculiar common law rule of descent of future interests governs, it may be sufficient to conduct a single judicial proceeding to determine the heirs of Abraham Clay as of 1970. If the prevailing modern view as to the descent of future interests governs, it may be necessary to conduct 249 separate proceedings to determine the heirs of Abraham Clay and each of his 248 deceased children, grandchildren and great-grandchildren. In either event, it will not be feasible to finance the necessary investigation and litigation if the average value of the interest of each of the 384 tenants in common is only $25. It would be difficult, if not impossible, for Hanoch, Phallu, Hesron and Charmi Clay to secure title by adverse possession against their 380 co-tenants[29] and, in any event, it cannot be done before October 1, 1972. If any of them buys a tax title, he will hold it for himself and his 383 co-tenants.[30] Perhaps someone who is not one of the co-tenants could acquire a beneficial tax title if none of the co-tenants pays the taxes. Every experienced lawyer will realize that, if

28. *E.g.*, Mo. Gen. Stat. 1865, c. 129, § 1; N.C. Rev. Code 1855, c. 38, § 1.

29. Collier v. Gault, 234 Mo. 457, 137 S.W. 884 (1911); Golden v. Tyer, 180 Mo. 196, 79 S.W. 143 (1904); Warfield v. Lindell, 38 Mo. 561 (1866); Warfield v. Lindell, 30 Mo. 272 (1860); Brewer v. Brewer, 238 N.C. 607, 78 S.E.2d 719 (1953); Lee v. Parker, 171 N.C. 144, 88 S.E. 217 (1916); Dobbins v. Dobbins, 141 N.C. 210, 53 S.E. 870 (1906); Annot., 82 A.L.R.2d 5 (1962).

30. Kohle v. Hobson, 215 Mo. 213, 114 S.W. 952 (1908); Smith v. Smith, 150 N.C. 81, 63 S.E. 177 (1908); Annot., 85 A.L.R. 1535 (1933); Annot., 54 A.L.R. 874 (1928).

ownership of the northwesterly acre is dependent upon intestate descent of Abraham Clay's possibility of reverter, the chance of anyone being able to perfect a merchantable title by October 1, 1972, is virtually nil.

The Right of Entry Into the Rural School Site

The situation of the southwesterly acre of Ashland is even worse. It was conveyed in 1860 to Clay County Rural School District in fee simple upon a condition subsequent entitling the grantor, Abraham Clay, or his heirs, by way of right of entry or power of termination, to terminate the fee simple conveyed and revest a fee simple in himself or themselves, if the land should cease to be used for public school purposes. The land ceased to be used for public school purposes in 1971 but the fee simple estate of Clay County Rural School District has not yet terminated because the owners of the right of entry have not yet elected to terminate it.[31] To ascertain who those owners are, it is necessary to go through the same process used with respect to the northwesterly acre.

As has been seen, rights of entry on breach of condition subsequent could not be conveyed inter vivos or devised by will at common law.[32] An English decision of 1789 suggested that devise by will of rights of entry was permitted by the 1540 Statute of Wills;[33] they were expressly made devisable by the English Wills Act of 1837;[34] and an English statute of 1845 permitted their conveyance inter vivos by deed.[35] The weight of American authority is to the effect that a right of entry on breach of condition subsequent on an estate in fee simple cannot be transferred inter vivos, at least before the condition is breached.[36] The Missouri decisions suggest that such a right of

31. Ellis v. Kyger, 90 Mo. 600, 3 S.W. 23 (1887); Blue v. City of Wilmington, 186 N.C. 321, 119 S.E. 741 (1923); 2 BLACKSTONE *155; SIMES & SMITH § 255; RESTATEMENT OF PROPERTY § 24.

32. See note 9 *supra* and accompanying text. Stat. 32 Hen. 8, c. 34, § 2 (1540) permitted transfer with the reversion of rights of entry in leases for life or years.

33. Jones v. Roe *ex dem.* Perry, 3 T.R. 88, 100 Eng. Rep. 470 (1789).

34. Stat. 7 Will. 4 & 1 Vict., c. 26, § 3 (1837).

35. Real Property Law Amendment Act, 8 & 9 Vict., c. 106, § 6 (1845). *See also* Transfer of Property Simplification Act, 7 & 8 Viet., c. 76, § 5 (1844).

36. SIMES & SMITH § 1862. Originally, the *Restatement* adopted a distinctly minority view that an attempt to transfer a right of entry on breach of condition subsequent destroys it. RESTATEMENT OF PROPERTY § 160, comment *c*, at 577. In 1948, the *Restatement* changed its position and stated that such an attempt to transfer would not destroy the right of entry. *Id.* § 160, comment *c*, at 415 (1948 Supp.).

entry may be conveyed inter vivos after breach of the condition[37] but not before;[38] North Carolina appears to hold that a right of entry cannot be transferred inter vivos before or after breach of the condition, in the absence of express statutory authorization.[39] In the absence of express statutory provision, probably a majority of American states hold that a right of entry on breach of condition subsequent on an estate in fee simple can be devised by will;[40] there is, however, dictum in Missouri[41] and a decision in North Carolina[42] that it cannot be devised absent express statutory permission. A 1961 North Carolina statute permits conveyance of rights of entry by deed or will, before or after breach.[43] This statute would not validate the devises by Abraham, Isaac, Jacob and Reuben Clay of their interests in the southeasterly acre of Ashland, but it would indicate that the present owners of the right of entry into that acre could convey their interests before entry.

If the right of entry on breach of condition subsequent into the southwesterly acre of Ashland was effectively devised by the wills of Abraham, Isaac, Jacob and Reuben Clay, its present ownership, like

37. St. Joseph Lead Co. v. Fuhrmeister, 353 Mo. 232, 182 S.W.2d 273 (1944).

38. *See* Farmer's High School Consol. Dist. v. Parker, 240 Mo. App. 331, 203 S.W.2d 516 (Mo. App. 1947).

39. Blue v. City of Wilmington, 186 N.C. 321, 119 S.E. 741 (1923).

40. SIMES & SMITH § 1903; RESTATEMENT OF PROPERTY § 165, comment *c*, at 618-19.

41. Polette v. Williams, 456 S.W.2d 328, 331 (Mo. 1970). *See* notes 16, 20 *supra*. The interest involved in this case was not strictly a right of entry on breach of condition subsequent but a reserved power to revoke a springing use, as to which see Grange v. Twing, Bridgman, O. 107, 124 Eng. Rep. 494 (1665); 1 E. COKE, INSTITUTES *237a; W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES *524-25; 2 BLACKSTONE *335; 1 E. SUGDEN, POWERS *159, *440-42; 2 *id.* *30. Such a power may be transferable. How v. Whitfield, 1 Ventr. 338, 339, 86 Eng. Rep. 218, 219 (1679).

42. Methodist Protestant Church v. Young, 130 N.C. 34, 40 S.E. 691 (1902). Ch. 88 [1844] N.C. Laws 125 (now N.C. GEN. STAT. § 31-40 (1966)) provided

> [A]ny testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and *the power hereby given shall extend* to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also *to all rights of entry for conditions broken*, and other rights of entry . . . . (emphasis added).

This section was quoted in the opinion of Douglas, J., who concurred in the result only. 130 N.C. at 9-10, 40 S.E. at 693.

43. N.C. GEN. STAT. § 39-6.3 (1966). In view of the refusal of the court to give effect to the 1844 statute, see note 42 *supra*, we may question whether the 1961 statute will have any better success.

that of the former railroad right of way, is now the same as that of the portions of Ashland which were not affected by the conveyances made by Abraham Clay in 1860. If, however, the right of entry was not effectively devised by these wills, its present ownership is governed by the rules of intestate descent. In this event, the right of entry is now owned by the same 384 persons, as unequal tenants in common, who took the possibility of reverter in the northwesterly acre, if it passed by intestate descent. Presumably, the right of entry can be exercised only by the cooperation of all 384 tenants in common.[44] Until the right of entry is exercised, none of its holders has standing to bring suit for partition, because none has a vested estate.[45] No one can acquire title by adverse possession, because the statute of limitations does not run against the holders of future interests.[46] No one can acquire a tax title, because the land is not subject to taxation until the fee simple on condition subsequent of Clay County Rural School District is terminated.[47] If ownership of the southwesterly acre of Ashland is dependent upon intestate descent of Abraham Clay's right of entry on breach of condition subsequent, it may never be possible, as a practical matter, to perfect a merchantable title to the land in anyone. Certainly the chances of perfecting one by October 1, 1972, are non-existent.

AMERICAN LEGISLATION AFFECTING REVERSIONARY POSSIBILITIES

The chief evil of legal contingent remainders and executory inter-

44. SIMES & SMITH § 264; RESTATEMENT OF PROPERTY § 161, comment *g*, at 584-85; *id.* § 164, comment *e*, at 613; *id.* § 165, comment *c*, at 618-19; *id.*, app. 23-33. *See* Methodist Protestant Church v. Young, 130 N.C. 34, 39, 40 S.E. 691, 693 (1902) (opinion of Douglas, J.).

45. Prior v. Prior, 395 S.W.2d 438 (Mo. 1965); Vinson v. Wise, 159 N.C. 653, 75 S.E. 732 (1912); SIMES & SMITH § 1772.

46. Klorner v. Nunn, 339 S.W.2d 838 (Mo. 1960); Miller v. Proctor, 330 Mo. 43, 49 S.W.2d 84 (1932); Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954); Walston v. W.H. Applewhite & Co., 237 N.C. 419, 75 S.W.2d 138 (1953); Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952); Brown v. Brown, 168 N.C. 4, 84 S.E. 25 (1915); SIMES & SMITH §§ 258, 1962, 1966.

A few states have statutes barring possibilities of reverter and rights of entry on breach of condition subsequent if their owners do not attempt to enforce them for a stipulated period after breach of the condition. See note 53 *infra;* SIMES & SMITH § 258. There are some decisions that a right of entry is barred by "waiver" or "laches" if no attempt is made to exercise it for an extended period after breach of the condition. *E.g.*, Robinson v. Cannon, 346 Mo. 1126, 145 S.W.2d 146 (1940) (fifty years); Metropolitan Park Dist. v. Unknown Heirs, 65 Wash. 2d 788, 399 P.2d 516 (1965) (sixty years).

47. *E.g.*, VERNON'S ANN. MO. STAT. § 137.100 (Supp. 1971); N.C. GEN. STAT. § 105-278(1) (Supp. 1971).

ests is that they may be owned by unborn or unascertained persons who cannot cooperate with the owner of the present possessory estate to effectuate improvement, mortgage or sale.[48] The duration of this evil is limited, in effect, by the common law Rule Against Perpetuities, to a century or less. Possibilities of reverter and rights of entry on breach of condition subsequent are owned by living and, theoretically, ascertainable persons. This may be why American courts have held them to be exempt from the Rule Against Perpetuities.[49] The exemption means that there is no limit to their duration. As has been seen, a number of states have retained the common law rule that possibilities of reverter and rights of entry on breach of condition subsequent cannot be conveyed inter vivos or devised by will.[50] If this is so, they must pass on the death of an owner by intestate descent. Under the common law doctrine of primogeniture, this usually meant descent to a single heir, which did not result in an insuperable obstacle to improvement or sale of the land. For example, if the southwesterly acre of Ashland were now owned by Clay County Rural School District, subject only to a right of entry owned by Hanoch Clay alone, Clay and the School District could cooperate to convey a fee simple absolute. The combination of exemption from the Rule Against Perpetuities, inalienability and abolition of primogeniture, however, results, as in the examples described in the preceding two sections, in possibilities of reverter and rights of entry passing by descent to persons so numerous that their effective cooperation with the owner of the present possessory estate is practically impossible.

