

NOTES

PROPOSED ILLINOIS STATUTE ON POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY AS AFFECTING LAND USE POLICY

I

A recent legislative proposal in Illinois¹ has emphasized the anomalous character of two types of real property restrictions which receive favored judicial treatment. The result of such treatment is the creation of serious gaps in doctrines developed by courts of equity to free land from outmoded use restrictions. These two common law interests are the right of entry for breach of condition subsequent and the possibility of reverter. The former gives to the grantor of an estate on condition subsequent, or to his heirs, the option of terminating the estate by entry on the occurrence of the designated event.² The possibility of reverter upon a determinable fee, however, requires no such election; upon the happening of the event, the estate automatically terminates and the fee reverts to the grantor or his heirs.³

Two developments in the United States have served to convert these "Janus-faced conveyancing devices"⁴ into potent weapons of land use restriction. Contingent though these interests appear to be,⁵ American courts have held that neither possibilities of reverter⁶ nor rights of entry⁷ are subject to the rule

¹ Ill. S. 347, 65th Assemb., Reg. Sess. (Introduced April 30, 1947). Text cited in notes 36, 38, 39, 40, 43 and 44, *infra*.

² 1 Simes, *Law of Future Interests* § 159 (1936).

³ 1 Simes, *Law of Future Interests* § 177 (1936). Professor Gray's argument in *Gray, Rule against Perpetuities* §§ 31-42 (1915), that such interests could not be created after the abolition of subinfeudation by the Statute *Quia Emptores*, has been uniformly rejected by American courts. The Illinois decisions are *North v. Graham*, 235 Ill. 178, 85 N.E. 267 (1908); *Morton v. Babb*, 231 Ill. 488, 96 N.E. 279 (1911); *Regular Predestinarian Baptist Church v. Parker*, 373 Ill. 607, 27 N.E. 2d 522 (1940).

⁴ "They are half restriction and half estate. . . . Being hybrids, they are suited for neither purpose. The estate they create in the grantor represents 'a gambler's chance of recovering the property,' should the condition be broken at any time in the remote future. As restrictions for the benefit of other property, they are crude weapons of the early law; their survival indicates a cultural lag." Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 *Harv. L. Rev.* 248, 250 (1940).

⁵ 2 Simes, *Law of Future Interests* §§ 506-7 (1936). But compare *Gray, Rule against Perpetuities* §§ 299, 312 (1915), calling rights of entry contingent and possibilities of reverter vested interests.

⁶ *North v. Graham*, 235 Ill. 178, 85 N.E. 267 (1908).

⁷ *Gray v. C., M., & St. P. Ry. Co.*, 189 Ill. 400, 59 N.E. 950 (1901). In England, rights of entry were declared within the rule. *Re Hollis' Hospital* [1899] 2 Ch. 540. This holding has been codified as to possibilities of reverter. 15 *Geo. V., c. 20*, § 4(3) (1925).

against perpetuities. In addition, the common law prohibitions against inter vivos alienation⁸ or testamentary disposition⁹ of these interests are suffering progressive inroads by judicial decision¹⁰ and statute,¹¹ so that purchasers or devisees may acquire such interests in many instances, although these persons are even further removed from any genuine desire to encourage fulfillment of the condition stipulated than are the remote heirs of the grantor.

Estates on condition have been used chiefly for three purposes: provision of a means of summary relief for landlords upon the breach by tenants of conditions in leases, security for the payment of money or performance of services,¹² and restriction on the use and enjoyment of land.¹³ It is in connection with the use of possibilities of reverter and rights of entry as devices to achieve the last purpose that the most undesirable results and the greatest adverse criticism have appeared.¹⁴

Although armed with the same immunity from the rule against perpetuities as restrictive covenants, possibilities of reverter and rights of entry are neither at their inception nor in their course of existence subject to the policy restraints

⁸ Rights of entry: *Rice v. Boston & W. R. Corp.*, 94 Mass. 141 (1866). Possibilities of reverter: *North v. Graham*, 235 Ill. 178, 85 N.E. 267 (1908).

