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Possibilities of Reverter and Rights of Re-entry for Condition Broken: The Modern Context for Determinable and Conditional Interests in Land

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I. *Introduction*

The transfer of ownership in real property is usually characterised by an outright grant of the fee simple which operates to vest an absolute interest in the grantee. Sometimes, however, land is conveyed in circumstances where the grantor purports to reserve a right to recover the property if a stipulated event occurs or if the grantee does, or abstains from doing, a particular thing. Depending upon the form of the instrument, this may give rise to a determinable fee simple or a fee simple upon condition subsequent.

Such dispositions have proven to be an unpredictable vehicle for the grantor's intentions, the ultimate effect of which has often turned upon subtle distinctions beyond the contemplation of the original parties. The common law has been a vigilant guardian of these distinctions, consigning them, in the process, to the treacherous realm of literal construction. A long list of cases attest to the consequences of a minor oversight or inattention to detail. The decisions tend to cluster around two issues which will provide the foundation of this article: the dispositive effect of a grant and the relationship of the interests to the rule against perpetuities. With regard to former, this article will focus on the manner in which conditional and determinable fees are created, with particular emphasis upon the technical construction of documents. Discussion of the latter will principally concern the application of the common law rule against perpetuities and the impact of legislative changes that have been introduced in a number of jurisdictions. In addition, reference will be made to certain statutes that serve to qualify or curtail these estates. Finally, it will be asked whether reforms to date have laid a sufficient basis for the future role of conditional and

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determinable fees. The underlying analysis will be directed to whether both estates in their current form can be justified in terms of the function they fulfil and the effectiveness with which that function is accomplished.

II. *The Interests Defined*

The respective interests should be defined at the outset. A fee simple upon condition subsequent[1] arises when the grant of a fee simple is qualified by an independent condition which provides that the interest conveyed shall be defeated upon the occurrence or non-occurrence of a certain event, which constitutes a breach of that condition. If such a breach takes place, the grantor has a right of re-entry to terminate the grantee's estate.[2] Breach of a condition subsequent therefore renders the grantee's interest voidable at the instance of the grantor. Until this right is exercised, the estate continues.[3]

In contrast, a determinable fee simple creates a limitation on the estate that is granted. If the specified event occurs, the interest of the grantee is automatically brought to an end and the estate reverts to the grantor. The grantor's interest is termed a possibility of reverter. If at any time it is established that the determining event cannot occur, the possibility of reverter is extinguished and the grantee's interest becomes absolute.

It is apparent that a conditional and determinable fee give rise to different estates. A condition subsequent is added to what is already a transfer of an absolute interest. The full estate is granted subject to possible future forfeiture. Conversely, a determinable fee transmits less than the full estate, the determining event marking the limit of the interest conveyed. Maudsley and Burn express the distinction thus:

> There is a basic difference between determinable interests and interests upon condition. The former is a grant of something less than the interest specified; the latter is a grant of the interest subject to a liability to be cut down. To give land to trustees so long as it is used for Church purposes is a grant less than a fee simple. To give land to trustees in fee simple subject to a condition that the fee simple shall terminate if the land is not used for Church purposes is a fee simple subject to a condition. The difference is that between an eleven inch ruler and a foot ruler subject to the last inch being cut off.[4]

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1. This may be contrasted with a condition precedent, which relates to the commencement, as opposed to the termination, of an interest.
2. An estate may be granted *inter vivos* by deed, or devised by will. The terms "grantor" and "grantee" are used here to include both forms of disposition.
3. *Halsbury* makes the point succinctly: "An estate upon condition cannot be defeated without actual entry or claim equivalent to entry. It is not *ipso facto* defeated by the happening of the critical event." (39 *Halsbury's Laws of England,* 4th ed. (1982) at 280, para. 399).
4. R.H. Maudsley and E.H. Burn, *Land Law: Cases and Materials,* 2nd. ed. (London: Butterworths, 1970) at 24.

Canadian jurisprudence has recognised these distinct interests for over a century. In *Re Melville*[5] a certain parcel of land was sold to a municipality for the purpose of erecting a school house. The conveyance was subject, *inter alia,* to the condition that

> [I]f the Municipal Council should at any time thereafter sell, lease, alien, transfer or convey the said land, or any part thereof, then the indenture was to be null and void, and it should be lawful for the said John Le Breton and his heirs to re-enter the said land and premises and avoid the estate of the said Municipal Council.[6]

The grantee later sold the land and thereby breached the condition. In addressing the status of his provision, Mr. Justice Proudfoot of the Chancery Division of the Ontario High Court classified both a determinable fee simple and a fee simple upon condition subsequent as a species of condition subsequent. The former was described as a conditional limitation, the latter as a condition of re-entry or a condition strictly so called. Despite the use of a slightly different form of nomenclature, the following observations accurately reflect the present understanding of these interests:

> A conditional limitation operates to determine the estate by the intrinsic force of the limitation; in the event prescribed by the terms of the condition the estate ceases. A condition operates by reserving a right of re-entry to the grantor and his heirs; in the event prescribed the estate becomes defeasible by entry, but until entry the estate continues.[7]

It was found that there was a valid condition subsequent with a concomitant right of entry for its breach. Accordingly the land resulted to the grantor's estate.[8]

This basic statement of principle was adopted by Chief Justice Meredith of the Common Pleas Division of the Ontario High Court in *Re St. Patrick's Market*[9] and the Appellate Division of the Ontario Supreme Court in *Matheson* v. *Town of Mitchell.*[10]

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5. (1886), 11 O.R. 626 (Ont. H.C.).
6. *Ibid.* at 628.
7. *Ibid.* at 631.
8. In this case the Court upheld a condition of unlimited duration. *Prima facie* the provision seems to offend the rule against perpetuities (see *infra.*). However, the issue does not appear to have been raised either in argument or in the judgement; to this extent the decision was perhaps rendered *per incuriam.* See Barlow J. in *Fitzmaurice v. The Board of School Trustees of the Township of Monck,* [1949] O.W.N. 786 at 788 (Ont. H.C.) [hereinafter *Fitzmaurice v. Township of Monck*].
9. (1909), 1 O.W.N. 92.
10. (1919), 51 D.L.R. 477, 46 O.L.R. 546 [hereinafter *Matheson v. Town of Mitchell* cited to O.L.R.]

III. *Construction of Deeds*

While conditional and determinable interests are conceptually distinct, at a practical level the distinction has proven to be problematic. It is not uncommon to find that a document has failed to adequately define the interest it was intended to create. In turn it has fallen to the courts to determine the status of such dispositions. Given the nature of the task, courts have understandably sought recourse to the technical canons of construction. In the process, form and substance have become inextricably linked. Not infrequently the effect of a deed has hinged upon narrow considerations of drafting. In this regard two matters require attention: first, the terminology describing the interest, and second, the manner in which this information is recorded in the document. In addition, some confusion has arisen as to the relationship between conditions and covenants. More particularly, there is uncertainty as to how readily a covenant should be imputed as a substitute for an invalid condition. These topics will now be separately examined.

1. *The Language of an Instrument*

The language of an instrument is intended to illuminate the grantor's intentions. However, in the area under review, the task of interpretation is frequently undertaken in circumstances that can at best be described as murky. The essential determination can be simply stated: at issue is whether a qualification has been added to an outright grant or whether a limitation has been imposed on the estate itself. Often the distinction is a fine one. For example, the following clauses have been construed as creating a fee simple upon condition subsequent:

> [S]hould the said parcel or tract of land at any time hereafter cease to be used for the purposes for which it is hereby granted the said lands . . . shall revert to the said party of the first part . . . on payment . . . of Seventy five dollars.[11]

> [O]n the condition that this property is to be held and used for all time for civic purposes in perpetuity.[12]

> [T]he above described property is to be used for school purposes only and the said grantor reserve[s] to himself and his heirs the preference to buy the said property at the current price should the same ceased [sic] to be used for the purposes intended.[13]

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11. *Re North Gower Township Public School Board and Todd* (1967), 65 D.L.R. (2d) 421 at 422-3, [1968] 1 O.R. 63 at 64-5 (Ont. C.A.) [hereinafter *Re North Gower* cited to D.L.R.].
12. *City of Moncton v. The Queen in right of Canada* (1987), 46 R.P.R. 202 at 204 (N.B.Q.B.).
13. *Re Essex County Roman Catholic Separate School Board and Antaya* (1977), 80 D.L.R. (3d) 405 at 407, 17 O.R. (2d) 307 at 309 (Ont. H.C.) [hereinafter *Re Essex* cited to D.L.R.].

On the other hand, the following have established a determinable fee simple:

> Doth grant unto the said parties of the Third Part . . . for so long as it shall be used and needed for school purposes and no longer.[14]

> [To trustees] for the purposes of the Orphan Girls' Home at Kendal . . . and on failure of the said trust . . . to be held upon such [other] trusts . . . .[15]

> [T]o the charity school . . . so long as it shall continue to be endowed with charity.[16]

It is evident that the status of a disposition can turn upon subtle verbal distinctions.[17] At the same time, individual words and clauses cannot be studied in isolation because conflicting terminology may be used interchangeably in the same document. Thus, mere reference to a possibility of reverter will not in itself be conclusive of a determinable fee if the grant predominantly discloses the characteristics of a fee simple upon condition subsequent.[18] Similarly, a separate clause of defeasance will fail to establish a condition subsequent when a determinable fee is otherwise indicated.[19] Accordingly, only by viewing the instrument as a whole is it possible to categorise the interest it has created.