No one would intentionally convey or devise a limited interest in one acre of land to 384 persons living in various parts of the world. This absurd dispersion of ownership could be prevented, without destroying the useful features of these reversionary possibilities, by subjecting possibilities of reverter and rights of entry to the common law Rule Against Perpetuities and making them freely alienable by deed and by will. England has done both.[51] Some American states

48. See notes 75-82 *infra* and accompanying text.

49. First Universalist Soc'y v. Boland, 155 Mass. 171, 29 N.E. 524 (1892) (possibility of reverter); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918) (right of entry); SIMES & SMITH §§ 1238, 1239; RESTATEMENT OF PROPERTY § 372 (1944).

50. See notes 9, 16, 20, 36-42 *supra* and accompanying text.

51. As to alienability by deed and will, see notes 14-15, 34-35 *supra*. Rights of entry subject to the Rule Against Perpetuities: *In re* Da Costa, [1912] 1 Ch. 337; *In re* Hollis' Hospital, [1899] 2 Ch. 540; Law of Property Act, 15 & 16 Geo. 5, c. 20, § 4(3) (1925). Possibilities of reverter subject to the Rule Against Perpetuities: Hopper v. Liverpool Corp., 88 Sol. J. 213

have made possibilities of reverter and rights of entry transferable by deed and by will.[52] No American state has subjected these reversionary possibilities to the Rule Against Perpetuities, but a number have enacted statutes providing that possibilities of reverter and rights of entry expire after a stipulated period, usually thirty years, following their creation, so that the fee simple subject to one then becomes absolute.[53]

(Lancaster Palatine Ct. 1944), *noted in* 62 LAW Q. REV. 222 (1946); Perpetuities and Accumulations Act, c. 55, § 12 (1964). As § 3 of the latter Act adopts the "wait and see" doctrine, it would seem that a possibility of reverter or right of entry on breach of condition subsequent limited on a condition which might occur beyond the period of the Rule Against Perpetuities would be valid for twenty-one years after its creation. Henee, the effect of the Act is similar to that of the recent American legislation limiting the duration of reversionary possibilities, see note 53 *infra.*

52. See notes 16, 17, 21, 36-37, 40, 43 *supra. But see* ILL. ANN. STAT. ch. 30, § 37b (Smith-Hurd 1969); NEB. REV. STAT. § 76-299 (1966) (inalienable and undevisable). Some of the opposition to alienability probably springs from the realization that, so long as reversionary possibilities are exempt from the Rule Against Perpetuities and subject to no restriction on duration, they may be used to create the equivalent of an executory interest free from the Rule Against Perpetuities. If land is conveyed to Oak Grove Church so long as used for church purposes, and then to John Hancock and his heirs, the executory interest of John Hancoek is void under the Rule Against Perpetuities. Proprietors of Church in Brattle Square v. Grant, 3 Gray (69 Mass.) 142 (1855). If, however, the land is conveyed on Monday to Oak Grove Church so long as used for chureh purposes, the grantor will retain a possibility of reverter which is exempt from the Rule Against Perpetuities. If this is alienable, he may convey it on Tuesday to John Hancock and his heirs, thus giving Hancock an interest virtually identical with the exccutory interest. See Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E. 2d 922 (1950); Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action,* 85 HARV. L. REV. 729, 749 (1972).

53. CONN. GEN. STAT. ANN. § 45-97 (1960) (thirty years) (§ 45-98 indicates that § 45-97 is applicable to all possibilities of reverter and rights of entry, whenever created, so that preexisting reversionary possibilities could not be preserved in any manner); FLA. STAT. ANN. § 689.18 (1969) (twenty-one years; excepts forfeiture provisions in conveyances to charities, public transportation, etc.) (application of the section to an interest created before its effective date was held unconstitutional in Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954)); ILL. ANN. STAT. ch. 30, § 37e (Smith-Hurd 1969) (forty years) (held constitutional as to both possibilities of reverter and rights of entry created before its effective date, Blackert v. Dugosh, 12 Ill. 2d 171, 145 N.E.2d 606 (1957)); Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955); IOWA CODE ANN. § 614.24 (1972 Supp.) (reverter provisions expire unless owner records claim every twenty-one years; if ereated by instrument effective more than twenty years before July 4, 1965, recording then would preserve for twenty-one years) (held constitutional as to a possibility of reverter ereated before its enactment in Chicago & N.W. Ry. v. City of Osage, 176 N.W.2d 788 (Iowa 1970)); KY. REV. STAT. ANN. §§ 381.218-.223 (1969) (converts possibilities of reverter into rights of entry and provides that rights of entry expire after thirty years; permits preservation of those created before 1960 by recording of claim) (held constitutional as to a right of entry created before its enactment in Atkinson v. Kish, 420 S.W.2d 104 (Ky. 1967)); ME. REV. STAT. ANN. tit. 33, §§ 103-06 (1964) (same as the Connecticut statutes); MD. ANN. CODE art. 21, § 143 (Supp. 1971) (tbirty years) (reversionary possibilities created before July 1, 1899, may be preserved by recording notice within three years after

A statute providing for the expiration of possibilities of reverter and rights of entry if the condition upon which they are limited does not occur within a stipulated time takes care of those created after the enactment of the statute. This type of statute usually applies to reversionary possibilities created before its enactment unless the person claiming a possibility of reverter or right of entry records notice of his claim within some short period, usually a year, after enactment. If such a claim is recorded, the statute will not clear the title to the affected land. If no claim is recorded, retroactive application of the

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July 1, 1969; and those created between July 1, 1899, and June 30, 1969, by recording notice not less than seventy nor more than seventy-three years after creation. Thereafter, a new notice must be recorded every thirty years. *Id.* § 144); MASS. GEN. LAWS ANN. ch. 184A, § 3 (1969) (same as the Connecticut statutes) (this section was amended by Mass. Stat. 1961, ch. 448, §§ 2, 4, to eliminate certain exceptions and to permit preservation of pre-existing possibilities of reverter and rights of entry by recording of notice before January 1, 1964. The constitutionality of the amended section was suggested in Selectmen of Town of Nahant v. United States, 293 F. Supp. 1076 (D. Mass. 1968), holding that, if a possibility of reverter was created in 1898, its enforcement was barred on January 1, 1964, by failure to record a notice before that date under the complementary provision of MASS. GEN. LAWS ANN. ch. 260, § 31A (Supp. 1971). The application of the latter section to pre-existing reversionary possibilities was held constitutional in Town of Brookline v. Carey, 355 Mass. 424, 245 N.E.2d 446 (1969)); MICH. COMP. LAWS ANN. §§ 554.61-.65 (Supp. 1971) (thirty-years; excepts possibilities of reverter and rights of entry if terminable interest is held for public, educational, religious or charitable purposes; permits preservation by recording of notice every thirty years); MINN. STAT. ANN. § 500.20(2)(3) (1947) (thirty years) (applicable only to interests created after 1937; rights of entry barred six years after breach. In Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), it was held that a right of entry on breach of condition subsequent, created in 1897 and breached in 1946, while not barred by MINN. STAT. ANN. § 500.20(2), was barred by failure to record a claim within forty years under the Minnesota Marketable Title Act, although the "root of title" relied upon was the deed containing the condition. *Id.* § 541.023 (Supp. 1971)); NEB. REV. STAT. §§ 76.2.100 to 76.2.105 (1966) (thirty years; excepts possibilities of reverter and rights of entry in grants to railroads and public utilities) (held constitutional as to an interest created before its enactment, despite lack of provision for preservation by recording, Hiddleston v. Nebraska Jewish Educ. Soc'y, 86 Neb. 786, 186 N.W.2d 904 (1971)); N.Y. REAL PROP. LAW § 345 (McKinney 1968) (thirty years, unless renewal declaration is recorded before expiration of thirty years or before September 1, 1961, and each ten years thereafter) (this section was held unconstitutional as to a reversionary possibility created before its enactment in Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965). N.Y. REAL PROP. ACTIONS LAW § 612 (McKinney 1963) (bars actions to enforce reversionary possibilities ten years after breach of the condition)); OHIO REV. CODE ANN. §§ 5301.48 - 5301.56 (1970) (forty years; reversionary possibilities may be kept in force by recording notice before expiration of forty years or by September 29, 1964, and every forty years thereafter); R.I. GEN. LAWS ANN. § 34-4-19 (1969) (when created after May 11, 1953, possibility of reverter becomes void if condition does not occur within twenty years; those created in conveyances to the state, a railroad or public utility, or public, charitable, or religious purposes, excepted). *See also* UNIFORM ACT RELATING TO REVERTER OF REALTY in 1944 HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 209-10.

statutory bar has sometimes been held unconstitutional.[54] Legislation which is operative only as to reversionary possibilities created in the future is useful, but it does not solve the problem of titles made unmerchantable by possibilities of reverter and rights of entry created at some remote time in the past.

Some fourteen states have marketable title acts which extinguish possibilities of reverter and rights of entry on breach of condition subsequent under some circumstances. Except in Minnesota and Ohio, where the marketable title acts operate like the legislation discussed in the two preceding paragraphs,[55] it is only in rare cases that a marketable title act will convert a fee simple determinable or a fee simple on condition subsequent into a fee simple absolute. This is because the person claiming the benefits of such an act must show a conveyance to him, or to his predecessor in a chain of title, recorded for more than the statutory period (usually forty years), purporting to transfer a fee simple absolute; later conveyances must purport to transfer a fee simple absolute, and the chain of title must not mention the possibility of reverter or right of entry; finally, there must be no claim by the owner of the possibility of reverter or right of entry on breach of condition subsequent recorded within the statutory period.[56] The usual marketable title act would not help in clearing the title to the northwesterly and southwesterly acres of Ashland because the 1860 deeds to the trustees for Oak Grove Church and Clay County Rural School District did not purport to transfer estates in fee simple absolute.

The Contingent Remainder of the Issue of Hanoch Clay

It will be recalled that the will of Reuben Clay, who died in 1960, devised Ashland to

> my eldest son, Hanoch Clay for and during the full term of his natural life,

54. As indicated in note 53 *supra*, the Florida and New York statutes were held unconstitutional as to pre-existing interests. The Florida statute provided no means of preserving such interests; the New York statute did so. *Cf.* Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961); Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949); Girard Trust Co. v. Pennsylvania R.R., 364 Pa. 576, 73 A.2d 371 (1950). *See* Ryman, *The Iowa "Stale Uses and Reversions Statute": Parameters and Constitutional Limitations*, 19 DRAKE L. REV. 56 (1969); P. BASYE, CLEARING LAND TITLES § 143 (2d ed. 1970); SIMES & TAYLOR 20I-17.

55. See note 53 *supra*. But see notes 107-08 *infra* and accompanying text.

56. P. BASYE, *supra* note 54, at ch. 9 (with citations to the voluminous literature on legislation of this type); SIMES & TAYLOR 5-10; Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 279 (1962); Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967).

remainder, if he dies survived by issue, to his issue per stirpes, in fee simple absolute and, if he dies without issue him surviving, to my second son, Phallu Clay and his heirs; . . .