⁹ In Illinois, decisions have recently reaffirmed the court's adherence to the common law ban on inter vivos and testamentary alienation of possibilities of reverter. *Pure Oil Co. v. Miller-McFarland Drilling Co.*, 376 Ill. 486, 34 N.E. 2d 854 (1941); *Regular Predestinarian Baptist Church v. Parker*, 373 Ill. 607, 27 N.E. 2d 522 (1940). Older Illinois opinions express the same view. *Presbyterian Church v. Venable*, 159 Ill. 215, 42 N.E. 836 (1896). Rights of entry likewise have been held incapable of inter vivos transfer. *O'Donnell v. Robson*, 239 Ill. 634, 88 N.E. 175 (1909). It would seem, however, that entry rights are devisable. *Gray v. C., M., & St. P. Ry. Co.*, 189 Ill. 400, 59 N.E. 950 (1901). Text writers point out the unreasonableness of applying to contingent remainders and executory interests rules dealing with alienation different from those applied to possibilities of reverter and rights of entry. *Carey and Schuyler*, *Illinois Law of Future Interests* § 76 (1941).

¹⁰ Possibilities of reverter: *Irby v. Smith*, 147 Ga. 329, 93 S.E. 877 (1917). Rights of entry: *McKissick v. Pickle*, 16 Pa. 140 (1851).

¹¹ Generally these statutes are interpreted to cover possibilities of reverter and rights of entry by virtue of their all-inclusive authority to convey any interest in land. *Ky. Rev. Stat. Ann.* (Baldwin, 1943) § 382.010. But compare *W.Va. Code Ann.* (Michie, 1943) § 3529 which provides that "Any interest in or claim to real estate or personal property may be lawfully conveyed or devised." It has been held that this West Virginia section does not apply to a right of entry since it is only a right of action which cannot be transferred to a stranger. *White v. Bailey*, 65 W. Va. 573, 64 S.E. 1019 (1909). A statute typical of the more specific acts provides that "A right of re-entry, or of repossession for breach of condition subsequent, can be transferred." *Cal. Civ. Code* (Deering, 1941) § 1046.

¹² Numerous examples and illustrative cases are collected in *Brake, Fees Simple De-feasible*, 28 *Ky. L.J.* 424 (1940).

¹³ This category includes conditions requiring affirmative action with respect to the land, such as erecting buildings or maintaining railroad facilities, as well as conditions prohibitive in nature.

¹⁴ *Clark, Limiting Land Restrictions*, 27 *A.B.A.J.* 737 (1941); *Goldstein*, *op. cit. supra* note 4; *Walsh, Conditional Estates and Covenants Running with the Land*, 14 *N.Y.U.L.Q. Rev.* 162 (1937).

governing restrictive covenants.¹⁵ However, the former interests may be employed to produce exactly the same results as restrictive covenants, although the estates on condition carry a remedy in the form of a penalty of forfeiture, instead of recourse to an action for damages or for equitable relief. By the weight of authority, the only restrictive covenants enforceable in equity are those secured to protect other property in the neighborhood.¹⁶ Possibilities of reverter and rights of entry require no such dominant tenement. If the conditions are not illegal, the fact that such interests are in gross does not vitiate them. Even though the qualifications governing determinable fees and estates on condition subsequent have been imposed for the benefit of the grantor's property, the threat of forfeiture operates in favor of the grantor or his heirs and not in favor of the transferee of the land intended to be protected.¹⁷ Only in the event that the grantor or his heirs are the owners of the dominant land at the time of breach will the parties benefited by the forfeiture and the parties substantially interested in enforcement of the condition be identical.

Since most jurisdictions now refuse to enjoin breaches of restrictive covenants when the complainant does not own land in the neighborhood of the burdened tract, courts of equity are enabled to develop a limited policy of land use control. But the automatic operation of possibilities of reverter and rights of entry prevents their employment as instruments of a rational land use policy. In ad-

¹⁵ Rights of entry are "indistinguishable logically from conditional limitations over to third persons." Turrentine, *Suggestions for Revision of Provisions of the California Civil Code regarding Future Interests*, 21 *Calif. L. Rev.* 1, 7-8 (1932). 1 Simes, *Law of Future Interests* § 180 (1936); Walsh, *op. cit. supra* note 14, at 164-65.

¹⁶ *Bauby v. Krasow*, 107 Conn. 109, 139 Atl. 508 (1927); *McNichol v. Townsend*, 73 N.J. Eq. 276, 67 Atl. 938 (1907).

