

4-1-1941

# Estates on Condition and on Special Limitation in North Carolina

Frederick B. McCall

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

## Recommended Citation

Frederick B. McCall, *Estates on Condition and on Special Limitation in North Carolina*, 19 N.C. L. REV. 334 (1941).Available at: <http://scholarship.law.unc.edu/nclr/vol19/iss3/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## ESTATES ON CONDITION AND ON SPECIAL LIMITATION IN NORTH CAROLINA

FREDERICK B. MCCALL\*

It shall be our purpose in this article to discuss the status of estates on condition and on special limitation under the North Carolina law. May the owner of land in fee simple absolute effectively transfer to another a fee simple—or a lesser estate in such land—and yet place such a limitation or condition upon the estate conveyed as will, upon the happening of the stipulated contingency, cause the estate of the grantee or devisee to be cut short and either automatically revert to the grantor or his heirs, or be subject to their election to revest the title in themselves? If so, *how* may such a qualified interest in the grantee or devisee be created under our law? What is the nature of the interest retained by the grantor or testator after he has created an estate on special limitation or upon condition subsequent? These and other problems incident to the creation of such estates will be discussed in the hope that the law of North Carolina pertaining thereto will be clarified.<sup>1</sup>

### ESTATES ON SPECIAL LIMITATION

Before we enter into a discussion of the North Carolina law as it affects the valid erection of a fee on special limitation, perhaps a brief summary of some of the general propositions inherent in such an estate might prove helpful.

Suppose *A*, the owner of Blackacre in fee simple, transfers by deed or will the land "to *B* and his heirs so long as no apartment building is erected on the premises". Assuming that the instrument of transfer was validly executed, *A* has created in *B* a fee on special limitation, or, as it is more commonly designated, a fee simple determinable. Here is how he did it: in addition to the *general limitation* to *B* "and his heirs", which of course gives *B* a fee simple estate, *A* has put in a clause of *special limitation*—"so long as no apartment building is erected on the premises"—which latter clause has the effect of automatically terminating *B*'s fee simple estate if the event specified occurs before the time at which the estate generally limited to *B* would normally termi-

\* Professor of Law, University of North Carolina.

<sup>1</sup> The discussion in this article will be confined primarily to estates on special limitation and on condition subsequent. Its scope does not contemplate any treatment of the law pertaining to fees defeasible with a limitation over operating either as a shifting use under the Statute of Uses or as an executory devise under the Statute of Wills. Estates on condition precedent will receive only incidental treatment.

nate.<sup>2</sup> As a result of the language used, *B* is said to have a fee simple determinable estate in Blackacre. It is called a fee because of the possibility of it continuing forever; it is said to be determinable because its continuance may be cut short by the happening of the contingency upon which it was further especially limited.<sup>3</sup> The special limitation, *so long as*, etc., is regarded as a part of the original limitation, as marking out the utmost period of time during which the estate may endure. If and when the event specified occurs, the estate automatically comes to an end by virtue of its own limitation, and, without any action on the part of *A* or his heirs, reverts back to them by operation of law. Other apt words indicative of an intent on the part of a grantor or testator to create an estate in fee simple which will automatically expire upon the happening of the stated event—an estate on special limitation—are “until”, “while”, “during”; or a provision that upon the happening of the stated event “the land is to revert to the grantor”.<sup>4</sup> The clause of special limitation, introduced by such words or phrases, may be likened unto an *automatic time bomb* which, when set off by the happening of the contingency specified, causes the entire fee simple to cease and determine. In the illustration given above—if and when an apartment house is erected on the premises conveyed by *A* to *B*, the fee simple estate given to *B* automatically comes to an end. From what we have just said about the use of certain apt or “groove” words to create a determinable fee, it must not be inferred that such an estate may not be created by other language.<sup>5</sup> The intention on the part of the grantor or testator to set up a determinable fee must be arrived at by the courts upon a construction of all the language confined within “the four corners of the instrument”.