Hanoch and Phallu Clay are bachelors. Neither has issue now, but either or both may marry and have issue in the future. It is virtually certain that the will would be construed to devise a present estate for life to Hanoch Clay, with alternative contingent remainders in fee simple to the issue of Hanoch or to Phallu Clay.[57] There is no doubt that Hanoch Clay can convey his present estate for life; but can Phallu Clay convey his contingent remainder in fee simple? As has been seen, contingent remainders were not alienable under the English common law.[58] By the nineteenth century, however, English conveyancers had devised means for circumventing this archaic rule. Conveyances of contingent remainders by the judicial proceedings called fine and common recovery were effective by estoppel, so that the transferees owned the estates when and if they vested.[59] A conveyance supported by good or valuable consideration would be enforced by the High Court of Chancery when the remainder vested.[60] Moreover, it had been recognized much earlier that a future interest, otherwise inalicnable, could be released to the person seised of the present freehold estate.[61] As has been seen, an English statute of 1845 permitted conveyance of contingent remainders by deed.[62] In this country, most states permit conveyance of contingent remainders by ordinary deed[63] and the others permit transfer by a method usable in England before 1845,[64] so it is quite certain that Phallu Clay can convey his contingent remainder in fee simple.

The unborn natural issue of Hanoch Clay, however, are not in a position to join in a conveyance of their contingent remainder in

57. Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955); Whitesides v. Cooper, 115 N.C. 570, 20 S.E. 295 (1894). *See generally* SIMES & SMITH §§ 146, 148-49, 152-53. Festing v. Allen, 12 M. & W. 278, 152 Eng. Rep. 1204 (1843); Loddington v. Kime, 1 Salkeld 224, 91 Eng. Rep. 198 (1694).

58. See note 9 *supra* and accompanying text. *See* Doe *ex dem.* Brune v. Martyn, 8 B. & C. 497, 108 Eng. Rep. 1127 (1828).

59. Doe *ex dem.* Christmas v. Oliver, 10 B. & C. 181, 109 Eng. Rep. 418 (1829).

60. Wright v. Wright, 1 Ves. Sr. 409, 27 Eng. Rep. 1111 (1749-50).

61. Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612).

62. See note 15 *supra* and accompanying text.

63. McNeal v. Bonnel, 412 S.W.2d 167 (Mo. 1967); Brown v. Fulkerson, 125 Mo. 400, 28 S.W. 632 (1894); Scott v. Henderson, 169 N.C. 660, 86 S.E. 603 (1915); Davis v. Davis, 3 N.C. App. 536, 165 S.E.2d 553 (1969); SIMES & SMITH §§ 1857-59; RESTATEMENT OF PROPERTY § 162.

64. SIMES & SMITH §§ 1855, 1859.

Ashland. Hanoch, who is now fifty-two, might marry a widow and adopt her children. Under the traditional rules of construction of wills, a class gift to the "issue" of a named person does not include descendants by adoption unknown to the testator.[65] A modern change in judicial attitude has resulted in a tendency to include such descendants when the will is recent, and several states now have statutes creating a presumption that they should be included, even when the will is old.[66] It is possible, therefore, that the contingent remainder to the issue of Hanoch Clay will pass to persons now in being but, there being no means of identifying these persons, securing conveyances from them is not practicable.

Under the English common law a contingent remainder could not take effect unless it vested at or before the time when the particular estate for life preceding it terminated.[67] It is evident, of course, that the contingent remainder of the issue of Hanoch Clay will never take effect if Hanoch dies without issue surviving him. But the common law rule meant more than this; under it, a contingent remainder was destroyed if the particular estate for life preceding it was destroyed or prematurely terminated before the contingent remainderman was born and ascertained. A present estate for life was destroyed by forfeiture if its tenant was convicted of treason or felony, made a feoffment in fee, levied a fine in fee or suffered a common recovery in fee.[68] A particular estate for life was destroyed by merger, and the contingent remainder was destroyed with it if, after their creation, the same person acquired both the particular estate for life and the next vested estate of inheritance in reversion or remainder.[69] An 1845 English statute prevented the destruction of contingent remainders by forfeiture or merger of the preceding particular estate for life.[70] The common law rules of destructibility of contingent remainders have

65. Ratermann v. Ratermann, 405 S.W.2d 891 (Mo. 1966); Re Brinkley's Will Trusts, Westminster Bank v. Brinkley, [1967] 3 All E.R. 805; SIMES & SMITH §§ 546, 738 (Supp. 1972). *See also* Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963).

66. *E.g.*, MASS. GEN. LAWS ANN. ch. 210, § 8 (Supp. 1971); N.C. GEN. STAT. § 48-23(3) (1966). Under some recent statutes, descendents of Hanoch by a woman whom he never married would be included. N.D. CENTURY CODE § 56-01-05 (Supp. 1971).

67. Festing v. Allen, 12 M. & W. 278, 152 Eng. Rep. 1204 (1843); 1 FEARNE 465.

68. Biggot v. Smyth, Cro. Car. 102, 79 Eng. Rep. 691 (1628); 1 FEARNE 466-67.

69. Burnsall v. Davy, 1 Bos. & Pul. 215, 126 Eng. Rep. 867 (1798); Thompson v. Leach, 2 Ventr. 198, 86 Eng. Rep. 391 (1690); 1 FEARNE 468-69.

70. Real Property Law Amendment Act, 8 & 9 Vict., c. 106, § 8 (1845).

been recognized in American decisions.[71] Some states have statutes making them indestructible.[72] The types of forfeiture of estates for life which destroyed contingent remainders are probably non-existent in most states.[73] Even without statutory indestructibility, recent American decisions tend to reject destructibility of contingent remainders by merger, the only practicable method available to the Clay brothers.[74] This being so, it is improbable that Hanoch, Phallu, Hesron and Charmi Clay can destroy the contingent remainder of the issue of Hanoch Clay in order to convey Ashland free from it.

The evil effects of indestructible future interests in land in unborn or unascertainable persons were manifested in an acute form in the famous case of *Moore v. Littel.*[75] A large tract of agricultural land, known as the Hayscale Farm, was conveyed to John Jackson, then aged sixty, for life, remainder to his heirs in fee simple. Under local law, this created an estate for life in John Jackson, with an indestructible legal remainder in fee simple to the persons who would, at his death, be entitled to inherit any land owned by him in fee simple at that time.[76] This group of persons could not, of course, be ascertained definitely until the death of John Jackson. Within fifteen years after this conveyance was made, the nearby village of Brooklyn became a growing city which laid streets through the Hayscale Farm and subjected it to special assessments and city taxes. The streets obstructed cultivation of the farm, and its use for pasturage would require provision for fences and a water supply for each block. John Jackson, theretofore a successful farmer, could not produce enough income by

71. Flora v. Wilson, 35 N.C. 344 (1852); Chessun v. Smith, 4 N.C. 274 (1816); SIMES & SMITH §§ 194-95, 197.

72. SIMES & SMITH § 207.

73. McCall, *The Destructibility of Contingent Remainders in North Carolina,* 16 N.C.L. REV. 87, 96-108 (1938).

74. Lewis v. Lewis, 345 Mo. 816, 136 S.W.2d 66 (1940); Windlow v. Speight, 187 N.C. 248, 121 S.E. 529 (1924); Eckhardt, *The Destructibility of Contingent Remainders in Missouri,* 6 MO. L. REV. 268 (1941); McCall, *supra* note 73, at 109-11; SIMES & SMITH § 209.

75. 41 N.Y. 66 (1869). The horrible effects of the future interest involved in this case are vividly described in A. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 301-23 (1959).

76. At the English common law, a conveyance to *A* for life, remainder to the heirs of *A*, gave *A* an estate in fee simple under the Rule in Shelley's Case, 1 Co. Rep. 93b, 104a, 76 Eng. Rep. 206, 234 (1581). Moreover, even if such a conveyance had created a life estate and remainder, the remainder would have been destructible by the life tenant at common law. See notes 68, 69 *supra* and accompanying text. The New York Revised Statutes of 1829 had, however, abolished both the Rule in Shelley's Case and the destructibility of contingent remainders. Ch. 1, tit. 1, §§ 28, 32, 33 [1829] 1 N.Y. Rev. Stat. 725.

agricultural and pastoral uses of the Hayscale Farm to pay the new taxes and assessments.

If John Jackson had owned the Hayscale Farm in fee simple, there would have been at least three possible solutions to his problems, all involving subdivision of the farm into city lots and conversion from agricultural to urban uses. First, he could have sold lots to purchasers interested in erecting homes and business buildings. Second, he could have mortgaged the land, used the money borrowed to erect houses and business buildings, and leased the buildings to tenants for fixed terms of years. Third, he could have leased lots for long terms of years to tenants willing to erect buildings on them at their own expense. As, however, John Jackson owned only an estate for his own life, with the remainder in fee simple to pass to persons not ascertainable until his death, he could not, either alone or with the cooperation of the living members of his family, do any of these things.

There were two reasons for John Jackson's disability. First, the Statute of Gloucester provided that a life tenant who committed waste should forfeit his estate and be liable for triple damages.[77] This statute, or ones like it, were and are in force in several American states.[78] Any substantial change, even though it increases the value of the land, including the changing of meadow into arable land,[79] or the replacement of a building by one which would be of greater value and use, may be waste.[80] In a jurisdiction where contingent remainders are destructible, forfeiture of a life estate under such a statute might destroy a remainder following it.[81] If the life estate of John

77. 6 Edw. 1, c. 5 (1278).

78. *See, e.g.*, N.Y. REAL PROP. ACTIONS LAW § 815 (McKinney 1963); VERNON'S ANN. MO. STAT. § 537.420 (1953); N.C. GEN. STAT. § 1-538 (1969); SIMES & SMITH § 1659; Annot., 16 A.L.R.3d 1344, 1344-61 (1967). *See also* Rouse v. Strickland, 260 N.C. 491, 133 S.E.2d 151 (1963); Parrish v. Parrish, 247 N.C. 584, 101 S.E.2d 480 (1958).

79. 1 W. CRUISE, DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY *67 (1808).

80. Brokaw v. Fairchild, 135 Misc. 70, 237 N.Y.S. 6 (1929), *aff'd*, 231 App. Div. 704 (1930), *aff'd*, 256 N.Y. 670, 177 N.E. 186 (1931); McDonald v. O'Hara, 117 Misc. 517, 192 N.Y.S. 545 (1921); Smyth v. Carter, 18 Beav. 78, 52 Eng. Rep. 31 (1853). *See also* Homan, *Alterations By a Life Tenant or Tenant for Years as Waste*, 16 CLEV.-MAR. L. REV. 220 (1967). *Cf.* Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N.W. 738 (1899); RESTATEMENT OF PROPERTY § 140, comment *f*, at 466.

81. SIMES & SMITH § 195. *See* Richardson v. Richardson ,152 N.C. 705, 709, 68 S.E. 217, 219 (1910); Starnes v. Hill, 112 N.C. 1, 9 (1893) (The report of this case in Starnes v. Hill, 16 S.E. 1011 (1893) omits the dictum about forfeiture for waste.). *See also* Edens v. Foulks, 2 N.C. App. 325, 326, 163 S.E.2d 51, 52 (1968); McCall, *supra* note 73, at 98-102.