¹⁷ 1 Simes, *Law of Future Interests* § 177 (1936). But cf. *Young v. Cramer*, 38 Cal. App. 2d 64, 100 P. 2d 523 (1940). The plaintiff purchased land in a subdivision from a grantor who reserved a right of entry for breach of conditions restricting the land to residential uses, it being "understood and agreed that the foregoing conditions and restrictions are a part of a general plan for the improvement of Tract 4642, which plan contemplates that all of the lots in said Tract shall be used for residence purposes only . . . and that said conditions and restrictions are for the benefit of said Tract, and each and every parcel of land therein, and shall inure to and pass with said Tract, and each and every parcel of land therein, and are hereby imposed upon the premises covered by this conveyance as a servitude in favor of said tract, and each and every parcel of land therein as the dominant tenement or tenements." The grantor, upon selling all the lots in the subdivision, conveyed his rights of entry to the owners of the lots in proportion to their respective interests in the land. The plaintiff claimed title to two lots as holder of an undivided 550/1000ths interests in the rights of entry, although at the time of the action the plaintiff no longer owned any subdivision property. The court held that the exercise of the right of entry was dependent upon the holder's continuance in ownership of some part of the tract intended to be benefited. It is believed that the court's characterization of this position as the "majority view" is to be tempered by the circumstance that the restrictions here imposed were identical with the more usual "general plan" restrictive covenants, with the single addition of the right of entry for breach. See also *Second Church of Christ, Scientist, of Akron v. LePrevost*, 67 Ohio App. 101, 35 N.E. 2d 1015 (1941); *Stevens v. Galveston, J. & S. A. Ry. Co.*, 212 S.W. 639 (1919). One writer has discussed the role of the subdivider as a "commercial producer" of urban land. Monchow, *Use of Deed Restrictions in Subdivision Development* 5-7 (1928).

dition, according to well-established equity practice, specific enforcement of restrictive covenants will be decreed only where coerced compliance under the circumstances is not unreasonable, and in making the determination of reasonableness the courts will consider such factors as changes in the neighborhood and the practical benefit to the complainant as weighed against hardship to the defendant.¹⁸ A serious objection to the possibility of reverter and the right of entry is the unwillingness of the vast majority of American courts to apply to the enforcement of these interests the equitable notions of the changed conditions doctrine as applied to the enforcement of covenants. Further, since breach of restrictive covenants can be remedied by equitable enforcement, the covenant remains in effect as a protection for the benefited property. But breach of a condition establishing a reverter or right of entry also terminates all future protection for the benefited property, since the holders of these interests receive a fee simple absolute, shorn of all conditions. Thus the restrictive covenant, a theoretically perpetual limitation on land use, is in practice a flexible method of reconciling the protection of the desires of landowners with the freeing of land from restrictions no longer adapted to the changing needs of the community. But with only a few exceptions,¹⁹ American courts in dealing with conditions have refused to take into account anything other than the agreement originally made. As a result, possibilities of reverter and rights of entry are completely inflexible, operating in most jurisdictions wholly without concern for considerations of desirable land use.

¹⁸ "The problem is different where a right of entry has been created. The aid of equity is no longer required; the form of the restriction admits of a sort of legal specific performance." Goldstein, *op. cit. supra* note 4, at 251. But this specific performance, it is to be noted, is not of the condition, but of the promise to vacate the premises. Restatement, Property §§ 563-64 (1944).

¹⁹ In a leading case the court, in upholding a forfeiture based on a right of entry reserved against breach of a condition against sale, lease, or rental to Negroes, said by way of dictum that "it is true that where circumstances are changed, owing to the natural growth of a city or of the present use of a whole neighborhood, so that the purpose of a restriction in a conveyance no longer can be accomplished, and it would be oppressive and inequitable to give effect to such restriction, the courts will not enforce it, whether it be a restrictive covenant to restrain the violation of which injunction is sought, or whether it is a condition providing for a re-entry in case of breach." *Koehler v. Rowland*, 275 Mo. 573, 585, 205 S.W. 217, 221 (1918). A line of California cases has carried the changed conditions doctrine over into the possibility of reverter-right of entry situation. In one case, a declaratory judgment relieved the plaintiff's estate of a condition subsequent relating to building line restrictions, declaring that because of changed conditions no court would decree a reversion of the title to the grantor upon a breach of the condition. *Forman v. Hancock*, 3 Cal. App. 2d 291, 39 P. 2d 249 (1934). This approach had been clearly spelled out where the court refused to give effect to a racial restrictive condition, on the grounds that changes in the racial makeup of the community around the disputed property had made maintenance of the condition ineffectual to serve its original purpose. The court found it "needless to follow appellants' argument on the technical rules and distinctions made between conditions, covenants, and mere restrictions. . . . A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights." *Letteau v. Ellis*, 122 Cal. App. 584, 588-89, 10 P. 2d 496, 497 (1932). See also *Hess v. Country Club Park*, 213 Cal. 613, 2 P. 2d 782 (1931).