A further complication arises with respect to conditions in that courts generally place a narrow interpretation upon provisions conferring a right of re-entry. In the words of Anger and Honsberger:

> [S]ince a condition appended to an estate may lead to forfeiture, the law has been jealous in its scrutiny of conditions subsequent and will readily hold them void as offending public policy, as incapable of performance, or for uncertainty.[20]

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14. *Re Tilbury West Public School Board and Hastie* (1966), 55 D.L.R. (2d) 407 at 408, [1966] 2 O.R. 20 at 21 (Ont. H.C.) [hereinafter *Re Tilbury* cited to D.L.R.].
15. *Re Cooper's Conveyance Trusts, Crewdson v. Bagot,* [1956] 3 All E.R. 28 at 29-30, 1 W.L.R. 1096 at 1098 (Ch.D.).
16. *Attorney General v. Pyle* (1738), 26 E.R. 278 at 278 (Ch.).
17. The extent of such subtlety was captured by Grant J. (citing R.E. Megarry and H.W.R. Wade, *The Law of Real Property,* 2nd ed. (London: Stevens & Sons, 1959 at 77) in *Re Tilbury, supra,* note 14 at 411:

> [A] devise to a school in fee simple 'until it ceases to publish its accounts' creates a determinable fee, whereas a devise to the school in fee simple 'on condition that the accounts are published annually' creates a fee simple defeasible by condition subsequent . . . .

18. See *Re North Gower, supra,* note 11 at 422-24.
19. See *Re Tilbury, supra,* note 14 at 411-12.
20. Anger and Honsberger, *Law of Real Property,* vol. 1, 2nd ed. by A.H. Oosterhoff and W.N. Rayner (Aurora: Canada Law Book, 1985) at 127, para. 505.5. It seems that the requirement of certainty to which the authors refer, is applied with particular vigour: see *Clavering v. Ellison* (1859), 11 E.R. 282, 29 L.J. Ch. 761 (H.L.), *Re Viscount Exmouth*

An abiding concern is that whatever the form, the grantor's objective may be the same in each case, namely to bring an end to the grantee's estate if a specified event occurs. Nevertheless, an infelicity of the draftsman's pen has not infrequently served to defeat a grantor's true intent. Courts have readily commented upon the different consequences that would flow from a modified wording,[21] but it has generally been considered beyond their purview to re-cast documents so as to accommodate a particular result.

In one recent case however, judicial intervention has taken the more active form of ordering rectification. In *Re Village of Caroline and Roper,*[22] an owner of land, TR, gave permission to a community group to construct a hall on a portion of his property. This was on the understanding that the hall would only be used for community purposes. In due course the building was constructed, with TR retaining title to the land. Upon TR's death the land passed to his widow, RR. In 1949 the community association decided to make further improvements to the hall and before undertaking this, RR was asked to convey the land to the association. RR agreed to do so providing the property would continue to be used as a community centre. She was given a document that stated: "This acre . . . Shall revert back to the Late Thomas Roper Estate if used for other than a community centre."[23] In 1982 the hall was destroyed by fire and the present owner, the Village of Caroline proposed to sell the land for commercial use. The Village, as successor to the community group, had acquired the property with notice of the condition. The Village sought a declaration that the condition, as to use, contained in the document given to RR was void as infringing the rule against perpetuities. Mr. Justice Cavanagh reviewed the distinction between a determinable fee and a fee simple on condition subsequent and held that the provision in question was a condition that contemplated a future act of defeasance which may or may not occur at some indefinite date. As such it was void. However, Cavanagh J. proceeded to find that the document did not reflect the true intentions of the parties and ordered rectification,

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(1883), 23 Ch. 158 (Ch. D.), *Re Sandbrook,* [1912] 2 Ch. 471 (Ch. D.), *Sifton v. Sifton,* [1938] 3 D.L.R. 577, [1938] O.R. 529 (P.C.), *Clayton v. Ramsden,* [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.), *Re Brace (decd.), Gurton v. Clements,* [1954] 2 All E.R. 354 (Ch. D.) and *Re Down,* [1968] 2 O.R. 16 (Ont. C.A.).

21. e.g. *Re St. Patrick's Market, supra,* note 9 at 93, *Matheson v. Town of Mitchell, supra,* note 10 at 548, *Fitzmaurice v. Township of Monck, supra,* note 8 at 787-88.

22. (1987), 37 D.L.R. (4th) 761 (Alta Q.B.) [hereinafter *Caroline and Roper*].

23. *Ibid.* at 762.

> . . . to show that the transferees received title to the property as trustees for as long as the property was used as a community centre and to be conveyed back to the Ropers at the end of that use.[24]

The document as rectified qualified the Village's enjoyment of the estate in words denoting a determinable fee.[25] It was further directed that the property be conveyed back to TR's estate.

In satisfying himself as to the appropriateness of rectification, Cavanagh J. cited with approval the judgment of the Ontario Court of Appeal in *H.F. Clarke Ltd.* v. *Thermidaire Corp. Ltd.*[26] In *Clarke* Mr. Justice Brooke stated that the parties must have reached complete agreement as to the terms, but failed to record them correctly in accordance with their prior intentions. Cavanagh J. concluded:

> Here the evidence is undisputed that the intention was to preserve the Ropers' rights. That intention continued to the making of the document by an unfortunate use of words. The document does not protect that intention as the parties intended that it should.[27]

It is submitted that for practical purposes the remedy of rectification should be viewed with caution in the context of determinable and conditional fees. First, most cases are resolved solely as a matter of interpretation of deeds and ancillary documents. In these instances, while prior oral discussions undoubtedly took place, they usually fall outside the enquiry of the court. This approach was not adopted in *Caroline and Roper.* A factor that may have had some bearing is that the respondent, the son of TR and RR, was one of the original parties to the negotiations that culminated in production of the document that was provided to RR as an inducement to transferring title. It may be conjectured that the presence of an actual party to the original transaction and the opportunity for specificity of recall in respect of the terms of the agreement, were persuasive in encouraging the Court to look beyond documentary evidence. These circumstances, however, are relatively uncommon and most actions are heard after the original parties' demise.

Secondly, Cavanagh J. ruled that the agreement, which was drafted by laymen, did not adequately reflect their intention to preserve the grantor's

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24. *Ibid.* at 765.

25. It may be noted that rectification, being an equitable remedy, is not usually available where there has been a long delay. In *Caroline and Roper* the period between execution of the document and its rectification was 38 years. However, it is possible to rationalise this relief on the basis that it was granted within a relatively short time from the date of the proposed change of use, being the effective cause of the dispute. The precise time is not clear from the law reports but it would not in any event have exceeded 5 years.

26. (1973), 33 D.L.R. (3d) 13, [1973] 2 O.R. 57.

27. *Caroline and Roper, supra,* note 22 at 765.

rights. However, it may be argued that it is unlikely that the parties would have addressed the nuances of a determinable and conditional fee or the ultimate effect of each. The terminology of the document indicated a condition subsequent and this was not incompatible with the parties' objectives. This disposition would have entitled re-entry for condition broken. Its enforceability would in turn depend upon other factors, particularly whether the condition was of limited or unlimited duration. The substitution of a determinable fee undoubtedly produced the most favourable result for the grantor, but this initiative draws close to Hanbury's stricture[28] that the remedy of rectification exists to correct, not improve an instrument.[29]

2. *The General Form of an Instrument*

The ultimate effect of an instrument may depend not only upon the manner in which the interests are described, but also upon the precise placement of such descriptions within the scheme of the document. A qualification to a grant may be inserted in the recitals, grant, habendum or in an independent clause elsewhere. The consequences of each are not necessarily the same and certain rules of construction will determine the status of conditions or limitations that purport to modify an absolute grant. In this connection a few basic principles may be stated.

First, the incorporation of a right of re-entry or possibility of reverter in the granting clause will furnish the most cogent evidence of a residuary interest in the grantor. Thus, Mr. Justice Grant, in construing a deed as creating a determinable fee simple, remarked:

> I am influenced to such a conclusion by reason that the words 'so long as it shall be used and needed for school purposes and no longer' are used in the granting clause and they are words denoting a determinable fee. Another indication is that the limit of the estate granted is set in such

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28. *Hanbury's Modern Equity,* 9th ed. by R.H. Maudsley (London: Stevens & Sons, 1969) at 661.

29. In this context the words of Lord Selborne in *Pearks v. Moseley* (1880), 5 App. Cas. 714 at 719 (H.L.) seem particularly apposite:

> You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law.

granting clause itself as distinguished from a case where the fee absolute is qualified independently.[30]

Secondly, the grant may be expressed to convey an absolute interest while the recitals or habendum may appear to curtail it. As a general proposition, the grant prevails in respect of any conflict with the recitals[31] and the habendum.[32] If the grant is absolute, it would seem that any abrogation therefrom contained elsewhere in the deed is, by definition, inimical to the absolute nature of that disposition. In that sense any qualification could be characterised as a conflict which should theoretically be overridden. However, this approach has not been applied in its fullest vigour. To do so would ignore the function of the habendum which is to limit the estate.[33] Effect is given to the habendum providing it is not repugnant to the grant.[34] Thus a habendum imposing a restriction on an outright conveyance is not necessarily repugnant thereto even though it may introduce an interest such as a right of re-entry which could potentially defeat the estate granted.

On the other hand, recitals have a less significant role in the interpretation of documents, particularly because they are contained within the non-operative part.[35] If the operative part of a deed is unambiguous the recitals will usually be disregarded. In the limited situation where the operative part is unclear, recitals may be invoked in order to explain the context of the agreement.[36] Not surprisingly, words in a recital that conflict with a grant are more readily displaced than provisions in a habendum.

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30. *Re Tilbury, supra,* note 14 at 411.