Of course, as Tiffany says, “it is necessary that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an essential characteristic of a fee that it may possibly endure forever”.<sup>6</sup>

Assuming in the illustration used above that *A*, owning a fee simple absolute, has created in *B* a valid fee simple determinable, what interest if any, does *A* have left in the land? He is said not to have an *estate* in the land—because, according to the rigid doctrine of estates, there can be no *estate* in reversion or remainder after the creation of any fee simple estate in another; therefore he is said to have merely a possibility

<sup>2</sup> 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §217.

<sup>3</sup> First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231 (1892); see West v. Murphy, 197 N. C. 488, 490, 149 S. E. 731, 732 (1929).

<sup>4</sup> 1 RESTATEMENT, PROPERTY (1936) §44, Illus. 16, Comment (c); 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §218.

<sup>5</sup> 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §220.

<sup>6</sup> *Ibid.*

of reacquiring the land upon the happening of the contingency named. This possibility is known as a possibility of reverter.<sup>7</sup>

It has been contended by writers of eminent authority in the field of real property<sup>8</sup> that since the passage of the English Statute *Quia Emptores*,<sup>9</sup> it is impossible to create a determinable fee. The statute, the effect of which was to abolish subinfeudation, provided that if *A*, owning an estate in fee simple, alienated the land to *B* in fee simple, *B* the feoffee should not hold the land by any tenurial relation to *A* but should hold it of *A*'s overlord, *X*. In other words, *A* would drop out of the picture and there would no longer be any "reversionary" interest in him by way of escheat—as obtained before the passage of *Quia Emptores*. The statute reads, in part, as follows: "and it is to wit, that this statute extendeth but only to lands holden in fee simple."<sup>10</sup> Gray contended that the statute applied not only to fees simple *absolute* but also to fees simple *determinable*; hence it was impossible for *A* after the statute, to create the latter estate in *B* with the concomitant possibility of reverter left in *A*. May we quote his argument: "*Possibilities of Reverter*. These rights, as their name implies, were reversionary rights; but a reversionary right implies tenure, and the Statute *Quia Emptores* put an end to tenure between the feoffor of an estate in fee simple and the feoffee. Therefore, since the Statute, there can be no possibility of reverter remaining in the feoffor upon the conveyance of a fee; or, in other words, since the Statute, there can be no fee with a special or collateral limitation, and the attempted imposition of such a limitation is invalid."<sup>11</sup> Other writers<sup>12</sup> have taken the position that *Quia Emptores* applied only to fees simple *absolute* and hence did not include determinable fees. Despite Gray's argument, the validity of determinable fees has been recognized in about eighteen states in this country.<sup>13</sup>

Is North Carolina among those states which have recognized the validity of the fee determinable, i.e., the fee simple on special limitation? The direct question seems to have arisen first in the case of *The School Committee of Providence Township v. Kesler*.<sup>14</sup> In that case one Kesler in 1848 conveyed by deed land to a certain school committee and their successors in office "to have and to hold . . . as long as the

<sup>7</sup> For an interesting summary of the evolution of a possibility of reverter, see 1 SIMES, *FUTURE INTERESTS* (1936) §35, at p. 43.

<sup>8</sup> SANDERS, *USES AND TRUSTS* (5th ed. 1844); GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) §31.

<sup>9</sup> 18 EDW. 1, c. 1 (1290).

<sup>10</sup> *Ibid.*

<sup>11</sup> GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) §31.

<sup>12</sup> CHALLIS, *REAL PROPERTY* (3d ed. 1911) §437, and Powell, *Determinable Fees* (1923) 23 COL. L. REV. 207.

<sup>13</sup> For citation of decisions in the several states which have recognized the validity of fees determinable, see 1 SIMES, *FUTURE INTERESTS* (1936) 178, n. 10; 1 TIFFANY, *REAL PROPERTY* (3d ed. 1939) §220, n. 85.