II

Legislation drafted to impose restraints on possibilities of reverter and rights of entry has assumed three general patterns: a statutory time limit imposed in the absence of a differing time stipulation by the parties, as adopted in Massachusetts; a prohibition against trivial conditions annexed to a conveyance, as adopted in Michigan; and a combination of the Massachusetts and Michigan statutes, as adopted in Minnesota.

The Massachusetts statute is an undesirable solution of the problem, since its very terms invite grantor-convenantees and grantors of estates on condition effectively to withdraw their stipulations from the operation of the act by inserting a specific time limit.²⁰ Apparently such a period could be any specific number of years so that, in practical effect, all the results of unlimited restrictions or conditions could be obtained.²¹ On the other hand, this legislation would appear to embody a sound philosophy when it deals with conditions and restrictions as interests essentially similar and therefore to be treated similarly.²²

A second solution has been attempted in a few states which have adopted substantially identical versions of an extremely general statute. The Michigan legislation is typical.²³ The statute provides that conditions of "merely nominal" benefit to the beneficiary are to be disregarded. One difficulty with the measure is that its provisions do not literally apply to a situation where the condition originally was founded on an "actual and substantial benefit," but changed

²⁰ "Conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable, or religious purposes. This section shall not apply to conditions or restrictions existing on July sixteenth, eighteen hundred and eighty-seven, or to those contained in a deed, gift, or grant of the commonwealth." Mass. Ann. Laws (Supp., 1946) c. 184, § 23.

²¹ One case occasionally cited for this proposition contains only a dictum to this effect, but the position taken is believed sound. *Burke v. Metropolitan District Commission*, 262 Mass. 70, 79, 150 N.E. 739, 742-43 (1928). So far as covenants are concerned, even where no time stipulation has been made by the parties, the thirty-year statutory period has been held to be not of right, but to be subject to the usual discretion of courts of equity in enforcing such covenants. Thus, in one situation the plaintiff was held precluded from obtaining specific enforcement of a building set-back restriction because she stood by in silence while the defendant in good faith violated the covenant, although the thirty-year period had approximately fifteen years to run. *Loud v. Pendergast*, 206 Mass. 122, 92 N.E. 40 (1910).

²² "No valid distinction—save possibly one of continuance of outworn procedural distinctions between forms of remedy—can possibly be drawn between the equitable restriction and most, if not all, of the other servitudes here involved [such as conditions, easements, profits, rights of re-entry, possibilities of reverter, or other servitudes or restrictions]." Clark, *op. cit. supra* note 14, at 740.

²³ "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." Mich. Stat. Ann. (Reis, Supp. 1946), § 26.46. The same statute appears in other states. Wis. Stat. (Brossard, 1943) § 230.46; Ariz. Code Ann. (Supp. 1945) § 71.123.

circumstances have rendered the stipulated use of "merely nominal" benefit.²⁴ While the striking down of whimsically conceived conditions would appear to be essential in this type of legislation, the more pressing problems—and the bulk of litigation—usually arise after an originally intelligible restriction or condition has been subjected to the pressures of a changing community. A further objection to this legislation is its piecemeal dealing with land use restrictions; it applies literally only to estates on condition.²⁵ It is submitted that an effective statute should govern all contractual restraints on land use which produce similar results.²⁶

The most ambitious enactment yet attempted is the Minnesota statute,²⁷ essentially a combination of the Michigan-type act and the thirty-year limit found in the Massachusetts legislation. Whether through more clearly defined policy or through better draftsmanship, the Minnesota legislature avoided at least two of the loopholes and ambiguities found in other measures. First, it expressly provided for the situation where conditions "shall become" merely nominal. Thus, the conditions on which forfeitable estates²⁸ depend presumably would be judged on the basis of considerations similar to those used in determining the granting of specific enforcement of real covenants. In addition, the legislature eliminated the virtually self-defeating option found in the Massa-

²⁴ *Smith v. Barrie*, 56 Mich. 314, 22 N.W. 816 (1885), construed the Michigan statute. Whether the plaintiffs could, after parting with all their holdings in the vicinity, take advantage of a condition subsequent prohibiting the use of liquor on the granted premises was a question expressly reserved by the court.