31. 12 *Halsbury's Laws of England,* 4th ed. (1975) at 638-39, paras 1509 and 1510. See also *Mackenzie v. Duke of Devonshire,* [1896] A.C. 400 (H.L.), *Powell v. City of Vancouver* (1912), 1 W.W.R. 1022 (B.C.S.C.). Affirmed on appeal (1912), 8 D.L.R. 24, 3 W.W.R. 108 and 161 (B.C.C.A.), *Commissioners of Inland Revenue v. Raphael,* [1935] A.C. 96 (H.L.).

32. *Halsbury, supra,* note 31 at 659, para. 1536. See also *Meyers v. Marsh* (1852), 9 U.C.Q.B.R. 242 (Ont. Q.B.), *Jameson v. The London and Canadian Loan and Agency Company* (1897), 27 S.C.R. 435, *Purcell v. Tully* (1906), 12 O.L.R. 5 (H.C.), *Re Sherlock and Green,* [1949] 3 D.L.R. 476 (Ont. H.C.), *Smith v. The Queen,* [1983] 1 S.C.R. 554.

33. *Halsbury, supra,* note 31 at 658, para. 1534.

34. *Odgers' Construction of Deeds and Statutes,* 5th ed. by G. Dworkin (London: Sweet & Maxwell, 1967) at 200-203. See also *Spencer v. Registrar of Titles,* [1906] A.C. 503 (P.C.) and *Hunter v. Munn,* [1962] O.W.N. 250 (C.A.).

35. *Odgers' Construction of Deeds and Statutes, supra,* note 34, divides deeds into the basic categories of "Non-Operative Elements" (date, parties and recitals) and the "Operative Part" (containing the premises including the grant, and the description of the parcels, the habendum, and covenants).

36. *Halsbury, supra,* note 31 at 638, para. 1509, and at 640, para. 1511; *Odgers' Construction of Deeds and Statutes, supra,* note 34 at 152-54.

The Ontario High Court decision in *Re McKellar*[37] illustrates the treatment of a recital and habendum which conflicted with each other as well as the grant. The Court was called upon to determine the status of a deed where the grant clause was without apparent limitation, but the recital provided that the grantor had,

> [A]greed to grant . . . the lands . . . but only so long as the said Railway Company shall continue to occupy and use the hereinbefore described lands for the purposes as set out. . . .[38]

Mr. Justice Fraser noted that the wording of the recital indicated a fee simple determinable. However this was at variance with a later clause in the operative part of the deed immediately after the legal description. This clause contained an express condition that as soon as the Railway Company ceased to occupy the land for stated purposes it would revert to the original grantor who would become entitled to enter thereon and take possession. The habendum which followed was expressed to be "subject to the above mentioned condition and understanding."[39] On a review of the entire document it was held that the recital could not prevail over the operative part of the instrument which included the grant, the condition and the habendum. The condition, as confirmed by the habendum, established "a clear and unambiguous grant of a fee simple subject to a condition subsequent"[40] and the estate was categorised accordingly.[41]

Thirdly, reference is sometimes made to the general rule of construction that if the effect of a clause would be to negate an earlier provision, the earlier clause will prevail.[42] It is submitted that this should be viewed as a proposition of limited application. The rule will not be adopted if it would serve to defeat the manifest intentions of the parties or force a tortuous construction of the document.

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37. (1972), 27 D.L.R. (3d) 289, [1972] 3 O.R. 16. Affirmed on appeal (1973), 36 D.L.R. (3d) 202 (Ont C.A.) [hereinafter *Re McKellar* cited to 27 D.L.R.].
38. *Ibid.* at 291.
39. *Ibid.* at 292.
40. *Ibid.* at 299.
41. It was further found that the condition as drafted was void for remoteness. For discussion of the rule against perpetuities see *infra.*
42. This construction was enunciated by Lord Wrenbury in *Forbes v. Git* (1921), 61 D.L.R. 353 at 355-56, [1922] 1 W.W.R. 250 at 253 (P.C.). However, in the same case, Duff J. (dissenting) in the Supreme Court of Canada, denounced the rule as being of application "only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole." (*Git v. Forbes* (1921), 62 S.C.R. 1 at 10, 59 D.L.R. 155 at 161). The latter view was endorsed by Sir Joseph Chisholm C.J. in *Kenny v. Kenny,* [1940] 1 D.L.R. 243 at 252 (N.S.S.C.).

In summary, it can be anticipated that words of limitation or condition will effectively qualify an absolute grant if they are incorporated in the operative part of the instrument, and particularly the grant clause. Inconsistencies within the operative part will usually be settled by reference to the habendum.[43] Finally, any conflict between the non-operative and operative parts will invariably be resolved in favour of the latter.

3. *Conditions and Covenants*

A provision that falls short of establishing a condition or limitation will either give rise to another form of legal interest or else it will simply fail. The latter is particularly likely when the grantor recites a philanthropic purpose for conveying property to a public body without expressly limiting the grant to reflect that intent. In *Powell* v. *City of Vancouver*[44] recitals in a deed mentioned that the grantee had agreed to construct and maintain a city hall on a designated site in return for donation of the land. The grant was silent as to use. Mr. Justice Clement, at trial, held that mere reference in the recital to the purpose for which the land was granted did not *per se* impose a qualification upon the estate. As neither a condition subsequent nor a resulting trust had been created, the defendant City took the land as an outright grant.[45]

On the other hand, a provision in a deed may impose a legal obligation upon the grantee without actually defeating the estate granted or operating a forfeiture for condition broken. A stated term may create a covenant which in its simplest form may constitute a promise that is enforceable under the ordinary law of contract between the original parties.[46] In certain circumstances it is also possible for a covenant to exist as an interest in land.[47] The distinction between conditions and covenants

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43. Conversely, if the operative part is consistent, as where an outright transfer is expressed in both the grant clause and the habendum, it is most unlikely that any effect will be given to reservations or limitations contained elsewhere in the deed: *King v. Estey* (1987), 35 D.L.R. (4th) 422 (N.B.C.A.).

44. *Supra,* note 31.

45. Clement J. remarked, without deciding the matter, that the plaintiff's remedy, if any, could only lie in damages for failure to maintain the hall (1912), I W.W.R. 1022 at 1024 (B.C.S.C.).

46. Again, property may be received under circumstances in which it is impressed with a trust in the hands of the transferee.

47. Covenants run with the land in the following situations: (i) if there is privity of estate, covenants which touch and concern the land are enforceable at law and equity, (ii) the benefit of covenants which touch and concern the land are enforceable at common law, and (iii) equity allows both the benefit and burden of restrictive covenants to run with the land (except against a *bona fide* purchaser of the legal estate, for value, without notice) providing there is both benefited and burdened land. See R.E. Megarry and H.W.R. Wade, *The Law of Real Property,* 3rd ed. (London: Stevens & Sons, 1966) at 724 *et seq.*

is sometimes problematic and the relationship between the two has on occasion proven a source of confusion.[48] This is illustrated in *MacLeod* v. *Town of Amherst.*[49] At issue was the wording of a deed that conveyed lands to the Town of Amherst "for use as a public or community beach and for other recreational purposes."[50] This clause appeared in the recitals and habendum, but not in the grant. At trial, Mr. Justice MacIntosh ruled that the grant prevailed over any qualifications or restrictions elsewhere in the document. The instrument failed to establish a condition subsequent or a trust. In so finding, MacIntosh J. opined: "If the provision in the deed is not a condition subsequent it must be a covenant. It cannot be a nullity."[51] However, as no damages were capable of assessment the action was dismissed.

The Appeal Division upheld the result but took a more cautious view.[52] It was noted that if the deed was interpreted as creating a condition subsequent, then the stipulation as to use offended the rule against perpetuities and was therefore void. No opinion was expressed on the merits of the trial judge's conclusion that if the provision in question was not a condition subsequent it must perforce be construed as a covenant. Mr. Justice Coffin, delivering the judgment of the Court, indicated that this determination may not have been strictly necessary for the decision. It was observed however that the approach of MacIntosh J. was supported by the reasoning of the Supreme Court of Canada in *Pearson* v. *Adams.*[53]

It is submitted that it is unsafe to suggest as a general proposition that a stipulation that fails as a condition subsequent must necessarily be a covenant giving rise to a cause of action on its breach. It has long been recognised that an instrument may contain precatory words that are insufficient to impose a binding obligation on the transferee. If a particular clause is ineffective, the deed will be interpreted without reference to it.

Furthermore, *Pearson* v. *Adams* does little to buttress the reasoning of MacIntosh J. in *MacLeod* v. *Town of Amherst.* The former case involved the interpretation of a deed that conveyed land on the basis that it was

> . . . to be used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, to be of fair architectural appearance,

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48. See *Bashir v. Commissioner of Lands,* [1960] A.C. 44, [1960] 1 All E.R. 117 (P.C.) and comment thereon: J.L. Montrose, "Conditions and Promises" (1960), 23 M.L.R. 550.
49. (1973), 39 D.L.R. (3d) 146 (N.S.S.C.T.D.).
50. *Ibid.* at 149.
51. *Ibid.* at 152.
52. (1974), 44 D.L.R. (3d) 723 (N.S.S.C., App. D.).
53. (1914), 50 S.C.R. 204.

> and to be built the same distance from the street line as houses on the adjoining lots.[54]

The matter was heard on appeal before the Divisional Court of Ontario,[55] the Ontario Court of Appeal[56] and ultimately, the Supreme Court of Canada.[57] Despite some differing opinions on other issues, it was common ground that the provision was not a condition subsequent. The absence of a right of re-entry was particularly persuasive in this determination.[58] Given the form, nature and context of this clause it is not surprising that it should have been construed as a covenant.[59] It may be surmised that the provision was not characterised as a *restrictive* covenant because it appears to be positive in nature. As such it would not be enforced by equity under the doctrine in *Tulk* v. *Moxhay*.[60] It is more likely that the stipulation was viewed as a common law covenant,[61] the benefit of which is enforceable by an assignee.