<sup>14</sup> 67 N. C. 443 (1872).

system of common schools shall be continued at that place, or as long as it shall not be applied to any other purpose except for schools of any kind." In an action brought by the plaintiff school committee against Kesler to recover for damages done by him to the school house located on the premises, the plaintiff proved that the school house had been used by the old school committee for twenty-five or thirty years, and continuously up to the adoption of a new system; that in the year 1870—two years before this suit was brought—a free school had been taught in the house for two months. As one of his defenses to this action for damages, the defendant insisted that the habendum clause in the deed, as quoted above, had the legal effect of making the estate of the school committee, existing in 1848, a "base or qualified fee" to said committee and its successors, so long as the *then existing system of public or common schools* should be in force; but that the estate terminated, by its own limitation, when the system of common schools was changed and a new system was adopted. He cited one of the classic examples of a fee on special limitation: "An estate to A and his heirs, tenants of the Manor of Dale, is at an end as soon as they cease to be tenants of the Manor of Dale". The court refused to accept as valid this contention of the defendant and flatly held that a base or qualified fee had never been in use or in force in this state, or recognized by its laws for the reasons that, first, it was contrary to public policy; and, second, that such a limitation or qualification in the defendant's deed was repugnant to and inconsistent with the nature of the grant and therefore void. As to the first reason, the court said: ". . . great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon land a peculiar character which should follow the land into all hands, however remote". As to the second reason the court said: "The condition or qualification being repugnant, and inconsistent with the object of the grant, is void and must be rejected in the same way that a condition annexed to an estate in fee simple, that the grantee should not alien . . . is rejected and treated as surplusage, as repugnant to the nature of the estate". At no point in the decision did the court refer to *Quia Emptores* as it might affect the creation of such an estate in North Carolina.

It is interesting to note that, despite Judge Pearson's statement in the instant case to the effect that a base or qualified fee had never been in force or use in this state, he himself had directly held in an earlier case<sup>15</sup> that such an estate *had been created* by the deed involved in that case.

Since the court in the *Kesler* case<sup>16</sup> reached the further conclusion

<sup>15</sup> *Merriman v. Russell*, 55 N. C. 470, 472 (1856). <sup>16</sup> See note 14, *supra*.

that the condition or qualification in the deed had not been violated and, furthermore, that the deed did not contain apt and proper terms "to create a condition, or a qualification, or even a covenant to run with the land," what was said by the court with reference to the creation of what it termed "a base or qualified fee" might be regarded merely as dicta.

Twenty years later in the case of *Hall v. Turner*<sup>17</sup> the problem of whether or not a *fee determinable*—a fee on special limitation—might be validly created in North Carolina, was again presented to the court. In that case Hall entered into a sealed agreement with Turner whereby Hall "consents for the said Turner to back water, if necessary, up into his field, on condition that the said Turner will allow Hall as much woodland along the line fence on the south of the river. Said Turner is allowed to raise a dam eight or nine feet high. This agreement to remain good *so long as*<sup>18</sup> the said Turner keeps up a mill . . . afterwards to be null and void". A controversy subsequently arose between Hall and Turner which involved primarily, the construction of the agreement to determine the quality of the interest held by Turner in the land under the agreement—whether he had a mere personal right to flood Hall's land, which would terminate at his death, or whether he had such an estate in the land as would descend to his heirs. The court held as follows: "We are of the opinion . . . that Turner and his heirs took, in equity, an easement to overflow the land of Hall, determinable when they ceased to keep up the said mill. In this respect it is a limitation. But it is to be observed that this base, qualified or determinable fee (we prefer the term qualified) is liable to be defeated by the failure of Turner 'to allow the said L. W. Hall as much woodland along the line fence on the south side of the river.' In this particular, the estate in the easement is an estate upon condition . . ." In the course of its decision in the instant case the court commented upon the *Kesler* case<sup>19</sup> and said that it was impossible to reconcile the conflicting utterances of Judge Pearson on the subject of base or qualified fees; that however broad the language used by that learned jurist on the subject "we have no idea that it was the purpose of the Chief Justice to say that the limitation expressly defined by him as a base or qualified fee in *Merriman's* case could not be made in North Carolina. Such limitations are not infrequent in this and other states and we are not prepared to adopt a view which leads to such a revolution in the law of limitations of real property". Thus in polite and euphemistic language the court overruled the dogmatic statement of Judge Pearson in the *Kesler* case that base or qualified fees (*i.e.*, fees on special limita-

<sup>17</sup> 110 N. C. 292, 14 S. E. 791 (1892).

<sup>18</sup> Italics ours.