Jackson were forfeited and the remainder to his heirs destroyed, the fee simple in Hayscale Farm would, presumably, have returned to the grantor of the deed to John Jackson by way of reversion.[82] Consequently, John Jackson would run the risk of forfeiting his own estate and destroying the remainder to his heirs if he converted any of the Hayscale Farm from agricultural to urban uses, erected buildings on it or permitted his lessees to do so.

Second, John Jackson, even with the cooperation of all living members of his family, could not convey, by deed, lease, or mortgage, any interest in Hayscale Farm which would be certain to continue beyond his own life. Although his living children, considering his advanced age, were likely to be his sole heirs, they might predecease him and his heirs might be persons as yet unborn or unascertainable. This inability to convey an indefeasible title was evident in the events which actually occurred. At the age of seventy-six, John Jackson conveyed his life estate to his eleven children. While their father lived on to the age of eighty-nine, the children tried to finance payment of the taxes and assessments by sales and mortgages but, being unable to convey merchantable title, they could not realize the full value of any part of the land and ultimately lost virtually all of it. The creation of the remainder in unascertainable persons prevented effective use of the land affected for twenty-nine years and inflicted ruin and distress upon the very family it was intended to benefit.

A later New York case, *Losey v. Stanley*,[83] involved land which was devised to Briggs, as trustee with power of sale, upon trust to pay the net income to James W. Stanley during his life, with alternate contingent remainders to the issue of Stanley and, in default of issue him surviving, to others. Briggs died, and James W. Stanley, the life beneficiary, was appointed successor trustee by the supreme court. Stanley petitioned the supreme court for authority to sell or mortgage the land held by him as trustee, alleging that the taxes were in default, the houses on the land could not be rented for lack of repairs, the land was, in consequence, unproductive, and that it would be lost if the repairs were not made. The supreme court granted the petition and Stanley gave a mortgage to Losey. After Stanley's death, the mortgage being in default, Losey secured a decree of foreclosure in the

82. Hobbs v. Yeager, 263 S.W. 225 (Mo. 1924); Festing v. Allen, 12 M. & W. 279, 152 Eng. Rep. 1204 (1843).

83. 147 N.Y. 560, 42 N.E. 8 (1895).

supreme court.[84] Upon appeal, the court of appeals conceded that a court of equity could empower a trustee who lacked power under the terms of the trust to sell or mortgage to do so, but concluded that, despite the power of sale conferred on the trustee, the contingent remainders were legal. The opinion does not make it clear whether this conclusion was reached by construction of the will or by application of the very broad New York substitute for the Statute of Uses, which executes into legal estates the interests of all trust beneficiaries entitled to possession.[85] Having reached this conclusion, the court of appeals decided that a court of equity has no power to authorize sale or mortgage of legal future interests, no matter how great the necessity.[86]

Despite the authority of the New York Court of Appeals and the dearth of favorable English precedents, a number of American courts, refusing to follow *Losey,* have held that they have inherent power to authorize sale of the full fee simple, free of future interests in unborn and unascertained persons, when the income is insufficient to pay for repairs and taxes, so that the fee is in danger of being lost by tax sale.[87] The proceeds of such a sale are either invested in other

84. Losey v. Stanley, 83 Hun. 420, 31 N.Y.S. 950 (1894).

85. N.Y. EST., POWERS & TRUSTS LAW § 7-1.1 (McKinney 1967). In most states, the trustee's power to sell the fee would keep the remainders from becoming legal estates until the life tenant's death. Rarick, *The Trustee's Estate and the Ultimate Interest (Part I),* 8 OKLA. L. REV. 1, 35 (1955).

86. There are cases in other states in accord with this view. *See* Stansbury v. Inglehart, 9 Mackey (20 D.C.) 134 (1891); Hoskins v. Ames, 78 Miss. 986, 29 So. 828 (1901); Soules v. Silver, 118 Ore. 96, 245 Pac. 1069 (1926); Thurston v. Thurston, 6 R.I. 296 (1859). *See also* Brown v. Brown, 83 W. Va. 415, 422, 98 S.E. 428, 431 (1919). These cases mention that the remedy in England in such situations was by private act of Parliament and suggest that the remedy in this country is by private act of the legislature. American state constitutions tend, however, to impose severe restrictions on the enactment of private legislation. *See, e.g.,* MO. CONST. art. III, § 40; N.C. CONST. art. II, § 24.

87. Christopher v. Chadwick, 223 Ala. 260, 135 So. 454 (1931) (court has power to authorize life tenant to exchange vacant lot for income-producing land of greater value if transaction clearly beneficial to minor remaindermen); Walker v. Blaney, 225 Ark. 918, 286 S.W.2d 479 (1956) (court has power to authorize life tenant to purchase contingent remainder owned by presently unascertainable heirs of the body of a living person; extent of necessity not stated); Cauffiel v. Cauffiel, 39 Del. Ch. 190, 161 A.2d 432 (1960) (court has power to authorize sale of fee on petition of life tenants so as to cut off alternative contingent remainders to unborn issue of life tenants and to others, where income is insufficient to cover necessary expenses); Nash v. Crowe, 222 Ga. 173, 149 S.E.2d 88 (1966) (court properly ordered sale of fee devised to widow for life, remainder to children in fee, with shifting executory interest to persons not yet ascertainable in event of children predeceasing life tenant without surviving issue, on showing that taxes and expenses exceeded income); Baldridge v. Coffey, 184 Ill. 73, 56 N.E. 411 (1900) (shifting executory interest on vested remainder in fee, circumstances like preceding

land, subject to the same future interests, or placed in trust, the income to be paid to the life tenant or other person who was entitled to possession of the land and the principal to be paid over to the owners of the future interests when the interests would have become possessory. Some states have statutes empowering the courts to authorize sale of the fee under these circumstances.[88]

The inadequacy of this narrow basis for relief is illustrated by the recent Missouri case of *Stephens v. Gillette*.[89] There, a forty-acre tract of unimproved, unfenced land, ten acres of which were arable and the rest covered with brush and scrub timber, was devised in 1926 to the testator's crippled granddaughter in fee, with a shifting executory interest to the testator's daughter if the grandaughter died with-

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case); Coquillard v. Coquillard, 62 Ind. App. 489, 113 N.E. 481 (1916) (court could authorize sale of fee in farmland devised to widow for life, remainder to sons for life, remainder to unborn children of sons, when growth of nearby city made subdivision and sale for urban uses essential and income was much less than taxes); Lambdin v. Lambdin, 209 Miss. 672, 48 So. 2d 341 (1950) (court properly ordered sale of fee devised to life tenants with alternative contingent remainders to their issue and the heirs of the testatrix determined at the death of the surviving life tenant; plantation which did not produce enough income to pay taxes and repairs but was valuable because of proximity to oil field); Whitten v. Whitten, 203 Okla. 196, 219 P.2d 228 (1950) (court may authorize sale of fee conveyed to life tenant, with remainder to the heirs of his body, only if, by reason of some exigency growing out of changed conditions, it becomes necessary in order that the body of the estate may be preserved); Caine v. Griffin, 232 S.C. 562, 103 S.E.2d 37 (1958) (court could authorize exchange of farmland producing $200 a year income and subject to alternative contingent remainders in unborn and unascertainable persons, for commercial building producing $3,000 a year income); Johnston v. Johnston, 276 S.W. 776 (Tex. Civ. Ct. App. 1925) (court could order sale of fee in farmland devised to life tenant, remainder to his children, when city had grown to it and income was less than taxes); RESTATEMENT OF PROPERTY § 179 (future interests in persons unborn or under disability; no mention of future interests owned by persons in being who are not presently ascertainable; sale only; showing that sale will be beneficial to persons unborn or under disability). *See also* Traversy v. Bell, 195 Iowa 1243, 1249, 193 N.W. 439, 442 (1923) (court may authorize sale of fee in land devised to life tenants, remainder to their children and descendants, only if it clearly appears that otherwise it will be entirely lost); Beliveau v. Beliveau, 217 Minn. 235, 245-47, 14 N.W.2d 360, 363-64 (1944); Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process*, 42 HARV. L. REV. 30 (1928); Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437 (1964).

88. MICH. COMP. LAWS ANN. § 600.2930 (1968); VERNON'S ANN. MO. STAT. § 528.010 (1952); N.C. GEN. STAT. § 41-11 (Supp. 1969) authorizes the court to direct sale of the fee, as against non-consenting remaindermen with indefeasibly vested interests, only when the plaintiff has a life estate in lands which are unproductive. WIS. STAT. ANN. §§ 296.26-.34 (1958), *as amended*, (Supp. 1972-73) permits relief if the land is unproductive or its income, together with all other income of the possessory tenant, is insufficient to pay his debts, maintenance and costs of education.

89. 464 S.W.2d 507 (Mo. Ct. App. 1971). The report does not clearly state whether the plaintiff took a fee subject to a shifting executory interest in her aunt or a life estate with alternative contingent remainders to the heirs of her body and to her aunt.

out bodily heirs. The daughter died, and the crippled granddaughter, aged sixty and childless, sued the heirs of the daughter, seeking sale of the fee simple absolute and investment of the proceeds, showing that the land was producing no income and that the taxes were steadily increasing. The tract could have been sold for $32,000, probably because it was near a main highway leading from St. Louis and the suburbs of that city were extending toward it. The applicable Missouri statute directs a court to order a sale if the income of the estate is insufficient to pay for repairs and taxes and assessments thereon.[90] Relief, however, was denied on the ground that the tract could be rented for $300 a year, which was more than the current taxes. The court seemed unconcerned with the results of its decision—that is, that the elderly, incapacitated plaintiff could get no more than $200 a year income, and that the land could not be improved sufficiently to be put to effective use because of the plaintiff's lack of means.[91]

The rule that sale of the fee simple absolute may be authorized only if the income is insufficient to pay for repairs and taxes, so that the fee is in danger of being lost by tax sale, provides no relief for a possessory life tenant, or a tenant in fee simple subject to a shifting executory interest, when the income is sufficient to pay for repairs and taxes but insufficient to give the possessory tenant an adequate income for his own use. Yet the possessory tenant is almost always the person, of all those interested, best known to, and most intended to be benefited by the creator of the divided title in the land. Some statutes recognize this by empowering the court to authorize sale if that will be for the benefit of all persons with interests in the land,[92] or for the benefit of the tenant in possession and not detrimental to

90. VERNON'S ANN. MO. STAT. § 528.010 (1952).

91. The opinion does not observe that the testator knew and wished to benefit his crippled granddaughter, the plaintiff, but could not know the persons who would take the shifting executory interest after his daughter's death. One wonders if these persons opposed a judicially ordered sale in order to force the plaintiff to sell her estate to them at an inadequate price. As, under Missouri law, an adopted child is capable of taking through his parent by adoption property limited expressly to the heirs of the body of his parent by adoption, *id.* § 453.090(4), the plaintiff may yet be able to defeat the defendant's executory interest by adopting a child.