²⁵ The Michigan statute has been applied without discussion to the case of a residential restrictive covenant. *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N.W. 385 (1919). The same application was made later in another decision. *Stahl v. Dyer*, 235 Mich. 355, 209 N.W. 107 (1926). Only one case has come before the courts involving the Wisconsin statute. *Pepin County v. Prindle*, 61 Wis. 301, 21 N.W. 254 (1884) (condition subsequent). The Arizona statute has not thus far been involved in litigation.

²⁶ While comprehensive treatment of all such restraints, legal and equitable, seems essential, it is recognized that practical political considerations governing the enactment of such legislation may dictate a narrower treatment. This note does not consider problems arising in connection with easements, profits, or licenses, because it is primarily directed toward an examination of currently proposed Illinois legislation. This omission should not be considered as an indication that such problems are not of real concern in this field.

²⁷ Minn. Stat. (Mason, Supp. 1946) § 8075: "(a) Whenever any conditions annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis of forfeiture of the lands subject thereto. (b) All covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative thirty years after the date of the deed, or other instrument, or the date of the probate of the will, creating them; and after such period of time they may be wholly disregarded. (c) Hereafter any right to re-enter or to repossess land on account of breach made in a condition subsequent shall be barred unless such right is asserted by entry or action within six years after the happening of the breach upon which such right is predicated."

²⁸ The first paragraph of the statute would seem by construction to apply only to determinable fees and estates on condition subsequent. *Goldstein*, op. cit. supra note 4, at 255-56.

chusetts statute by making the thirty-year limit mandatory, and not merely an official substitute in the absence of private agreement.

Legislation dealing with land use restrictions should recognize the fact that the refusal of most American courts to apply the safeguards developed in connection with covenants to the possibility of reverter and right of entry probably is attributable to legal conceptions which ignore the similarity in function between forfeitable estates and covenants. Thus, most courts, in dealing with possibilities of reverter and rights of entry, apparently have felt themselves concerned solely with a property relationship, while in the covenant cases the typical approach has considered the duties of a promissory obligation. The very allegations contained in the pleadings in the two types of cases²⁹ appear to have moved courts in the direction of narrowing the scope of policy considerations deemed pertinent in the possibility of reverter and right of entry actions. When it is recognized, however, that forfeitable estates, essentially, are more drastic methods of obtaining compliance with contractual restraints on the use of land, these differences in rationale appear to be the result of a lag in legal analysis which not even the conservative law of real property should continue to tolerate.

Legislation decreeing the enforcement of estates on condition only as equitable servitudes should satisfy parties beneficially interested in maintenance of the prescribed use or restriction when such estates on condition are employed merely to compel a certain use of servient land. The well-established practice of enjoining breaches of negative covenants has been enlarged in most American jurisdictions to include the specific enforcement of affirmative covenants as well.³⁰ The harsh effects of forfeiture involved in reverter clauses and reserved rights of entry would seem to be easily and equitably avoided by specific enforcement of the condition.³¹ Where the condition governing a possibility of reverter or right of entry is merely in gross, the same rule should apply. Here the condition would have a maximum duration of the life of the grantor, and in any event would be enforceable only between the original parties.³²

Comprehensive legislation governing possibilities of reverter and rights of

²⁹ In substance, the possibility of reverter and right of entry allegations state "This is my land" while the covenant allegations claim that "The defendant promised."

³⁰ *Neponsit Property Owners Association v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 15 N.E. 2d 793 (1938). *Walsh*, *Equity* § 100 (1930); 3 *Tiffany*, *Law of Real Property*, § 859 (Jones ed. 1939).

³¹ Express exception of determinable fees and estates on condition subsequent granted for charitable, educational, or religious purposes from the operation of such legislation may be thought desirable. An argument in favor of such an exemption is that the policy in favor of encouragement of such gifts outweighs any detriment suffered from the stagnating effects of these restrictions.