There is no cogent evidence from the judgements in *Pearson* v. *Adams* that a provision which fails to create a condition must, by default, be deemed a covenant. The only authority for this claim is the assertion of Mr. Justice Riddell in the Divisional Court, that: "It is either a condition or a covenant — it is not simply a mere nullity."[62] However, the boldness of these words must be tempered by their context. Riddell J. went on to adopt the reasoning of Chief Justice Bigelow in *Rawson* v. *Inhabitants of School District No. 5 in Uxbridge*[63] which was commended as presenting a clear, concise and accurate statement of the law. The latter case discussed the form and method of creating covenants. In a passage quoted by Riddell J. at some length, it is apparent that Bigelow C.J.'s observations were predicated upon the assumption that a deed, on its proper construction, must be capable of sustaining the necessary elements of a covenant.[64] This seems an obvious qualification. It is axiomatic that the law cannot give effect to an obligation if the requisite intention cannot reasonably be adduced from the words and conduct of the parties.

Although the Supreme Court of Canada in *Pearson* v. *Adams* indicated that wherever possible, effect should be given to contractual

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54. *Ibid.*, at 205.
55. (1912), 27 O.L.R. 87.
56. (1913), 28 O.L.R. 154.
57. *Supra*, note 53.
58. *Ibid.* at 208-209 (Idington J.) and 212 (Anglin J.).
59. See *supra*, note 47.
60. (1848), 18 L.J. Ch. 83, [1843-60] All E.R. Rep. 9 (L.C.Ct.).
61. See note 47 *supra*.
62. *Supra*, note 55 at 92.
63. (1863), 89 Mass. (7 Allen) 125.
64. *Supra*, note 55 at 92-94.

terms,[65] their Lordships did not embrace the extreme of suggesting that a defective condition should be treated as a covenant regardless of whether it possesses the necessary properties of such an interest.[66]

The conventional approach to construction is exemplified in *Spruce Grove* v. *Yellowhead Regional Library Board.*[67] A township had agreed to convey land to a library board for use as a Regional Library Headquarters and it was held by Mr. Justice Dea that the absence of recognised words of limitation or condition were fatal to the creation of a determinable fee or a condition subsequent. As the requirements of a covenant giving rise to a real property interest were similarly lacking, this claim also failed.[68]

It is apparent that the existence of conditions and covenants can each be ascertained in their own right, without the attendant assumption that the absence of one necessarily connotes the presence of the other. The contrary position can only be advanced by straining certain dicta to a point that is logically unsupportable.

IV. *The Rule Against Perpetuities*

A possibility of reverter and a right of re-entry for condition broken represent distinct modes of determining an estate. A significant consequence is that one interest is subject to the rule against perpetuities while the other is not. This has attracted considerable criticism and in many jurisdictions the common law position has been amended by statute. The status of determinable interests and interests upon condition must be examined in both contexts because perpetuities legislation has modified, but not extinguished, the common law.[69]

1. *Common Law*

The rule against perpetuities is summarised by Megarry and Wade in two succinct propositions:

(i) Any future interest in any property, real or personal, is void from the outset if it may possibly vest after the perpetuity period has expired.
(ii) The perpetuity period consists of any life or lives in being together with a further period of 21 years and any period of gestation.[70]

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65. *Supra,* note 53 at 209 (Idington J.) and 212 (Anglin J.).
66. As Jessel M.R. observed in *Richards v. Delbridge* (1874), L.R. 18 Eq. 11 at 14: "[H]owever anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."
67. (1985), 59 A.R. 304 (Alta Q.B.).
68. *Ibid.* at 308-309.
69. Manitoba being the one exception to this statement, see *infra.*
70. *Supra,* note 47 at 215-216.

The principle is concerned with remoteness of vesting and not the duration of an interest after it has vested. In the case of a determinable fee simple, the possibility of reverter is already vested in the grantor at the time of disposition and therefore the rule against perpetuities has no application.[71] Accordingly, a determinable fee simple is capable of reverting to the grantor at any time in the future.[72] As Mr. Justice Fraser observed in *Re McKellar:*

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71. *Halsbury* maintains that it has never been settled whether the rule against perpetuities applies to a determinable fee simple (33 *Halsbury's Statutes,* 4th ed. (1987) at 524). Cases are cited in support of both arguments but it is submitted that the decisions which suggest that this interest is subject to the rule, are not strongly persuasive. In the first, *Re Hollis' Hospital Trustees and Hague's Contract,* [1899] 2 Ch. 540, [1895-9] All E.R. Rep. 643 (Ch. D.) [hereinafter *Re Hollis' Hospital* cited to All E.R. Rep.] there was a clear finding by Byrne J. that the clause in question constituted an express common law condition subsequent. The remarks on limitations were *obiter* and not intended as an authoritative pronouncement on this interest. In the second, *Re Peel's Release,* [1921] 2 Ch. 218. [1921] All E.R. Rep. 103 (Ch. D.) it was concluded that the original gift was perpetual and no reversion was left in the donor. The "clause of reverter" to which *Halsbury* refers was an executory gift over in favour of the donor's estate. This disposition was void, being contingent upon a future event that may not necessarily have occurred within the perpetuity period. Finally, *Hopper v. Corporation of Liverpool* (1944), 88 S.J. 213 (Chancery Court of Lancaster) treated possibilities of reverter as being susceptible to the same reasoning as conditions subsequent for the purposes of the rule against perpetuities. This approach was compounded by the fact that the Vice-Chancellor considered himself bound by *Re Da Costa,* [1912] 1 Ch. 337 and *Re Hollis' Hospital supra,* neither of which concerned determinable limitations. *Hopper v. Corporation of Liverpool* has attracted considerable academic criticism: see R.E. Megarry (1946), 62 L.Q.R. 222, Megarry and Wade, *supra,* note 47 at 250-251, G.C. Cheshire, *The Modern Law of Real Property,* 9th ed. (London: Butterworths, 1962) at 282-283. It is submitted that the preponderant judicial and academic view is that possibilities of reverter under a determinable fee simple are not subject to the rule against perpetuities at common law, see Megarry and Wade, *supra,* note 47 at 250, Anger and Honsberger, *supra,* note 20 at 127 and 498, J.C. Gray, *The Rule Against Perpetuities,* 4th ed. by R. Gray (Boston: Little, Brown and Co., 1942) at paras. 41 and 113.3. Canadian cases have adopted this approach: *Re St. Patrick's Market, supra,* note 9 at 93, *Re Tilbury, supra,* note 14 at 412-417, *Re McKellar, supra,* note 37 at 295-296, *Fitzmaurice v. Township of Monck, supra,* note 8 at 787-788 and *Re Essex, supra,* note 13 at 408.

72. The absurdities that can result from an indefinite suspension of a possibility of reverter were documented by J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities,* 2nd ed. (London: Stevens & Sons, 1962) at 214-215, in an evocative description of *Brown v. Independent Baptist Church of Woburn* (1950), 325 Mass. 645, 91 N.E. (2D) 922 (Mass. S.J.C.).

Under the terms of a will, a parcel of land was devised to a Church in 1849 "so long as they shall maintain and promulgate their present religious belief and faith and shall continue as a Church." In 1939 the Church ceased operations and the land was sold. It was held that the estate was a determinable fee simple and the proceeds of sale passed to the successors of ten persons designated as residuary beneficiaries under the original will. In consequence:

> The cost of tracing the persons entitled to the various shares (over a hundred in number) was nearly half as much as the proceeds of sale of the land, and twenty times as much as the largest individual share. The smallest individual share amounted to six dollars and one quarter. The list of modern descendants of two of the original devisees looked like a genealogy of Methuselah, scattered all the way from California to Buenos Aires.

> I am of the opinion that . . . the possibility of reverter . . . is not subject to the rule as to perpetuities. The reason behind that rule seems to be that the perpetuities rule is directed to the vesting of an interest not to its cesser. Thus when the grantor grants a determinable fee simple he grants an immediate estate to continue until the occurrence of some future event which may or may not occur or until some condition ceases to exist he is merely parting with a part of his estate for that period and retains a vested interest. Therefore, when the event occurs there is no new vesting and the possibility of reverter is not subject to the rule against perpetuities.[73]

A fee simple upon condition subsequent is viewed differently. A right of re-entry is a future interest and therefore subject to the rule against perpetuities.[74] Thus, a right of re-entry that may arise beyond the specified period will be void for remoteness. In this event the grantor cannot defeat the interest he has conveyed and the grantee's estate becomes absolute.

Although conditions subsequent and determinable limitations are conceptually distinct, the immunity of the latter from the rule against perpetuities has, from a practical standpoint, been regarded as anomalous. Various statutes have endeavoured to redress this by amending the common law. The scope and effect of this legislation now falls to be considered.

2. *Perpetuities Legislation*

The *Perpetuities and Accumulations Act, (U.K.)* 1964[75] introduced significant reforms to the English law of perpetuities.[76] At this point it is appropriate to review certain features of the Act which served, in large part, as a model for succeeding Canadian perpetuities legislation.

Of particular note for present purposes, the *Perpetuities and Accumulations Act, (U.K.)* assimilated determinable and conditional fees

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73. *Supra,* note 37 at 295-296.