92. CONN. GEN. STAT. § 52-500 (1958); D.C. CODE ENCYCL. ANN. §§ 45-1101 to -1104 (1968); ILL. ANN. STAT. ch. 22, § 50 (Smith-Hurd 1968); IND. ANN. STAT. § 3-2426 (1968); KY. REV. STAT. ANN. §§ 389.030, .040 (1969); MD. ANN. CODE art. 16, §§ 62, 167-68 (1966); N.J. STAT. ANN. §§ 3A: 32-1, 32-3, 33-1, 34-1, 34-8, 34-14 (1953); N.C. GEN. STAT. §§ 41-11, -11.1 (Supp. 1969); ORE. REV. STAT. §§ 128.110-.160 (1969); PA. STAT. ANN. ch. 20, §§ 1561-64 (1964); Model Act Providing for the Sale of Real Estate Affected With a Future Interest, *in* SIMES & TAYLOR 237. *Cf.* OKLA. STAT. ANN. tit. 12, §§ 1147.1 -.6 (1961) (expedient or for best interests of all concerned).

those with future interests.[93] California appears to give a life tenant an absolute right to compel sale of the fee as against contingent remaindermen, even though the land is fully developed and producing income adequate to support the life tenant in comfort.[94] Other statutes condition relief upon its being "necessary or expedient."[95] One statute wholly ignores the interest of the owner of the possessory estate by permitting relief only if it is manifestly for the interest of the holder of the future interest.[96]

If the land is likely to increase in value, sale may deprive the owners of future interests of the advantage of future increase. This advantage could sometimes be saved by authorizing the owner of the possessory estate to mortgage the fee simple in order to finance improvements designed to make the land usable and productive under current conditions or to give a long lease to a tenant who will covenant to make such improvements. The fact that some of the statutes permit no relief except outright sale of the fee simple[97] may go far to explain decisions like that in *Stephens*.[98] Other statutes do, however, permit the court to authorize an exchange, mortgage, or lease.[99] Some

93. OHIO REV. CODE §§ 5303.21, .31 (1970); VA. CODE §§ 8.703.1 (1950), 8.703.2 (Supp. 1971); W. VA. CODE ANN. §§ 36-2-1 to -2-13 (1966), *as amended*, (Supp. 1971) (Those with vested estates must consent except to an urgently needed lease of timber, oil, gas or minerals); WYO. STAT. §§ 1-974 to -982 (1957).

94. CAL. CIVIL PRO. CODE §§ 752, 763, 781 (West 1955), *as amended*, § 763 (West Supp. 1972). IOWA CODE ANN. § 557.9 (1950) appears to confer an absolute right on a life tenant to compel sale of the fee with the consent of the holder of the reversion. It is difficult to understand why the consent of the holder of the reversion is relevant if the reversion can never become possessory, as is the case when the life estate is followed by alternative indestructable contingent remainders which exhaust all possibilities. SIMES & SMITH § 85. This is the situation of Hanoch Clay, and it is probably the commonest situation in which a life tenant seeks sale of the fee.

95. ME. REV. STAT. ANN. tit. 33, § 153 (1964); MASS. GEN. LAWS ANN. ch. 183, § 49 (1969); N.Y. REAL PROP. ACTIONS LAW §§ 1602-15 (McKinney 1963) (expedient); R.I. GEN. LAWS ANN. § 34-4-7 (1969). *Cf.* OKLA. STAT. ANN. tit. 12, §§ 1147.1-.6 (1961).

96. TENN. CODE ANN. §§ 34-606 to -621 (1955). If all of the persons with future interests are unborn, sale must be "necessary." *Id.* § 34-619.

97. The statutes of California, Connecticut, Iowa, Kentucky, Michigan, Missouri, New Jersey, Oklahoma and Tennessee appear to authorize no relief except sale of the fee simple. CAL. CIVIL PRO. CODE §§ 752, 763, 781 (West 1955), *as amended*, § 763 (West Supp. 1972); CONN. GEN. STAT. § 52-500 (1958); IOWA CODE ANN. § 557.9 (1950); KY. REV. STAT. ANN. §§ 389.030 -.040 (1969); MICH. COMP. LAWS ANN. § 600.2930 (1968); VERNON'S ANN. MO. STAT. § 528.010 (1952); N.J. STAT. ANN. §§ 3A:32-1, 32-3, 33-1, 34-1, 34-8, 34-14 (1953); OKLA. STAT. ANN. tit. 12, §§ 1147.1 -.6; TENN. CODE ANN. §§ 34-606 to -621 (1955). *See also* notes 88, 92, 94, 96 *supra*.

98. See note 89 *supra* and accompanying text.

99. D.C. ENCYCL. ANN. §§ 45-1101 to -1104 (1968) (sale or lease); ILL. ANN. STAT. ch. 22, § 50 (Smith-Hurd 1968) (sale, mortgage, lease, exchange, conversion, improvement); IND.

permit only oil, gas and mineral leases.[100] If the tenant in possession has only an estate for life, enabling him to finance improvements will not help him if bringing wild land under cultivation, erecting a building, or drilling an oil well will entail forfeiture of his estate for waste under the Statute of Gloucester.[101] No doubt a statute empowering a court to authorize a transaction designed to achieve an improvement should be construed to modify the local version of the Statute of Gloucester to the extent necessary to prevent forfeiture or triple damages.

Some of the statutes are narrowly limited as to the types of future interests which may be overridden by a court-ordered sale. The Connecticut statute, for example, applies only if there is a remainder to the heirs of a life tenant or, alternatively, to others.[102] This would have helped the John Jackson family,[103] but it would be of no use to James W. Stanley[104] or Hanoch Clay, life tenants with remainder to their issue. The Oklahoma statute applies only if persons not in being may become entitled to a future interest.[105] This would provide no relief

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ANN. STAT. § 3-2426 (1968) (sale, exchange or lease); ME. REV. STAT. ANN. tit. 33, § 153 (1964) (sale, lease or mortgage); MASS. GEN. LAWS ANN. ch. 183, § 49 (1969) (sale or mortgage); MD. ANN. CODE art. 16, §§ 62, 167-68 (1966) (sale, lease or mortgage); N.Y. REAL PROP. ACTIONS LAW §§ 1602-15 (McKinney 1963) (mortgage, lease or sale); N.C. GEN. STAT. 41-11, -11.1 (Supp. 1969) (sale or mortgage); OHIO REV. CODE §§ 5303.21, .31 (1970) (sale or lease); ORE. REV. STAT. §§ 128.110 -.160 (sale, mortgage, lease, exchange, improvement or other transaction); PA. STAT. ANN. ch. 20, §§ 1561-64 (1964) (sale, mortgage, lease, exchange); R.I. GEN. LAWS ANN. § 34-4-7 (1969) (sale or mortgage); VA. CODE §§ 8.703.1 (1950), 8.703.2 (Supp. 1971) (sale, lease or exchange); W. VA. CODE ANN. §§ 36-2-1 to -2-13 (1966), *as amended*, (Supp. 1971) (sale, lease or mining lease); WIS. STAT. ANN. §§ 296.26 -.34 (1958), *as amended*, (Supp. 1972-73) (sale, mortgage or lease); WYO. STAT. § 1-974 to -982 (1957) (sale or lease); Model Act Providing for the Sale of Real Estate Affected with a Future Interest, *in* SIMES & TAYLOR 237 (sale, mortgage or lease). See notes 88, 92-96 *supra*.

100. NEB. REV. STAT. §§ 57-222 to -224 (1968) (oil and gas lease); N.D. CENT. CODE § 38-10-12 (1960) (oil, gas, coal or mineral lease).

101. 6 Edw. 1, c. 5 (1278). See notes 77-78 *supra* and accompanying text.

102. CONN. GEN. STAT. § 52-500 (1958). See note 92 *supra* and accompanying text. The Iowa statute, IOWA CODE ANN. § 557.9 (1950), appears to be limited to a life estate followed by a contingent remainder. See note 94 *supra*. The Kentucky statute, KY. REV. STAT. ANN. §§ 389.030, .040 (1969), requires a particular estate followed by a reversion or remainder. See note 92 *supra*. The Michigan statute, MICH. COMP. LAWS ANN. § 600.2930 (1969), applies only when there is a life estate. See note 88 *supra*. The Nebraska statute, NEB. REV. STAT. §§ 57-222 to -224 (1968), requires a life estate and contingent remainder. See note 100 *supra*. The North Carolina statutes, N.C. GEN. STAT. §§ 41-11, -11.1 (Supp. 1969), are restricted to a life estate followed by a contingent remainder or a remainder vested subject to open to admit afterborn members of the class of remaindermen. See note 92 *supra*.

103. See notes 75-82 *supra* and accompanying text.

104. See notes 83, 84 *supra* and accompanying text.

105. OKLA. STAT. ANN. tit. 12, §§ 1147.1 -.6 (1961). See note 92 *supra*. The *Restatement* is similarly narrow, RESTATEMENT OF PROPERTY § 179. See note 87 *supra*.

in the case of a future interest in living but unascertainable persons. The Oregon statute applies only if the future interest follows a trust.[106] At the other extreme from the statutes that are restricted to remainders on life estates are some which permit a sale under court order to override a possibility of reverter or right of entry on breach of condition subsequent.[107] The disposition of proceeds of such a sale, however, presents problems. If land had been conveyed to "Justin Miller and his heirs so long as Duke Chapel stands" and a sale of the fee simple free of the possibility of reverter of the grantor were directed, would the proceeds of the sale have to be held in trust so long as Duke Chapel stands? What if the land had been conveyed subject to a condition subsequent against any but residential use and the sale overriding the right of entry on breach of condition subsequent is to a purchaser who intends to use the land for business purposes?[108]

Ashland is a prosperous farm producing ample income to pay for taxes, repairs and the comfortable support of the life tenant, Hanoch Clay. Hence, if Clay County is in Missouri, sale of the fee simple free of the contingent remainder of the issue of Hanoch Clay is not possible.[109] If Clay County is in North Carolina, the court may authorize sale of the fee simple, free of this remainder, if it finds that "the interest of all parties require or would be materially enhanced by it."[110]

The Executory Interest of the Issue of Hesron Clay

The will of Reuben Clay, who died in 1960, devised Ashland, if

106. ORE. REV. STAT. §§ 128.110 -.160 (1969). See note 92 *supra.*

107. *See* ILL. ANN. STAT. ch. 22, § 50 (Smith-Hurd 1968); N.Y. REAL PROP. ACTIONS LAW §§ 1602-15 (McKinney 1963); W. VA. CODE ANN. §§ 36-2-1 to -2-13, *as amended,* (Supp. 1971); WYO. STAT. §§ 1-974 to -982 (1957); Model Act Providing for the Sale of Real Estate Affected With a Future Interest, *in* SIMES & TAYLOR 237.

108. The New York statute directs that proceeds of sale are to be distributed as in the case of a partition sale. N.Y. REAL PROP. ACTIONS LAW §§ 961, 1613(3) (McKinney 1963). This would mean immediate distribution to each owner of a present or future interest in the land of the estimated value of his interest. The Model Aet would empower the court to remould the condition so as to give the owner of the possibility of reverter or right of entry on breach of condition subsequent an appropriate interest in the proceeds of sale. SIMES & TAYLOR 236-38. The other statutes appear to make no provision for the peculiar problem created by reversionary possibilities exempt from the Rule Against Perpetuities. The Illinois statute restricting the duration of some reversionary possibilities would help in some situations. ILL. ANN. STAT. ch. 30, § 37e (Smith-Hurd 1969). See note 53 *supra.*

109. See notes 88-90 *supra* and accompanying text.

110. N.C. GEN. STAT. § 41-11 (Supp. 1969).

the present life tenant, Hanoch Clay, dies without issue him surviving, to

> my second son, Phallu Clay and his heirs; but if both my said sons shall die without issue them surviving, the said estates and interests shall pass, upon the death of the survivor of them, to the issue then living of my third son, Hesron Clay, per stirpes in fee simple. . . .