³² "It is very clear that an equitable restriction running as a servitude with the land conveyed does not arise when the covenantee does not retain ownership of neighboring land, so that no dominant estate exists. Though enforceable at law and possibly in equity as a personal contract between the original parties, such restrictions cannot run as burdens upon the land conveyed for the personal benefit of the covenantee when no easement, legal or equitable, is created for the benefit of a dominant estate." *Walsh*, *Equity* § 100 (1930).

entry might well establish an additional rule, relating to covenants as well as to the forfeitable estates, placing a definite time limit on the operation of these qualifications on title.³³ A relatively certain method of determining what use can legally be made of land at any given time, without the necessity of resorting to the courts, appears to be as essential to systematizing the law of land use restrictions as the assimilation of rules governing estates on condition to general equitable considerations. In Illinois, although time-limit provisions apparently could be made retroactive in the case of possibilities of reverter and rights of entry, constitutional difficulties probably would bar this action in the case of covenants.³⁴

III

Problems arising from possibilities of reverter and rights of entry are being considered by the Illinois legislature. Judged by the considerations outlined above, the proposed Illinois legislation³⁵ requires some revision. Section 1³⁶ is merely a restatement of the common law as to alienability of possibilities of reverter and rights of entry. But if these interests are to become covenants in essence, as is believed desirable, alienability of the estates on condition will not be the crux of the problem. Rather, transferability of the protected estate will be the prime consideration. The mischief caused by possibilities of reverter and rights of entry cannot be cured, as attempted in the proposed Illinois statute by prohibiting their transfer while, at the same time, allowing descent to the heirs of the grantor.³⁷

Section 2,³⁸ apparently inserted to clarify the status of trustees and cestuis under the terms of Section 1, would be unnecessary if possibilities of reverter and rights of entry were to be enforced only as servitudes.

³³ "Legislation should be supplemented by a direct and simple provision upon which the conveyancer and title searcher can rely without extensive investigation or court proceedings, by which the title of the servient land is made wholly free after a period of years." Clark, *op. cit.* supra note 14, at 739.

³⁴ See notes 41 and 42 *infra* and accompanying text.

³⁵ Ill. S. 347, 65th Assemb., Reg. Sess. (Introduced April 30, 1947).

³⁶ "Section 1. No possibility of reverter or right of entry or re-entry for breach of a condition subsequent is alienable or devisable; and no conveyance thereof made after the effective date of this Act shall operate in favor of the grantee, or persons claiming under him, by estoppel, inurement of title, or operation of Section 7 of an Act entitled 'An Act Concerning Conveyances,' approved March 29, 1872, as amended."

³⁷ In spite of the fifty-year limit in Section 4, as set out in note 40 *infra*, all of the difficulties outlined above would still be present if the designated condition happened within the period. For example, the grantor may have transferred the protected land to a third person, but upon the breach of condition within the fifty-year time limit, the estate would revert to, or be subject to entry by, the grantor or his heirs, who, it is submitted, have slight moral claim to it.

³⁸ "Section 2. At the termination of trust, however effected, any possibility of reverter and any right of entry or re-entry for breach of condition subsequent heretofore or hereafter reserved by or to the trustee and affecting land in this State ceases and determines as to the trustee but shall, at such termination, pass to the person or persons who receive the assets of the trust."

The draftsmanship of Section 3³⁹ is questionable. The provision may be sound when the condition is imposed for the benefit of a business which is being discontinued. But termination of the possibility of reverter or right of entry upon dissolution of a corporation may be unwarranted if such dissolution is either part of a reorganization proceeding or is the forerunner of continuation of the business under a non-corporate form of enterprise.

Irrespective of the desirability of the time limits provided in the next two sections,⁴⁰ a serious constitutional difficulty might be created in some states in connection with the retroactive operation of the statute in invalidating pre-existing interests in land. However, this problem probably will not arise in Illinois. A line of Illinois cases dealing with possibilities of reverter arising out of statutory dedication of streets has established the position that these interests may be dealt with by the legislature free from "any constitutional limitation."⁴¹ If possibilities of reverter are not estates and may therefore be subjected to the summary treatment indicated, a fortiori rights of entry, which require not only breach but election to enter as well, should be amenable to the same legislative handling. So far as covenants are included in time-limit legislation of this kind, however, express negation of retroactivity as to them is believed essential.⁴²

³⁹ "Section 3. When a corporation is dissolved or ceases to exist, any possibility of reverter and any right of entry or re-entry for breach of a condition subsequent heretofore or hereafter reserved by or to the corporation and affecting land in this State ceases and determines."