74. *Dunn v. Flood* (1883), 25 Ch. D. 629 at 632-633, 53 L.J. Ch. 537 at 539 and (1885), 28 Ch. D. 586 at 592, 54 L.J. Ch. 370 at 374 (C.A.), *Re Hollis' Hospital, supra,* note 71 at 648-650, *Pardee v. Humberstone Summer Resort Company of Ontario Limited,* [1933] 3 D.L.R. 277 at 285-286, [1933] O.R. 580 at 588-589 (H.C.), *Re Tilbury, supra,* note 14 at 412-414, *Re North Gower, supra,* note 11 at 423-424, *Re McKellar, supra,* note 37 at 296, *Re Essex, supra,* note 13 at 408, *Missionary Church, Canada East v. Township of Nottawasaga* (1980), 32 O.R. (2d) 88 at 94 (Ont. H.C.). See also Megarry and Wade, *supra,* note 47 at 79 and 253, *Cheshire and Burn's Modern Law of Real Property,* 14th ed. by E.H. Burn (London: Butterworths, 1988) at 327-328, Anger and Honsberger, *supra,* note 20 at 496-498.

75. *Perpetuities and Accumulations Act,* (U.K.) 1964, chap. 55.

76. There are two important limitations to the Act. First, it is not retroactive and applies only to instruments taking effect after July 15, 1964 (sec. 15(5)). Secondly, the common law rules were not repealed *in toto* and therefore continue except as modified by this statute. If an instrument is valid at common law, the saving provisions (*infra*) of the Act are unnecessary.

to the extent of making possibilities of reverter subject to the rule against perpetuities. Section 12 (1) provides:

> In the case of —
> (a) a possibility of reverter on the determination of a determinable fee simple, or
> (b) a possibility of a resulting trust on the determination of any other determinable interest in property,
> the rule against perpetuities shall apply in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise, on breach thereof, to a right of re-entry or an equivalent right in the case of property other than land, and where the provision falls to be treated as void for remoteness the determinable interest shall become an absolute interest.

The Act also established a number of important remedial provisions in order to save various dispositions. These include presumptions as to future parenthood,[77] acceleration of expectant interests,[78] reduction of age and exclusion of class members.[79] Perhaps the most fundamental measure was the adoption of a "wait and see" rule[80] to mitigate the severity of the common law requirement that the validity of an interest must be determined at the time of its creation. Formerly, an interest was void *ab initio* if any possibility existed that it might vest outside the relevant period.[81] The *Perpetuities and Accumulations Act, (U.K.)* specifies that where it is uncertain whether a disposition will vest within the perpetuity period, the interest only becomes invalid when it is actually determined that vesting must necessarily occur beyond that time.[82] Until this is established the disposition is to be treated as if it was not subject to the rule.[83]

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77. *Supra,* note 75, sec. 2.
78. *Ibid.* sec. 6.
79. *Ibid.* sec. 4.
80. *Ibid.* sec. 3.
81. The point is aptly summarised by *Halsbury* (35 *Halsbury's Laws of England,* 4th ed. (1981) at 493-494, para. 908):

> An executory devise or other future limitation to be valid must vest, if at all, within a life or lives in being and twenty-one years and a possible period for gestation after; it is not sufficient that it may vest within that period. It must be good in its creation, and, unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years and the period allowed for gestation, it is not valid, and subsequent events cannot make it valid.

82. It is also possible at common law to await the outcome of a disposition. The essential distinction between this and the statutory wait and see formula is that actual events will only be allowed to determine the effect of a condition at common law if it must, according to its terms, be incapable of vesting outside the perpetuity period. Thus, the validity of the disposition for the purpose of the perpetuity rule is not in issue.
83. *Supra,* note 75, sec. 3.

From the preceding observations it is possible to address three basic scenarios as they relate to conditions subsequent and determinable interests. First, a condition or limitation purporting to terminate an estate may, according to its terms, be incapable of vesting within the perpetuity period. It will be void at common law and therefore fail unless saved by one of the Act's remedial clauses. Secondly, the determining event, if it occurs at all, may be expressly limited so as to not exceed the perpetuity period. This will not offend the common law rule. The disposition will be valid and its effect will depend upon whether the actual event takes place. If it does, the estate will revert to the grantor or give rise to a right of re-entry. If it does not, the grantee's estate becomes absolute. Thirdly, it may be uncertain when the determining event will occur. This typically arises when a possibility of reverter or right of re-entry are expressed without time limitation. The former will be valid at common law, but the *Perpetuities and Accumulations Act, (U.K.)* now confines its duration to the perpetuity period. The latter will fail at common law. Under the Act, however, the wait and see provisions would apply and the status of the parties' interests would depend upon whether specified events happen within the perpetuity period.

Following this legislative initiative, the Ontario Law Reform Commission considered the status of the law against perpetuities.[84] In addressing conditional and determinable estates it was noted that:

> Whether a donor uses the technical language of a condition subsequent or the language of limitation, the property is tied up indefinitely for the remote future in exactly the same way and therefore if the rule affects the rights of re-entry, it should also affect the possibility of reverter in order to free the property from this remote interest. To have a difference in result depending on a mere matter of words does not seem to make sense and brings the law into disrepute, as well as acting as a snare for the draftsman.[85]

The Commission concluded that the common law, including determinable and conditional interests, required amendment. Their recommendations culminated in *An Act to modify the Rule against Perpetuities.*[86] This statute is broadly similar to its English predecessor and includes a wait and see provision,[87] presumptions as to future parenthood,[88] reduction of age and exclusion of class members.[89] Again,

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84. Ontario Law Reform Commission, Report No. 1 (Toronto, 1965).
85. *Ibid.* at 33.
86. *The Perpetuities Act,* S.O. 1966, c. 113. Now enacted as R.S.O. 1980 c. 374.
87. *Ibid.* sec. 4.
88. *Ibid.* sec. 7
89. *Ibid.* sec. 8

possibilities of reverter were subordinated to the rule against perpetuities, causing the interest to be determinable in the same manner as a condition subsequent.[90] While the Ontario *Perpetuities Act* generally preserved the existing common law perpetuity period,[91] by way of exception, it specifically modified the calculation of time in respect of possibilities of reverter and rights of re-entry.[92] Two subsections must be read together. Section 15(2) states that in the absence of a life in being, the period shall be 21 years from the time the interests were created. Section 15(3) provides that if there are lives in being, the perpetuity period shall not exceed the lesser of 40 years or a period composed of the relevant life or lives and 21 years. Thus, if there are no relevant lives, the period is 21 years. If however there are such lives in being, the duration is restricted to 40 years even though the sum of relevant lives plus 21 years may otherwise exceed that period.

In 1968 the North West Territories enacted a *Perpetuities Ordinance*[93] that was substantially identical to the Ontario Act and replicated its treatment of conditional and determinable interests.[94] A similar ordinance was passed by the Yukon in the same year.[95]

Two years later the status of the common law rule against perpetuities was reviewed by the Commissioners on Uniformity of Legislation in Canada.[96] This led to the adoption of a *Draft Uniform Act*[97] at the 54th Annual Meeting of the Conference of Commissioners in August 1972. The *Draft Uniform Act* contains wait and see provisions and other remedial clauses familiar to the English and Ontario Perpetuities Acts. Again, possibilities of reverter were made subject to the rule against perpetuities in the same manner as conditions subsequent.[98] The modified perpetuity period stipulated for these interests differs slightly from the Ontario Act by simply reciting 40 years without an alternative formula.[99]

Unlike the English and Ontario Acts, the *Draft Uniform Act* exempts charitable purposes from the general fusion of possibilities of reverter and

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90. *Ibid.* sec. 15 (1).
91. *Ibid.* sec. 6.
92. This was based upon the further deliberations of the Ontario Law Reform Commission, Report No. 1A (Toronto, 1965) at 8-9.
93. O.N.W.T. 1968, 2nd Session, c. 15. Now enacted as R.O.N.W.T. 1974, c. P-3.
94. *Ibid.* sec. 16 (1).
95. *The Perpetuities Ordinance,* O.Y.T. 1968, 2nd Session, c. 2. This was superseded by the *Perpetuities Ordinance,* O.Y.T. 1980, 1st Session, c. 23, to correspond to the *Draft Uniform Act (infra.).* Now enacted as R.S.Y. 1986, c. 129.
96. Proceedings of the Fifty-Second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970).
97. *The Perpetuities Act.*
98. *Ibid.* s. 19 (1).
99. *Ibid.* s. 19 (2).

conditions subsequent and the accompanying rule that the determinable interest becomes absolute if the determining event does not occur within the perpetuity period.[100] If the determining event is the cessation of a charitable purpose, the *Draft Uniform Act* would allow such an interest to continue beyond the perpetuity period.[101] Thereafter, if the charitable purpose terminates, the property is to be applied *cy-pres* as if it were subject to a charitable trust. Thus, once the perpetuity period has lapsed, the interest survives as a curious hybrid: a determinable fee simple bereft of a possibility of reverter.[102] Nevertheless this statutory exemption avoids a potential anomaly. Property may be given to an individual or a non-charitable entity for an express charitable purpose. If the charitable use is observed until expiration of the perpetuity period, the grantee would then become seised of an absolute estate. From that point on the property could be applied for non-charitable purposes.[103]

The *Draft Uniform Act* was prepared and submitted to the Conference by the Alberta Commissioners. Befittingly, Alberta was the first province to enact perpetuities legislation[104] modelled on the *Draft Uniform Act.* The provisions relating to determinable and conditional interests[105] were incorporated almost *verbatim* and a 40 year period was specified.[106]