Hesron Clay is now forty-eight. He is married, has four children, and may have more. Hanoch and Phallu Clay are bachelors aged, respectively, fifty-two and fifty. If Hanoch Clay dies without surviving issue during the lifetime of Phallu Clay, Phallu will have a vested present estate in fee simple. If Phallu later dies without surviving issue, Ashland will pass to the issue of Hesron Clay living at that time by way of executory interest.[111] Although executory interests could not be conveyed or devised at common law,[112] they are transferable by deed and will under current law in both England[113] and this country.[114] This being so, the four children of Hesron now in being can convey their executory interest. If any of them are minors, this will have to be done under court order in a guardianship proceeding. Hesron may have more children in the future, who may survive Hanoch and Phallu Clay. A child of his, now in being or born hereafter, may die before the survivor of Hanoch and Phallu, survived by children who will be issue of Hesron Clay. Hence, persons not yet born may be entitled to all or part of the executory interest devised to the issue of Hesron Clay living at the death of the survivor of Hanoch and Phallu Clay.

The problem of conveying merchantable title to Ashland free of the executory interest of the unborn issue of Hesron Clay is virtually the same as the problem of cutting off the contingent remainder of the unborn issue of Hanoch Clay, discussed in the preceding section of this article, except that executory interests have never been destructible by the tenant of the present estate,[115] and some of the statutes empowering courts to authorize sale of the fee simple free of

111. Estate of Carter v. Carter, 404 S.W.2d 693 (Mo. 1966); Kindred v. Anderson, 357 Mo. 564, 209 S.W.2d 912 (1948); Newbern v. Barnes, 3 N.C. App. 521, 165 S.E.2d 526 (1969); SIMES & SMITH §§ 191, 205, 206, 222. It could be argued that, if the order of the deaths of Hanoch and Phallu were reversed, the surviving issue of Hesron would take by way of contingent remainder.

112. See note 9 *supra* and accompanying text.

113. See notes 13-15 *supra* and accompanying text.

114. See notes 63-64 *supra*.

115. Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620); PIGOTT, COMMON RECOVERIES 127, 134 (2d ed. 1770).

future interests in unborn and unascertained persons may not be broad enough to cover executory interests.[116] The Missouri statute is broad enough to cover executory interests, but sale under it is not authorized because Ashland is producing enough income to pay for repairs and taxes.[117] The North Carolina statute mentions only contingent remainders to unborn or unascertainable persons and so may not be broad enough to empower the court to authorize a sale which would override the executory interest of the unborn issue of Hesron Clay.[118]

The Equitable Charge in Favor of Charmi Clay or His Issue

When Reuben Clay died in 1960, his will devised Ashland, if both Hanoch and Phallu Clay die without issue them surviving, to the then living issue of Hesron Clay

> subject to a charge in the amount of $10,000 in favor of my fourth son, Charmi Clay, if he is then living, or in favor of his issue per stirpes, if he is then dead and issue of his survive.

Charmi Clay is now forty-six and married, but childless. This provision of the will created an equitable charge which resembles, in some respects, a beneficial interest under a trust.[119] It is clear that a court of equity has inherent power to authorize the holder of legal title to land which is subject to an equitable charge to sell it free of the charge and to secure the charge on the proceeds of sale or other property.[120] This power falls into the same category as the inherent power of a court of equity to authorize a trustee to deviate from the terms of the trust if, owing to circumstances not known to the settlor, and not anticipated by him, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.[121] In the exercise of the latter power it is well settled

116. See notes 88, 92, 94, 100, 102 *supra.*

117. VERNON'S ANN. MO. STAT. § 528.010 (1952). See notes 88-90 *supra* and accompanying text.

118. N.C. GEN. STAT. § 41-11 (Supp. 1969) mentions only contingent remainders to "persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are." *Id.* § 41-11.1 mentions only an estate in a class which is vested subject to open to admit after born members.

119. Thompson v. Thompson, 175 S.W.2d 885 (Mo. 1943); Davis v. Stephens, 344 Mo. 24, 124 S.W.2d 1132 (1939); Carter v. Worrell, 96 N.C. 358, 2 S.E. 528 (1887); King v. Denison, 1 V. & B. 260, 35 Eng. Rep. 102 (1813); RESTATEMENT (SECOND) OF TRUSTS § 10, comment *a*, at 28 (1959); SCOTT § 10; Annot., 134 A.L.R. 361 (1941); Annot., 116 A.L.R. 7 (1938).

120. Frewin v. Charleton, 1 Eq. Ca. Abr. 386, pl. 4, 21 Eng. Rep. 1121 (1712).

121. SCOTT § 167; RESTATEMENT (SECOND) OF TRUSTS § 167 (1959); Marshall, *Deviations*

that a court of equity may authorize a trustee to make a sale,[122] mortgage[123] or lease[124] of land which will override equitable future interests under the trust.

How King George Slew the Dragon

Conveyances of land by way of subinfeudation, under which the transferee was to hold the land as a feudal vassal of the transferor, were sometimes upon the express condition subsequent that the lord could terminate the tenant's estate if the latter failed to perform the feudal services due for the land.[125] Statutes of 1278 and 1285 had the effect of treating every subinfeudation as being on such a condition subsequent.[126] A statute of 1290 forbade further subinfeudation in fee simple[127] but conditions subsequent continued to be used to enforce obligations to pay money.[128] The English courts refused to enforce conditions subsequent in conveyances in fee simple if their purpose was to restrict the use of the land conveyed[129] or to restrain aliena-

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from the Terms of a Trust, 17 MODERN L. REV. 420 (1954); Scott, *Deviation From the Terms of a Trust*, 44 HARV. L. REV. 1025 (1931).

122. Young v. Young, 255 Mich. 173, 237 N.W. 535 (1931) (although terms of trust forbade sale); Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967); Winnington v. Foley, 1 P. Wms. 536, 24 Eng. Rep. 505 (1719); Basset v. Clapham, 1 P. Wms. 358, 24 Eng. Rep. 425 (1717); Platt v. Sprigg, 2 Vern. 303, 23 Eng. Rep. 796 (1693); SCOTT § 190.4 (citing statutes which amplify the inherent power); RESTATEMENT (SECOND) OF TRUSTS § 190, comment *f*, at 420 (1959).

123. Seigle v. First Nat'l Co., 338 Mo. 417, 90 S.W.2d 776 (1936); *cf.* Townsend v. Lawton, 2 P. Wms. 379, 24 Eng. Rep. 775 (1726); SCOTT § 191.2; RESTATEMENT (SECOND) OF TRUSTS § 191, comment *d*, at 425 (1959).

124. SCOTT § 189.4; RESTATEMENT (SECOND) OF TRUSTS § 189, comment *d*, at 419 (1959). *See* St. Louis Union Trust Co. v. Van Raalte, 214 Mo. App. 172, 184, 259 S.W. 1067, 1071 (1924); Cox v. Kinston Carolina R. & Lumber Co., 175 N.C. 299, 308, 95 S.E. 623, 627 (1918).

125. T. MADOX, FORMULARE ANGLICANUM 178 ch. CCXC, 221 ch. CCCLXVIII, 278 ch. CCCCLXX, 297 ch. DXIII, 305 ch. DXXXIV (1702). By modern analysis, some of these conveyances would create a fee simple determinable and a possibility of reverter rather than a fee simple on condition subsequent.

126. Statute of Gloucester, 6 Edw. 1, c. 4 (1278); Statute of Westminster II, 13 Edw. 1, Stat. 1, c. 21 (1285).

127. Statute of Westminster III, 18 Edw. I, Stat. 1, *Quia Emptores Terrarum*, cc. 1-3 (1290).

128. T. MADOX, FORMULARE ANGLICANUM 318 ch. DLX, 323 ch. DLXIX, 328 ch. DLXXIX, 402 ch. DCCXXXVI, 413 ch. DCCXLVII (1702). A modern court might find that some of these, also, created a fee simple determinable and a possibility of reverter.

129. Anonymous, Y.B. 21 Hen. 7, Trin., pl. 15 (1506); Puseto's Case, Y.B. 21 Hen. 7, Mich., pl. 10 (1506); Fitz-Hugh v. Cornewall, Y.B. 7 Hen. 6, Trin., pl. 21 (Exch. Ch. 1429); 1 E. COKE, INSTITUTES *206b (1628); J. PERKINS, PROFITABLE BOOKE § 731 (1642); W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 131 (1648). *See also* Sir Edward Coke's Case, Godbolt 289, 78 Eng. Rep. 169 at 175 (1623); Stukeley v. Butler, Hobart 168, 80 Eng. Rep.

tion.[130] Most American courts have followed the English view that conditions restraining alienation of estates in fee simple are void,[131] but, unlike the English courts, they will enforce conditions imposing use restrictions in conveyances in fee simple.[132] As England made rights of entry on breach of condition subsequent devisable and alienable[133] and subjected them to the Rule Against Perpetuities[134] before the abolition of primogeniture,[135] legal rights of entry on breach of condition subsequent, although still permitted,[136] do not cause the

316 (1614); Eyliff v. Chopley, 1 Bulst, 42, 80 Eng. Rep. 746 (1610); Earl of Pembroke's Case, Jenk. 266, pl. 73, note, 145 Eng. Rep. 191 (1597); Anonymous, Y.B. 21 Hen. 6, Hil., pl. 21 (1443). *Cf.* Flower v. Hartopp, 6 Beav. 476, 49 Eng. Rep. 910 (1843). However, a condition against other uses in a conveyance for public or charitable purposes is valid if it does not violate the Rule Against Perpetuities. Walsh v. Secretary of State of India, 10 H.L.C. 367, 11 Eng. Rep. 1068 (1863); Re Robinson, [1897] 1 Ch. 85 (C.A.), Re Macnamara, 104 L.T. 771 (1911). *Cf.* Attorney General v. Pyle, 1 Atk. 435, 26 Eng. Rep. 278 (1738); *In re* Blunt's Trusts, [1904] 2 Ch. 767; *In re* Randell, 38 Ch. D. 213 (1888).

130. Shailard v. Baker, Cro. Eliz. 744, 78 Eng. Rep. 977 (1600); Vernon's Case, 4 Co. Rep. 1a, 3b, 76 Eng. Rep. 845, 854 (1572); Anonymous, Y.B. 10 Hen. 7, Mich., pl. 28 (1494); Anonymous, Y.B. 8 Hen. 7, Hil., pl. 3 (1493); Anonymous, Y.B. 21 Hen. 6, Hil., pl. 21 (1443); Mayn v. Cros, Y.B. 14 Hen. 4, Mich., pl. 6 (1412); Anonymous, Liber Assissarum 33 Edw. 3, pl. 11 (1359); N. STRATHAM, ABRIDGMENT, "Conditions," pl. 12 (1495); R. BROOKE, GRAUNDE ABRIDGEMENT, "Conditions," pl. 57, 135, 239 (1573); 1 E. COKE, INSTITUTES *222b -223a (1628).

131. Triplett v. Triplett, 332 Mo. 870, 60 S.W.2d 13 (1933); Wool v. Fleetwood, 136 N.C. 460, 48 S.E. 785 (1904); Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 972-75 (1935).