⁴⁰ "Section 4. Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than fifty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than fifty years, it shall be valid for fifty years."

"Section 5. If by reason of a possibility of reverter created more than fifty years prior to the effective date of this Act, a reverter has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such possibility of reverter, after one year from the effective date of this Act."

"If by reason of a breach of condition subsequent created more than fifty years prior to the effective date of this Act, a right of re-entry has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such right of entry or re-entry after one year from the effective date of this Act, unless entry or re-entry has been actually made to enforce said right before the expiration of such year."

⁴¹ *People ex rel. Franchere v. Chicago*, 321 Ill. 466, 476, 152 N.E. 141, 144-45 (1926). "Prior to the act in question . . . nothing remained in the dedicator but a mere possibility of reverter. This possibility, not being an estate, was not protected by any constitutional limitation, and it was competent for the legislature to abolish this possibility of reverter or to change the devolution of title upon the happening of the future contingency in any way it saw fit and . . . any legislative enactment to that end is not unconstitutional." *Ibid.* Another Illinois opinion stated that "the possibility of reverter in the streets which remains in a dedicator after the making of a statutory plat . . . is not an estate and is not protected by any constitutional limitation . . . it is perfectly competent for the legislature to abolish this possibility of reverter or to change the evolution of title upon the happening of the future contingency in any way it may see fit." *Prall v. Burckhardt*, 299 Ill. 19, 36, 132 N.E. 280, 287 (1921).

⁴² Both the Massachusetts and Minnesota statutes, notes 20 and 27 *supra*, restrict operation of their thirty-year limit to subsequently created interests.

But since pre-existing equitable interests of this type would remain subject to the controls involved in their specific enforcement, though they might outlast the statutory limit, they would not do so if courts of equity deemed their enforcement inequitable.

Section 6⁴³ appears to be a sound realization of the limitations of legislation dealing with possibilities of reverter and rights of entry. Certainly the use of these instruments in the enforcement of leasehold promises does not produce the grossly inequitable results caused by their use in grants of fees. Nor need such legislation deal with the highly developed law of mortgages, where the safeguards devised to protect mortgagors and the security nature of the transaction render the problems greatly different from those involved in the Illinois proposal.⁴⁴

THE LIQUIDATION OF CORPORATE OWNERSHIP INTERESTS—A FEDERAL TAX PROBLEM

Tax problems raised for shareholders concerned with liquidating their entire interests in a corporate enterprise have been complicated by failure of Congress and the courts to recognize the existence of a distinct, identifiable business decision which requires consistent treatment regardless of the particular method employed to accomplish disinvestment¹ of the capital used in the business. Basically, three alternative methods of disposal are available to the sellers of a corporate business. The conventional method of disinvestment is a statutory proceeding in liquidation and dissolution by which the corporation, usually through trustees, sells its assets and then distributes the proceeds to its share-

⁴³ "Section 6. This Act does not invalidate or affect (1) a conveyance made for the purpose of releasing or extinguishing a possibility of reverter or right of entry or re-entry:

(2) A right of entry or the transfer of a right of entry for default in payment of rent reserved in a lease or for breach of covenant contained in a lease, where such transfer is in connection with a transfer of a reversion and the rent reserved in the lease.

(3) A right of entry or the transfer of a right of entry for default in payment of a rent granted or reserved in any deed or grant, or for breach of any covenant in any deed or grant where a rent is granted or reserved, where such transfer is in connection with a transfer of a rent so granted or of a rent so reserved; or

(4) Any rights of a mortgagee based upon the terms of the mortgage, or any right of a Trustee or a beneficiary under a trust deed in the nature of a mortgage based upon the terms of the trustless deed."

⁴⁴ The proposed Illinois statute concludes with a separability clause that does not require comment.

"Section 7. If any provision of this Act or the application of any provision thereto to any property, person, or circumstances is held to be invalid, such provision as to such property, person or circumstances shall be deemed to be excised from this Act, and the invalidity thereof as to such property, person, or circumstances shall not affect any of the other provisions of this Act or the application of such provision to property, persons or circumstances other than those as to which it is invalid, and this Act shall be applied and shall be effective in every situation so far as its constitutionality extends."

¹ The word "disinvestment" is used to mean a conversion of assets to liquid form or, as it is sometimes expressed, a negative investment.