While the British Columbia *Perpetuities Act,* 1975[107] followed other provincial legislation in reforming the common law in regard to possibilities of reverter and conditions subsequent,[108] no particular period was indicated for these interests. The term, for perpetuities purposes, is therefore as provided in the general part of this Act, namely the common law period, as modified,[109] or alternatively 80 years.[110] It has been suggested that the 80 year formula pertains only to dispositions that are valid at common law because the wait and see principle does not apply to this period.[111] The 80 year provision appears to invoke the common law necessity for certainty from the commencement of the interest.[112]

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100. *Ibid.* s. 19 (3).
101. The perpetuity period being 40 years, as provided in s. 19 (2).
102. Perhaps a more satisfactory rationale is that when the possibility of reverter becomes defunct, the estate is irrevocably dedicated to charity.
103. This concern was identified by the Institute of Law Research and Reform, the University of Alberta, in Report No. 6, *Report on the Rule Against Perpetuities* (Edmonton, 1971) at 58.
104. *Perpetuities Act,* S.A. 1972, s. 121. Now enacted as R.S.A. 1980, c. P-4.
105. *Ibid.* s. 19 (1).
106. *Ibid.* s. 19 (2).
107. S.B.C. 1975, c. 53. Now enacted as the *Perpetuity Act,* R.S.B.C. 1979, c. 321.
108. *Ibid.* s. 20.
109. *Ibid.* s. 1.
110. *Ibid.* ss. 3(1), 6(1)(b).
111. Anger and Honsberger, *supra,* note 20 at 523-524.
112. The *Perpetuity Act, supra,* note 107, provides:
    3 (1) Subject to subsection (2), an interest in property which either

British Columbia's perpetuity reforms were further buttressed by an amendment to the *Limitation Act.*[113] Section 3(5)(f) states:

> . . . after the expiration of 6 years after the date on which right to do so arose an action shall not be brought . . . for the possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility of reverter of a determinable estate.

This gives welcome recognition to a secondary issue that has been neglected in other provinces.[114] Providing a determining event occurs within the perpetuity period, the grantor can notionally seek possession at any time thereafter. Arguably, unconscionable delay in exercising a right of re-entry might constitute laches or acquiescence. Yet even this is doubtful in the case of a possibility of reverter. As the grantee's estate is automatically determined, no act is required on the part of the grantor;[115] it follows that no question of delay arises. The *Limitation Act* removes such uncertainties and further acknowledges that the status of an estate cannot be held in abeyance indefinitely.[116]

However, an obvious objection to imposing a common formula upon different interests is that the reasoning appropriate to one may not necessarily extend to the other. The application of section 3(5) to conditional and determinable fees does not escape this criticism. The resumption of the grantor's estate on breach of a condition subsequent is contingent upon a prior act, namely re-entry. The *Limitation Act* bars the assertion of this claim with the result that the condition subsequent is nullified. On the other hand, a determinable fee simple cannot be

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(a) according to the express terms of the disposition creating it; or
(b) by necessary implication from the terms of the disposition creating it, must vest, if at all, not later than 80 years after the creation of the interest does not violate the rule against perpetuities.

113. Formerly the *Limitations Act,* S.B.C. 1975, c. 37. Now enacted as the *Limitation Act,* R.S.B.C. 1979, c. 236.

114. While other provincial Limitation Acts do not make specific reference to these interests, it is nevertheless possible that they be caught by general restrictions in respect to proceedings to recover land. Such proceedings commonly include any action, entry or taking possession by reason of forfeiture, breach of condition or an interest in reversion.

115. Subject to the qualification that certain procedural steps may be required to enforce the substantive right, particularly if the grantee remains in possession. This consideration was discussed by the Law Reform Commission of British Columbia in *Report on Limitations,* Part 2, (Vancouver, 1974) at 61.

116. Similar views have been espoused in the United States. See, for example, the *Real Property Actions and Proceedings Law,* New York, section 612 which requires a person entitled to possession or power of termination, to serve a written demand within ten years after the occurrence of the right to reverter or breach of condition subsequent. Thereafter an action must be commenced within one year. Alternatively, if no demand is served, an action must be instituted within ten years. This was based upon the recommendations of the Law Revision Commission of New York, Leg. Doc. (1963) No. 65 (E).

described in these terms. The determining event, without more, brings the grantee's estate to an end. The effect of the *Limitation Act* is to estop the grantor from recovering possession notwithstanding that the substantive event upon which it is based has already occurred by operation of law.

Perpetuities Acts have also been introduced in three other provinces, but none reflect the approach of modern legislation. The first was passed by Prince Edward Island in 1931.[117] The Act was confined to substituting a statutory period of a life or lives in being plus 60 years for future estates.[118] No mention was made of determinable and conditional interests. The purview of Newfoundland's *Perpetuities and Accumulations Act,*[119] was even more limited, its sole purpose being to exclude employee benefit trusts from the perpetuity rule. Both provinces can therefore be viewed as common law jurisdictions, the former having an extended perpetuity period. Finally, it should be noted that Manitoba alone has taken the sweeping initiative of abolishing the rule against perpetuities,[120] providing instead that successive legal interests take effect behind a trust.[121] It seems that under such a model, possibilities of reverter and rights of re-entry enjoy a unique status in that both can be sustained indefinitely. However, it is doubtful that this was an intended corollary of Manitoba's *Perpetuities and Accumulations Act.*[122] Elsewhere there is a pronounced trend towards limiting these interests and it is unlikely that Manitoba's Legislature proposed to enlarge them. If the matter fell for judicial determination, a court might be reluctant to uphold an estate in this form, perhaps on grounds of public policy or uncertainty.

It is apparent that a number of Canadian jurisdictions have moved to reform the traditional rule against perpetuities. In the process an essential distinction between limitations and conditions subsequent has been eliminated. Also, conditions subsequent that might previously have failed at common law may now be saved. However, two important reservations

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117. *Perpetuities Act,* S.P.E.I. 1931, c. 15. Now enacted as R.S.P.E.I. 1974, c. P-3.
118. *Ibid.* sec. 1.
119. S.N. 1955, c. 6. Now enacted as R.S.N. 1970, c. 291.
120. *The Perpetuities and Accumulations Act,* S.M. 1982-83-84, c. 43 (sec. 3). Now enacted as R.S.M. 1987, c. P. 33. It may be noted that the Law Reform Commission of Saskatchewan also favours abolition of the rule against perpetuities, see "Proposals Relating to the Rules Against Perpetuities and Accumulations" (Saskatoon, 1987).
121. *The Perpetuities and Accumulations Act, supra,* note 120, s. 4 (1).
122. *Supra,* note 120.
123. *The Perpetuities Act* (Ontario), *supra,* note 86, s. 19 (1966 and 1980 Acts), *Perpetuities Ordinance* (North West Territories), *supra,* note 93, s. 20 (1968 and 1974 Ordinances), *Perpetuities Ordinance* (Yukon), *supra,* note 95, s. 20 (1968 Ordinance), s. 25 (1) (1980 Ordinance) and s. 24 (1986 Act), *Perpetuities Act,* (Alberta), *supra,* note 104, s. 25 (1972 and 1980 Acts), *Perpetuity Act* (British Columbia), *supra,* note 107, s. 25 (1975 and 1979 Acts).

should be stated. First, the statutes operate prospectively and have no application to instruments that took effect at an earlier date.[123] It can therefore be anticipated that for years to come, cases will still have to be decided without recourse to the legislation.[124] Secondly, some provinces have yet to introduce perpetuities legislation and thus the common law in unmodified form continues to provide the basis for ascertaining the validity of a fee simple upon condition subsequent and a determinable fee simple.

It is now possible to state the modern application of the perpetuity rule at common law and statute as it pertains to these interests.

3. *The Modern Context*

The modern context for the rule against perpetuities in relation to conditional and determinable interests is most logically approached in terms of jurisdictions that have enacted perpetuities legislation and those that have not.

(i) *Common Law Jurisdictions*

It is unnecessary to recapitulate the common law position in detail. Suffice it to say that it is essential to identify the nature of the interest. A fee simple upon condition subsequent will be subject to the perpetuity rule and the validity of a right of re-entry will be decided accordingly. In contrast, a determinable fee is unaffected by considerations as to remoteness of vesting and the possibility of reverter may arise at any time in the future.

(ii) *Statutory Jurisdictions*

In provinces where Perpetuities Acts have been passed,[125] the first step is to ascertain the date at which the instrument creating the conditional or determinable interest took effect. If this occurred before the statute was in force, then the status of the disposition will be determined at common law without reference to the Act. In these circumstances the distinction between a conditional and determinable fee will be fundamental.

If a Perpetuities Act was in force at the time the interest took effect, there are several possible permutations. If a fee simple on condition subsequent has been created, its status at common law must first be

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124. For example, see *Re North Gower, supra,* note 11 at 424, *Re Essex, supra,* note 13 at 408, *Re McKellar, supra,* note 37 at 297.

125. The following analysis is generally inapplicable to the perpetuities legislation of Manitoba, Prince Edward Island and Newfoundland.

resolved. Usually legislation expressly reserves the modern rule against perpetuities so that the statutory modifications only come into play if the interest would otherwise fail. Where the right of re-entry is framed so as to be incapable of operating outside the perpetuity period, the condition is valid and the Act has no application. The estate will be forfeited if the condition is broken within the relevant time and the grantor or his estate elects to re-enter. Conversely, if re-entry may possibly arise beyond the perpetuity period, the condition will be void at common law and the Act can be invoked to save it. Applying the wait and see principle, the interest will be presumptively valid until actual events establish that it is incapable of vesting within the perpetuity period. As previously mentioned, the period for both conditional and determinable fees has usually been modified by statute to a maximum of forty years.