132. Cowell v. Springs Co., 100 U.S. 55 (1879); O'Brien v. Wetherell, 14 Kan. 616 (1875); Gray v. Blanchard, 8 Pick. (25 Mass.) 284 (1829); Lawrence v. Gifford, 17 Pick. (34 Mass.) 366 (1835); Plumb v. Tubbs, 41 N.Y. 442 (1869); Sperry's Lessee v. Pond, 5 Ohio 387 (1832); Loring, *Estates Upon Condition*, 1 AM. L. REV. 265 (1867); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940); Williams, *Restrictions on the Use of Land; Conditions Subsequent and Determinable Fees*, 27 TEX. L. REV. 158 (1948). See Carolina & N.W. Ry. v. Carpenter, 165 N.C. 465, 81 S.E. 682 (1914).

133. See notes 14, 15, 34-35, 51 *supra*.

134. See note 51 *supra*. *See also In re* Peel's Release, [1921] 2 Ch. 218; *In re* Da Costa, Clarke v. Church of England Collegiate School, [1912] 1 Ch. 337; Dunn v. Flood, 25 Ch. D. 629 at 633 (1882), *aff'd*, 28 Ch. D. 586 at 592 (1885); *In re* MacLeay, L.R. 20 Eq. 186 at 190 (1875).

135. The doctrine of primogeniture, see note 27 *supra*, was abolished in England by the Administration of Estates Act, 15 & 16 Geo. 5, c. 23, §§ 1-3, 45-46, 52 (1925).

136. Law of Property Act, 15 & 16 Geo. 5, c. 20, § 7 (1925), *as amended*, Law of Property (Amendment) Act, 16 & 17 Geo. 5, c. 11, Sch. (1926); R. MAUDSLEY & E. BURNS, LAND LAW: CASES AND MATERIALS 5n (2d ed. 1970); R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 142-43 (3d ed. 1966). In a letter of Jan. 4, 1972 to the writer, Professor Maudsley has suggested that the courts may and should restrict the rights of entry on breach of condition subsequent on a fee simple which may exist as legal interests to those enforcing the payment of rent charges.

trouble there that they do in this country. They are less numerous, both because the permissible grounds for forfeiture are more limited and because those created at remote times in the past have been invalidated by the application of the Rule Against Perpetuities. Those which exist are necessarily of recent creation and are likely to be owned by a single ascertainable person rather than by the heirs of someone who died a century or more ago. If Clay County were in England, the southwesterly acre of Ashland would not be subject to a right of entry on breach of condition subsequent owned by 384 tenants in common with unequal shares.[137]

With the sole exception of the right of entry on breach of condition subsequent, no legal future interest in land has been permitted in England since 1925. Under legislation enacted in that year, the only estates in land which are capable of subsisting or of being conveyed or created at law are an estate in fee simple absolute in possession, and a term of years absolute.[138] Life estates, determinable estates for years,[139] reversions and remainders expectant upon such estates, executory interests, powers of appointment, equitable charges, determinable and defeasible estates in fee simple, and possibilities of reverter may exist only as equitable interests under trusts and are subject to being overridden by the exercise of the statutory powers of the trustee owner of the legal fee simple absolute to sell, mortgage and lease the land.[140] A beneficial owner of both the legal and equitable fee simple absolute who wishes to create interests in land that may exist only as equitable interests may vest the legal fee simple absolute in trustees of his own selection;[141] if he creates such

137. See note 44 *supra* and accompanying text.

138. Law of Property Act, 15 & 16 Geo. 5, c. 20, § 1 (1925).

139. *E.g.*, the estate created by a conveyance or devise "to John Stiles for ninety-nine years if he shall so long live."

140. Law of Property Act, 15 & 16 Geo. 5, c. 20, §§ 2, 4 (1925).

141. *Id.* § 23. These are called "trustees for sale." The trustee owner of the legal fee simple absolute has statutory power to make sales, exchanges, mortgages and long-term leases of the land which override all of the equitable interests in it, including all contingent remainders, executory interests, possibilities of reverter and equitable charges. Settled Land Act, 15 & 16 Geo. 5, c. 18, §§ 38, 41, 71 (1925); Law of Property Act, 15 & 16 Geo. 5, c. 20, §§ 2, 28 (1925). He cannot, moreover, be deprived of his statutory powers by the terms of the instrument creating the trust or by his own release or contract. Settled Land Act, 15 & 16 Geo. 5, c. 18, §§ 104, 106 (1925). Proceeds of sales and mortgages are "capital money," as are part of the proceeds of sales of timber and of rent paid under mining leases. *Id.* §§ 47, 52, 55-57, 61, 66, 71, 117. If the legal fee simple absolute is vested in two or more independent trustees, or a trust corporation, selected by, or under powers conferred by, the settlor, capital money is payable to the trustees or corporate trustee of the fee simple. Law of Property Act, 15 & 16 Geo. 5, c.

interests without designating trustees of the fee simple, the beneficial holder of the present equitable interest, commonly a life interest,[142] takes the legal fee simple absolute as trustee for himself and the other holders of equitable interests in the land.[143]

If Clay County were in England, therefore, Hanoch Clay, as life tenant, would own the entire legal fee simple absolute in all of Ashland, except the seven acres conveyed by Abraham Clay in 1860, and would have power to convey a merchantable title in fee simple absolute to these 193 acres, free of the contingent remainders of his own unborn issue and his brother Phallu Clay, of the executory interest of the issue of his brother Hesron Clay, and of the equitable charge in favor of his brother Charmi Clay, or his issue. The Columbia, Clayton and Maryville Railroad would hold legal title in fee simple absolute to the easterly five rods of Ashland, and the Trustees of Oak Grove Church would hold legal title in fee simple absolute to the northwesterly acre of Ashland. If, as is probable, the common law Rule Against Perpetuities did not apply to possibilities of reverter created in England in 1860, each of these parcels would be held upon trust for the devisees under the will of Reuben Clay. Hanoch Clay, as life tenant under that will, would be entitled to demand conveyances of the legal fee simple to himself and, after receiving them, to

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20, §§ 27(2), 28 (1925). If, however, the legal fee simple absolute is vested by statute in the equitable life tenant, he must arrange to have capital money paid to independent trustees, either two or more individuals or a single corporation. Settled Land Act, 15 & 16 Geo. 5, c. 18, §§ 18, 30, 34, 75. The life tenant-statutory estate owner may, as an alternative, arrange to have capital money paid into court, which means that the Bank of England administers it as trustee for the holders of equitable interests in the land.

Proceeds of a mortgage which overrides equitable interests in the land may be used by, or at the direction of, the trustee owner of the legal fee simple to pay off encumbrances on the land or to pay for improvements to the land, including the cost of reducing uncultivated land to cultivation, subdivision of previously rural land into urban lots, and erection of buildings. *Id.* §§ 71, 73, 75, 83-84, 89, 117, and Third Schedule. In some cases the cost of improvements is to be amortized, wholly or in part, from income. The making of improvements authorized by law is not waste. *Id.* § 89. Capital money not used to discharge encumbrances or pay for improvements is invested and held in trust by the trustees who receive it. The income is paid to the life tenant or other person who is, or would be if there had not been a sale, entitled to the rents and profits of the land and the corpus is held for the owners of equitable future interests in the land. *Id.* §§ 73, 75.

142. Although he is commonly referred to as "the life tenant," the equitable interest of the statutory estate owner may be a determinable estate for years, see note 139 *supra*, a determinable fee subject to a possibility of reverter, or a fee simple subject to a shifting executory interest. He may be an equitable tenant in tail.

143. Settled Land Act, 15 & 16 Geo. 5, c. 18, §§ 1, 16, 19, 20, 21, 107 (1925). The Act makes provision for other trustees of the legal fee simple absolute if there is no holder of the present equitable interest or he is an infant, lunatic, or bankrupt. *Id.* §§ 23, 24, 26-28, 102.

make a sale which would override the future interests. The southwesterly acre of Ashland would be owned by Clay County Rural School District in fee simple absolute, free of trust, because the right of entry on breach of condition subsequent imposed upon that acre by Abraham Clay's 1860 conveyance to the school district would be void ab initio under the common law Rule Against Perpetuities.

The effect of the 1925 English legislation is to abolish the restraints on improvement and alienation imposed by the mere existence of legal future interests under the seventeenth and eighteenth century English law which is still in force in this country. It ensures that there are always competent, living adults or a trust corporation with the right to make needed improvements to every piece of land, without fear of forfeiture or liability for waste, and with the power to mortgage, give long leases, and convey merchantable title in fee simple absolute, free of future interests. Improvement, mortgage, lease and sale may be effected without the expense, difficulty and delay of conducting judicial proceedings against unborn and unascertained owners of future interests. Yet all of the types of future interests known to the old law are recognized and protected in the same manner that future beneficial interests under trusts are protected in this country. The English legislation preserves the freedom to create future interests but deprives them of their former effect of restraining the use and transfer of land in the manner most beneficial to its owners and the community.[144]

THE MODEST PROPOSAL

American estate planners are familiar with and often use the device required by the 1925 English legislation for avoiding the chief evils of future interests in property. That is, they create future interests as beneficial interests under trusts and confer upon the trustees powers to make improvements and to make mortgages, leases and sales of the trust property which will override the future interests. This is virtually the only method used for creating future interests in chattels personal and investment securities and certainly the only satisfactory one.[145] It is often used to create future interests in land,

144. Bordwell, *English Property Reform and its American Aspects*, 37 YALE L.J. 1, 179 (1927); Crane, *The Law of Real Property in England and the United States; Some Comparisons*, 36 IND. L.J. 282 (1961); Schnebly, *"Legal" and "Equitable" Interests in Land Under the English Legislation of 1925*, 40 HARV. L. REV. 248 (1926).

145. In general, the English courts have never enforced future interests in chattels personal

and a statutory requirement that it be the exclusive method of creating future interests in land would be unlikely to encounter serious constitutional or practical difficulties. American legislation providing that future interests in land may be created hereafter only as beneficial interests under trusts and that the trustees shall have power to improve the land and to override the future interests by mortgage, lease or sale would be helpful, but it would not solve the problem of future interests created prior to its enactment. It would not eliminate legal remainders and executory intcrests until the expiration of lives in being and twenty-one years—perhaps a century after enactment—and would permit existing legal possibilities of reverter and rights of entry on breach of condition subsequent to continue to work evil forever.

The King in Parliament was subject to no constitutional limitations on the sovereign legislative power, so that the 1925 English legislation could and did convert all existing legal future interests in land into beneficial interests under trusts, subject to being overridden by conveyances made by the trustees. The constitutional power of an American state legislature to do likewise is, at best, doubtful.[146] But that which cannot constitutionally be done dircctly may sometimes be accomplished indirectly by exercise of the power of taxation.[147] There is no doubt of the constitutional power of a state legislature to impose property taxes on interests in land. Land taxes are usually based upon the full value of the unencumbered fee simple absolute and the whole property tax is ordinarily assessed against the person seised of the present freehold, even when he is a life tenant subject to a mortgage, the rights of a tenant for years in possession, and the interests of owners of freehold future interests.[148] In effect, the person seised of the present freehold usually bears the whole burden of the land tax, although other persons with interests in the land derive as

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and investment securities except as beneficial interests under trusts. American courts have commonly enforced legal future interests in chattels personal and securities but they sometimes do so by means of a judicially created trust of the whole title. SIMES & SMITH §§ 351-71, 1711-23; Simes, *Future Interests in Chattels Personal*, 39 YALE L.J. 771 (1930).