If the grantor has created a determinable fee simple, the possibility of reverter becomes subject to the perpetuity period by virtue of the statute. The Acts provide that where a determining event does not occur within the prescribed period, it shall be treated as void and the determinable interest becomes absolute.

It should be emphasised that the distinction between limitations and conditions has not been rendered entirely redundant under the statutory scheme. For example, a right of re-entry which is valid for the purposes of the perpetuities rule may nonetheless fail for an independent reason, as where the right can no longer be exercised by the grantor. Such considerations would not apply to possibilities of reverter which automatically determine an estate without any act of the grantor.

V. *Related Legislation*

In considering the modern context of determinable and conditional fees it should be borne in mind that these estates may be affected by various statutes in addition to the perpetuities legislation previously discussed. Certain Acts appear to abolish or at least cast doubt upon these interests while others serve to qualify or curtail their application. It is evident that their status in any given province can therefore only be understood after a careful review of both specific and general legislation. By way of illustration, provisions in Saskatchewan's *Land Titles Act*[126] and Manitoba's *Law of Property Act*[127] may be interpreted as having abolished any right to impose limitations upon a fee simple. Other legislation, such as the Ontario *Education Act*[128] accepts the existence of

126. R.S.S 1978, c. L-5.
127. R.S.M. 1987, c. L 90.
128. R.S.O. 1980, c. 129.

such rights, but abridges the period in which they can be exercised. These two aspects will be considered in turn.

1. *Extinguishing of Interests*

Most Canadian jurisdictions have taken the initiative of abolishing estates tail.[129] However, in some instances uncertainty has arisen as to whether the reforming statute has also extinguished determinable and conditional fees. This is particularly borne out in the Saskatchewan *Land Titles Act*. Section 243 provides:

> No estate in fee simple shall be changed into any *limited fee* or fee tail, but the land, whatever form of words is used in any transfer, transmission or dealing, shall, except as hereinafter otherwise provided, be and remain an absolute estate in the owner for the time being. (emphasis added)

It may be questioned whether this effectively abolishes the creation of determinable fees and, by extension, conditions subsequent. The purview of the section is unclear and the matter does not seem to have been raised in any reported decisions. It may be conjectured that express words would have been used to identify determinable and conditional fees if a fundamental reform of these interests had been contemplated. Some support for this view can be drawn from the fact that the heading of section 243 is simply entitled "No Estates Tail." Furthermore, although not conclusive on the point, the Law Reform Commission of Saskatchewan noted the existence of determinable limitations and conditions subsequent in its report on the rules against perpetuities and accumulations.[130]

A similar provision in the Manitoba *Law of Property Act* contains an additional refinement that offers some insight as to its intended scope. The pertinent section reads:

> 30 (4) No estate in fee simple shall be changed into any limited fee or fee tail, but whatever form of words is used in any instrument, the land shall be and remain an estate in fee simple in the owner; and any limitation that would have created an estate tail shall transfer the estate in fee simple or absolute ownership that the transferor has in the land.

The effect of this section hinges, in part, on whether "any limitation that would have created an estate tail" in the latter clause serves to qualify and restrict the ambit of "limited fee" in the former.[131] Logic and consistency

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129. A concise review of the relevant legislation is contained in Anger and Honsberger, *supra*, note 20 at 144-146.

130. *Supra*, note 120 at 20-21.

131. The latter clause of sec. 30 (4) Manitoba *Law of Property Act* is basically repeated in the Saskatchewan *Land Titles Act* as a separate section. Section 244 provides:

> Any limitation that heretofore would have created an estate tail shall transfer the absolute ownership or the greatest estate that the transferor had in his land.

indicate that it should, although this in turn begs the question as to why a limited fee should be mentioned at all if it was meant to be nothing more than a synonym for a fee tail. As in the case of the Saskatchewan Act, the section is entitled "No estates tail" and it is submitted that on balance, this provision, like its Saskatchewan counterpart, should be construed as being confined to that interest. If this was indeed the intention of the Manitoba and Saskatchewan Acts, it is unfortunate that they failed to address the subject with the same directness as corresponding legislation in other jurisdictions.[132]

Such uncertainties do not beset British Columbia's property legislation. While the *Property Law Act*[133] abolishes estates tail in terms similar to section 243 of the Saskatchewan *Land Titles Act,* the British Columbia statute removes any attendant doubts by specifying that "[t]his Act does not prevent the creation of a determinable fee simple or a fee simple defeasible by condition subsequent."[134]

The *Property Law Act* also affirms that a possibility of reverter and right of entry for condition broken may be registered under the *Land Title Act*[135] against title to land in the same manner as a charge.[136] This touches upon a fundamental consideration, namely the role of these common law interests in jurisdictions that have adopted a Torrens system of land registration. British Columbia's legislation explicitly addresses this. While other provinces also seem to recognise limitations and conditions subsequent under the Torrens system, this conclusion arises only inferentially from the fact that reported cases and related legislation appear to accept their existence.

2. *Modification of Interests*

A further category of legislation fulfils a modest reforming function in reducing the period within which possibilities of reverter and rights of re-entry can be exercised or modifying the terms on which property is held. Such statutes may not necessarily refer to conditional or determinable fees as such, but their language may be sufficiently broad to include both interests. Generally these provisions relate to property in a limited class of

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132. For example, the Nova Scotia *Real Property Act,* R.S.N.S. 1967, c. 261, s. 5 simply states:

> All estates tail are abolished; and every estate which hitherto would have been adjudged a fee tail, shall hereafter be adjudged a fee simple, and may be conveyed and devised or descend as such.

133. R.S.B.C. 1979, c. 340, s. 10 (1).
134. *Ibid.,* s. 10 (3).
135. R.S.B.C. 1979, c. 219.
136. *Supra,* note 133, s. 10 (4).

ownership and entitle the grantee to institute proceedings for an appropriate declaration or order. Thus, in British Columbia, a University Foundation may apply to a judge of the Supreme Court for an order varying the directions, terms or trusts imposed by a donor, settlor, transferor or testator in respect of property which it holds.[137] In Ontario, the *Education Act*[138] empowers a school board to petition the Supreme Court for the removal of restrictions relating to land that has been vested in the board for a minimum period of 50 years. The application of the *Education Act* to determinable and conditional interests has been examined in a number of cases and therefore this statute may be taken as a convenient illustration of some of the issues that can arise in proceedings of this kind.

Section 170 (2) of the *Education Act* states:

> Where land, the use of which is restricted by deed in any manner to school purposes so as to appear that some other person may have an interest therein, has been vested in a board for at least fifty years, the board may apply to the Supreme Court to remove the restriction, and the Supreme Court may make such order on the application as it considers just including, where the land adjoins land being used as a farm, a requirement that the board shall, where the board intends to sell the land, first offer it at a reasonable price to the owner or owners of such adjoining land.[139]

It should be noted at the outset that the requirement of 50 years vesting precludes any consideration of the *Perpetuities Act*[140] which is confined to dispositions made after the Act came into force.

A preliminary question arises as to whether the restriction referred to in section 170(2) contemplates determinable limitations and conditions subsequent. Despite the apparent breadth of its wording, the section has attracted contrary views in two High Court decisions.

In *Re Tilbury*[141] Mr. Justice Grant indicated that a similar provision under former legislation (section 9a of the *Public Schools Act*[142]) did not

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137. *University Foundations Act,* S.B.C. 1987, c. 50, s. 10 (2).

138. *Supra,* note 128.

139. Land held under grant from the Provincial Crown is covered by a different procedure. Section 13 of the *Education Amendment Act,* S.O. 1984, c. 60 provides:

> A board that is in possession of real property that was originally granted by the Crown for school purposes and that has reverted or may have reverted to the Crown may continue in possession of the real property for school purposes and when the board determines that the real property is no longer required for school purposes, the board may, with the approval of the Lieutenant Governor in Council and subject to such conditions as are prescribed by the Lieutenant Governor in Council, sell, lease or otherwise dispose of the real property.

140. *Supra,* note 86.

141. *Supra,* note 14.

142. R.S.O. 1960, c. 330 as enacted by S.O. 1964, c. 95, s 2.

extend to possibilities of reverter. Grant J. was of the opinion that the Act only governed situations where a school board acquired the entire estate.[143] This would exclude a determinable fee, but not a fee simple upon condition subsequent.

A different view was expressed in a later Ontario decision, *Re Essex,*[144] where Mr. Justice Krever held that a corresponding section in the *Education Act* 1974,[145] encompassed both interests. It was observed that the provision evinced

> [A] legislative intent that the Court be empowered to remove a restriction, whatever its nature, and whatever the nature of the interest in the land of any person other than a school board, provided only that the land . . . has been in the public domain for 50 years, in the sense that it has been used for school purposes.[146]

It is submitted that the approach in *Re Essex* is to be preferred. *Re Tilbury* adopts a somewhat narrow definition of vesting and forces a distinction upon a section that does not require further qualification.

In removing a restriction under section 170(2) of the *Education Act,* the Supreme Court may "make such order as it considers just." It is thus at liberty to impose terms in granting an application. In *Re Essex* a school board obtained an order removing a reservation in favour of the grantor, subject to the condition that the Board forthwith offer to sell the land to the grantor's successor at fair market value. Krever J remarked that if the application had not been brought under the *Education Act,* the Board would have been entitled to a declaration that it held an absolute fee simple.[147] It follows that the manner in which an action is framed may have some bearing upon the form of order granted. If a condition seems void for perpetuity, a school board could seek a declaration to that effect without recourse to the *Education Act,* thereby obviating the discretion conferred under that statute. The feasibility of this approach will of course depend upon the facts of each case. For example, a possibility of reverter created more than 50 years ago would predate the Ontario *Perpetuities Act* and thus constitute an indefinite cloud on the title. This limitation could only be impugned by bringing proceedings under the *Education Act.* Similarly, a right of re-entry under an instrument taking effect prior to the *Perpetuities Act* may be capable of enforcement in excess of 50 years from the date of the original grant providing it is

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143. *Supra,* note 14 at 417-418.
144. *Supra,* note 13.
145. *The Education Act,* S.O. 1974, c. 109, s. 167(2).
146. *Supra,* note 13 at 407.
147. *Ibid.* at 412.

properly limited so as to not offend the common law rule against perpetuities. In these circumstances, an action under the *Education Act* would offer an appropriate means of confining the period to 50 years.