146. See notes 53-54 *supra;* J. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND ch. 4 (1953).

147. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

148. Weller v. Searcy, 343 Mo. 768, 123 S.W.2d 73 (1938); Jeffreys v. Hocutt, 195 N.C. 339, 142 S.E. 226 (1928); N.C. GEN. STAT. § 105-302 (Supp. 1971); SIMES & SMITH § 1693; Annot., 86 A.L.R.2d 670 (1962); Annot., 126 A.L.R. 862 (1940); Annot., 94 A.L.R. 311 (1935); Annot., 75 A.L.R. 416 (1931); Annot., 17 A.L.R. 1384 (1922). *Cf.* Willard v. Blount, 33 N.C. (11 Ired. L.) 624 (1850).

much or more benefit from the state's protection of their interests in the land. Separate assessment of the interests of mortgagees,[149] tenants for years,[150] holders of mineral interests[151] and owners of condominium apartments[152] is not, however, unknown. Separate assessment of the interests of life tenant and remainderman,[153] tenant in fee simple defeasible and holder of an executory interest, tenant in fee simple determinable and holder of a possibility of reverter, and tenant in fee simple on condition subsequent and holder of the right of entry on breach of condition, would thus not seem to violate the usual provisions of state constitutions. Therefore, it should be possible for a state legislature to discourage the creation of legal future interests and encourage the conversion of existing legal future interests into interests under trusts by imposing a property tax on legal future interests in land.

The exact form of the legislation needed in a particular state will depend upon the extent to which the Statute of Gloucester,[154] imposing forfeiture of the estate and liability in triple damages upon a life tenant who improves the land or sells timber, stone, gravel, minerals, coal, oil or gas, is still enforced. Some states have substantially modified, by statute or judicial decision, the provisions of the Statute of Gloucester insofar as they penalize reasonable use of land[155]—for example, some permit a tenant for life to sell timber in accordance with the usages of good husbandry,[156] and although some prevent a tenant for life from giving an oil or gas lease,[157] others allow him to do so but require that he invest the royalties for the benefit of the remainderman, keeping only the income.[158]

149. VERNON'S ANN. MO. STAT. §§ 146.010 to .020 (1952), *as amended,* (Supp. 1971); N.C. GEN. STAT. §§ 105-202, -302 to -305 (Supp. 1971).

150. State *ex rel.* Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S.W. 998 (1901); State v. Grosvenor, 149 Tenn. 158, 258 S.W. 140 (1923). *Cf.* Willard v. Blount, 33 N.C. (11 Ired. L.) 624 (1850). Annot., 154 A.L.R. 1309 (1945); Annot., 59 A.L.R. 701 (1929).

151. *See* Dorman v. Minnieh, 336 S.W.2d 500 (Mo. 1960); N.C. GEN. STAT. § 105-302 (Supp. 1971); Annot., 16 A.L.R. 513 (1922).

152. VERNON'S ANN. MO. STAT. § 448.100 (Supp. 1971); N.C. GEN. STAT. § 47A-21 (1966).

153. *Cf.* Sherrill v. Board of Equalization, 452 S.W.2d 857 (Tenn. 1970) (life estate and remainder not separately assessable under statute in force).

154. See notes 77-82 *supra* and accompanying text.

155. SIMES & SMITH §§ 1654, 1658-59.

156. Brogdon v. McMillan, 116 Ga. App. 34, 156 S.E.2d 828 (1967). *But see* Rouse v. Strickland, 260 N.C. 491, 133 S.E.2d 151 (1963).

157. *E.g.,* Eide v. Tveter, 143 F. Supp. 665 (D.N.D. 1956).

158. D.'Evereaux Hall Orphan Asylum v. Green, 226 So. 2d 725 (Miss. 1969); Johnson v.

Another factor which would affect the exact form of legislation needed in a particular state is its treatment of entails. If estates tail still exist, as under the Statute de Donis Conditionalibus,[159] remainders following them cause little trouble because a tenant in tail is not impeachable for waste,[160] and he may at any time destroy the remainder.[161] If, however, estates tail have been converted by statute into life estates with indestructible remainders in the heirs of the body of the first taker[162] or into estates in fee simple,[163] so that what would have been destructible remainders become indestructible executory interests, legal future interests incident to what would have been estates tail may be very troublesome. The existing system of assessment of property taxes on interests in land must also be considered.

The modest proposal is for legislation, keyed to the existing statutes and case-law of each state, to the effect that:

I. A person seised of a freehold estate in land shall not forfeit his estate or incur liability in damages for changes in the land made with the reasonable and good faith intent of improving its usefulness, value, or beauty, including the erection, alteration or demolition of buildings or other structures, conversion from meadow or pasture to cultivation or vice versa, conversion from rural to urban uses, and conversion from residential to commercial or industrial uses, or vice versa.

II. A person seised of a freehold estate in land shall not forfeit his estate or incur liability in damages for sale of timber, stone, gravel, earth, minerals, coal, oil or gas, if the sale price is reasonable and the proceeds are paid to a corporation authorized to act as trustee, which is not, and is not controlled by, the person seised, upon

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Messer, 437 S.W.2d 643 (Tex. Civ. App. 1969). *Cf.* Kimbark Exploration Co. v. Von Lintel, 192 Kan. 791, 391 P.2d 55 (1964) (life tenant entitled to all royalties payable under oil and gas lease given by testator whose will created life estate and remainder even though wells were not drilled before testator's death).

159. Statute of Westminster II, De Donis Conditionalibus, 13 Edw. 1, cc. 1-4 (1285).

160. W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 131 (1648). *See* Mary Portington's Case, 10 Co. Rep. 35b, 77 Eng. Rep. 976, 982 (1613); Sir Anthony Mildmay's Case, 6 Co. Rep. 40a, 77 Eng. Rep. 311, 314 (1605); Earl of Pembroke's Case, Jenk. 266, pl. 73, note, 145 Eng. Rep. 191 (1597).

161. Gulliver *ex dem.* Corrie v. Ashby, 4 Burr. 1929, 98 Eng. Rep. 4 (1766); 2 FEARNE 107 (5th ed. 1795) (Powell's note).

162. VERNON'S ANN. MO. STAT. § 442.470 (1952); Moore v. Moore, 329 S.W.2d 742 (Mo. 1959), *noted in* 25 MO. L. REV. 438 (1960).

163. N.C. GEN. STAT. § 41-1 (1966); Tremblay v. Aycock, 263 N.C. 626, 139 S.E.2d 898 (1965).

trust for the holders of present and future estates in the land as their interests may appear.

III. If a possibility of reverter conditioned upon an event which has not yet occurred has been in existence for more than thirty years, the person seised of the present freehold estate shall be entitled to have the possibility of reverter assessed for property taxation separately from the other interest or interests in the fee simple absolute. If the tax so assessed against the possibility of reverter is not paid by the last day upon which it may be paid without interest or penalty, the non-payment of the tax shall operate as a release of the possibility of reverter to the person seised of the present freehold estate, subject to the unpaid tax and interest and penalties due thereon, which release shall extinguish the possibility of reverter.

IV. If a right of entry on breach of condition subsequent on a fee simple has been in existence for more than thirty years and has not yet been exercised by entry or action, whether or not the event upon which it is conditioned has occurred, the person seised of the present freehold estate shall be entitled to have the right of entry assessed for property taxation separately from the other interest or interests in the fee simple absolute. If the tax so assessed against the right of entry is not paid by the last day upon which it may be paid without interest or penalty, the nonpayment of the tax shall operate as a release of the right of entry to the person seised of the present freehold estate, subject to the unpaid tax and interest and penalties due thereon, which release shall extinguish the right of entry.

V. In the absence of other persuasive evidence of value presented to the assessor, it shall be presumed, for the purposes of III and IV, that a possibility of reverter or a right of entry on breach of condition subsequent on a fee simple is worth one tenth of the value of the unencumbered fee simple absolute.

VI. A person seised of a freehold estate in land shall be entitled to have legal reversions, remainders and executory interests in the land assessed for property taxation separately from the other interest or interests in the fee simple absolute. If the tax so assessed against the reversions, remainders and executory interests is not paid by the last day upon which it may be paid without interest or penalty, the non-payment of the tax shall operate as a release of any and all legal reversions, remainders and executory interests in the land to the person seised of the present freehold estate, subject to the unpaid tax and penalties due thereon, upon trust for the benefit of all persons with

present or future interests in the land.[164]

VII. In the absence of other persuasive evidence of value presented to the assessor it shall be presumed, for the purposes of VI, that any and all legal reversions, remainders and executory interests are worth, in the aggregate, forty percent of the value of the unencumbered fee simple absolute.

VIII. A person seised of a freehold estate in land who becomes trustee of the land by virtue of VI shall have power to sell, exchange, mortgage or lease all or any portion of or interest in the land, to grant options for purchase, exchange, mortgage or lease and to make all conveyances necessary to effectuate such transactions, which options, mortgages, leases and conveyances shall override the equitable reversions, remainders and executory interests therein, subject to the following provisions:

A. Any sale or exchange shall be for an adequate consideration in money or money's worth, and any portion of the purchase price not paid at or before the execution of the conveyance shall be secured by mortgage or other security upon the land.

B. Land received in exchange shall be held upon the same trusts as the land exchanged.

C. Money or securities constituting all or part of the consideration for a sale or exchange, including royalties paid under a mineral, gas or oil lease, shall be paid or transferred by the purchaser to a corporation authorized to act as trustee which is not, and is not controlled by, the person theretofore seised, upon trust for the holders of present and future interests in the land as their interests existed prior to the sale or exchange.

D. Money lent on any mortgage made by the person seised shall be paid by the mortgagee to a like corporation, upon trust as under C. The corporate trustee, if it deems it in the interest of the beneficiaries of the trust, may apply the proceeds of such a mortgage, at the request of the person seised, toward discharge of encumbrances on the mortgaged land, or to the cost of making improve-

164. Unlike the English legislation of 1925, this proposal does not solve expressly the problem of unmerchantability of title caused by the existence of powers of appointment. Perhaps it should. Those who take by virtue of the exercise of such a power do so, however, by way of executory interest and a conveyance under the powers conferred by VIII should override their interests. Hole v. Escott, 4 My. & Cr. 187, 41 Eng. Rep. 74 (1838); SIMES & SMITH § 915. That is, although such a power could be exercised after the person seised conveyed the fee simple absolute under the powers conferred by VIII, the appointment would affect only the proceeds of sale in the hands of the corporate trustee (VIII C.), not the land sold.

ments, including the erection or alteration of buildings, to the mortgaged land.

E. A lease, other than a mineral, oil or gas lease, shall be for a term not exceeding ninety-nine years. Every lease shall reserve a full and adequate rent or provide for payment of adequate royalties.

IX. If, after any legal reversion, remainder or executory interest has become a beneficial interest under a trust by the operation of VI, an event occurs which would have caused such legal reversion, remainder or executory interest to become a present freehold estate but for the operation of VI, the reversion, remainder or executory interest shall become a legal present freehold estate, subject to any sale, exchange, mortgage, lease, option or conveyance made under the powers conferred by VIII.

This legislation would not, unfortunately, enable Hanoch, Phallu, Hesron and Charmi Clay to convey a merchantable title to Ashland by October 1, 1972. Its prompt enactment would, however, enable them to do so within a few years, with lasting benefit to themselves, their descendants and the people of Clayton and Clay County.