The observations of Krever J. in *Re Essex* may be contrasted with those of Mr. Justice Laskin in *Re North Gower*[148] where the Ontario Court of Appeal commented upon the ambit of section 9a of the *Public Schools Act*.[149] A conveyance of land to a school board purported to reserve to the grantor a right to recover the property if it ceased to be used as a public school site. This was held to be a condition subsequent that was void for perpetuity. In delivering the judgment of the Court, Laskin J.A. noted that section 9a did not have to be invoked by the School Board because the restriction was invalid. The statutory remedy was only required when a board sought relief from an enforceable condition.[150]

In *Re North Gower* the parties were vendor and purchaser. Unlike *Re Essex*, the rights of the original grantor or his successors were not in issue. It may be questioned whether the statement of Laskin J.A. was intended as an immutable principle, to be applied even where its effect would be to frustrate a court from imposing terms. This potential conflict will arise in situations where a school board holds property subject to an invalid restriction that could have been expunged in proceedings unrelated to the *Education Act*. If, out of an abundance of caution, or through inadvertence or otherwise, an application was brought under section 170 (2), it would arguably be open to a court to maintain that while the *Education Act* need not strictly have been invoked, the school board had nevertheless chosen to submit itself to the statutory jurisdiction and the obligations that accompany it.[151]

VI. *The Direction of Reform*

The status of a determinable fee simple at common law is clearly unsatisfactory. There is no useful purpose in subjecting an estate to an indefinite period of certainty. An obvious objection is that the grantor's ability to affect the ultimate ownership of land at any time in the future may render the title unmarketable. The existence of such a fetter runs transverse to the philosophy of modern property law.[152] As a result there

148. *Supra*, note 11.
149. *Supra*, note 142.
150. *Supra*, note 11 at 425.
151. See *Re Essex, supra*, note 13 at 408.
152. See A.J. McClean, "The Rule Against Perpetuities, Saunders v. Vautier, and Legal Future Interests Abolished" (1983), 13 *Man. L.J.* 245, which canvasses the competing interests of freedom of disposition versus public policy against withdrawing property from the inventory of commerce for excessive periods of time.

is now an established trend towards subordinating possibilities of reverter to a defined perpetuity period. Insofar as this remains to be implemented in some jurisdictions, the initiative is to be encouraged. To this a caveat must be entered. Current legislation does not operate retroactively. Consequently, two inconsistent systems are in place, one pertaining to dispositions taking effect before legislation was in force and another pertaining to transactions governed by the modern Perpetuities Acts. While retroactive enactments should be approached with caution, it is submitted that there is a clear advantage in treating all dispositions alike.[153] The goals of consistency and certainty must surely be preferable to the perpetuation of sophistry from a bygone age.

In canvassing further options for reform there is a superficial appeal to enfranchising determinable and conditional estates. However, converting a fee simple into an absolute interest could produce unfairness in situations where the grantor may legitimately assert a claim to the property. If land is donated on the clear understanding that it is to be used for a stated purpose, it becomes a question of fact as to whether it is reasonable for the donor to recover the property upon breach of the condition. In this regard the suspension of absolute ownership for a certain period may be seen as a *quid pro quo* for acquiring land without payment. The reasonableness of a right to forfeiture is largely a function of time. If the condition is broken within a few years of the transfer, the grantor may validly seek recovery on the ground that he was improperly induced to part with the property. The perspective changes if the same event occurs at some remote future date when the stipulation has no contemporary relevance. Here, reverter to the grantor or his estate merely confers a gratuitous windfall.

A balance can be achieved by confining the right of re-entry of reverter to a specified period. It has been previously noted that a number of provinces have adopted this approach by establishing a limit of forty years. This may often prove shorter than the common law formula of a life or lives in being and twenty-one years. The benefit of abridging the

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153. To this, objection might be voiced by those who drafted reservations and structured transactions based upon the state of the common law before perpetuities legislation was passed. At present such dispositions are valid under the old law. To place this group in perspective, it should be noted that in order to predate the Perpetuities Acts, these interests would have been created at least 15-20 years ago. As the Perpetuities Acts affected determinable limitations more profoundly than conditions subsequent, the class of documents that would be most impacted by retroactive legislation are those reserving an indefinite possibility of reverter to the grantor. It is submitted that on balance, the arguments in favour of consistency and freedom of disposition, outweigh any prejudice to those who availed themselves of what is now regarded as an excessive restraint upon land.

period is that any claim to the estate will be asserted within a time frame that bears some relationship to the original disposition. As such it provides a realistic format for the expectations of the parties. Furthermore it dispenses with the need for ascertaining measuring lives and making a determination as to their status.[154]

An argument can also be made for specifying a time limit within which re-entry or reverter can be asserted once a determining event has occurred. This is a logical extension of the statutory provisions restricting the duration of limitations and conditions. The point is addressed in British Columbia's *Limitation Act* which may be commended for consideration by other jurisdictions. In the same spirit it should be open for an owner of land to apply at any time after the perpetuity period has expired, for a declaration that the interest of the grantor has been extinguished. Assuming a statutory perpetuity period of 40 years, and say, a 6 year limitation period for enforcement, the status of the grantee's estate could theoretically be uncertain for a total of 46 years if the determining event occurred in the fortieth year. An ability to shorten the limitation period would provide a means of redress for such anomalies and enable the registered owner to ascertain the grantor's position in respect of any possible claim to the estate.

Incongruously, to establish that the period has expired it would be necessary for the grantee to aver his own act of defeasance as having commenced the running of the limitation period. In other circumstances this might give rise to an issue of estoppel. Moreover, to resist the motion, the grantor would have to allege that the conduct of the grantee did not constitute breach of condition. The role of the parties would therefore be curiously reversed. Notwithstanding this objection, such a proposal has the merit of avoiding further deferral of any uncertainty as to the status of a title.

If a limited right of re-entry or reverter should be retained in order to preserve the grantor's remedy for breach, it may be asked whether it is similarly necessary to maintain both forms of interest. Although many jurisdictions have unified the application of conditional and determinable interests to the rule against perpetuities, some differences between the two estates still remain. This does not, however, furnish any justification for keeping two separate interests. It is recommended that they be merged. In this regard it would be preferable for limitations under a determinable fee

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154. As Ontario and the North West Territories specify the lesser of 40 years or a life in being plus 21 years, it will be necessary to calculate on the basis of the latter if it is claimed that the perpetuity period has expired prior to 40 years.

simple to be treated as conditions. The latter are strictly construed. Courts are vigilant to ensure that a clause of defeasance is reasonable in terms of public policy and that it evinces sufficient certainty to be enforceable. A degree of stringency is desirable in these circumstances, for the effect of the condition is to expose a registered interest to forfeiture. Further, if there is an impediment to re-entry or if the right cannot be exercised (as where the grantor is a defunct corporate entity) this will conclusively dispose of the matter. By contrast, reverter under a determinable fee occurs automatically and failure by the grantor to immediately assert his interest merely leaves the issue in abeyance.

In the final analysis there is little practical justification for preserving in two forms what is essentially the same disposition. The amalgamation of conditional and determinable fees would accord with the general movement towards simplifying estates and interests in land and eliminate the pitfalls of construction that have been the draftsman's perennial *bete noire.*

VII. *Conclusion*

While determinable and conditional fees continue to fulfil a need in respect of certain dispositions, the manner in which that function is accomplished can at best receive qualified approval. As a general proposition there should be no objection in principle to an effective mechanism for restoring land to the grantor when the understanding upon which it was transferred has been breached. This is particularly so when property has been donated for a specific public purpose and the grantee seeks to profit by its sale.

At the same time, the proper scope and application of this remedy is a question of degree. Determination of an estate is an extreme measure which should only be exercised within defined limits. In this regard it is clearly unproductive for a title to be clouded indefinitely by a possibility of reverter. Notably, this situation still obtains in a number of jurisdictions that have yet to implement reform. In these cases the validity of dispositions continue to be governed by narrow and inflexible rules of construction.

Perpetuities legislation has struck a workable balance by removing the excesses of both determinable and conditional interests. The unlimited duration of a possibility of reverter is incompatible with present thinking and its restriction to a defined perpetuity period is the obvious corrective. It has been seen that rights of re-entry have often been defeated by the strictness of the perpetuity rule. In the process, the grantee has been gratuitously relieved of any obligations and his enjoyment of the estate has been enlarged to an absolute interest. Thus, the statutory wait and see

provisions represent an appropriate relaxation of the common law requirement of certainty of vesting.

These initiatives have removed the most significant practical distinctions between conditions subsequent and determinable limitations. What is left is simply not worth preserving. It cannot be suggested that the maintenance of two interests fulfils any worthwhile purpose in the context of modern property law. The associated complexities can only be viewed as remnants of an age when form was a rival to substance. The goals of simplicity and consistency dictate that the interests should be unified and it has been proposed that conditions subsequent could serve that generic function. This would ensure that future relations between those who give and receive real property on conditions, are governed by a measure of certainty that has hitherto proven so elusive.