<sup>19</sup> See note 14, *supra*.

tion) have no place in the North Carolina law. While the interest dealt with in *Hall v. Turner* as well as in the subsequent case of *Ruffin v. Seaboard Air Line Railway*,<sup>20</sup> was an *easement*, and while no case has been found in which the problem was squarely raised in connection with a full fee interest in the land itself,<sup>21</sup> yet it can be readily inferred from the broad, non-exclusive language of the *Hall* case as well as from dicta in succeeding cases,<sup>22</sup> in which a fee in the land was involved, that a person either by deed or will may validly place such a limitation or qualification upon a fee simple estate in land as will cause the fee to terminate automatically sooner than it normally would. This being so, it follows that prior to the happening of the stipulated event, there would remain in the grantor or testator a possibility of reverter. That the Statute of *Quia Emptores* does not forbid the creation of such interests in North Carolina is clearly recognized by the court in the case of *Sharpe v. North Carolina Railroad Company*, decided in 1925.<sup>23</sup>

It will be apparent to the reader who has endured us thus far that there is considerable confusion in the nomenclature used to identify this fee simple estate which may not live out its normal life because of some limitation or qualification imposed upon it by its creator. It will be recalled that Judge Pearson in the *Kesler* case<sup>24</sup> denominated it as a "base or qualified fee". In *Hall v. Turner*<sup>25</sup> the court spoke of it as a "base, qualified or determinable fee", but preferred to call it a "qualified fee". In *Ruffin v. Seaboard Air Line Railway*<sup>26</sup> it was called a "determinable fee". Even in this article we have spoken of it interchangeably as a "fee determinable" or a "fee on special limitation". What should the child be named? Modern authorities<sup>27</sup> have given it the appellation "fee simple determinable", shortened to "determinable fee". This is what we prefer to call it. Analytically, in terms of its

<sup>20</sup> 151 N. C. 330, 66 S. E. 317 (1909).

<sup>21</sup> In *Davis v. Frazier*, 150 N. C. 447, 64 S. E. 193 (1909), a deed to *standing timber* contained a clause giving the grantee the right to enter upon the lands and cut and remove the timber within five years from a specified date, followed by a clause providing that the grantee should not have the right to cut over the timber a second time. It was *held* that the second clause conveyed a *base or qualified fee* in the specified dimensions of timber, determinable as to all timber not cut and removed from the land within the five years, and subject to the further provision that the land should not be cut over a second time for timber.

<sup>22</sup> *Keith v. Scales*, 124 N. C. 497, 513, 514, 32 S. E. 809, 812 (1899); *Saint Peter's Church v. Bragaw*, 144 N. C. 126, 56 S. E. 688, 691 (1907); *West v. Murphy*, 197 N. C. 488, 490, 149 S. E. 731, 732 (1929); *Sharpe v. North Carolina R. R.*, 190 N. C. 350, 352, 129 S. E. 826, 827 (1925).

<sup>23</sup> See note 22, *supra*. It should be noted, however, that since the court in this case was dealing with a fee on condition subsequent, what was said by it (in a confused statement of the law) regarding *Quia Emptores* and possibilities of reverter must be regarded as *dicta*.

<sup>24</sup> See note 14, *supra*.

<sup>25</sup> See note 17, *supra*.

<sup>26</sup> See note 20, *supra*.

<sup>27</sup> 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §220; Powell, *Determinable Fees* (1923) 23 COL. L. REV. 207; 1 SIMES, FUTURE INTERESTS (1936) §177 *et seq.*; 1 RESTATEMENT, PROPERTY (1936) §44.

creation, a fee determinable is really a fee on special limitation, as contrasted with a fee on condition subsequent, with which we shall deal presently in the article. Hence, for the purpose of our discussion we have felt justified in using the interchangeable terminology—"fee determinable" or "fee on special limitation". We trust, however, that our court will abandon the use of the language "base or qualified" to describe such a fee, because such terminology is not only confusing but it is technically inaccurate.<sup>28</sup>

Before we complete our discussion of determinable fees in North Carolina we should like to call attention to the recent case of *Bernard v. Bowen*.<sup>29</sup> In that case one Matthews in 1848 conveyed by deed a tract of land to certain named commissioners of a school district and their successors, for the purpose of enabling them to build a school house and church, said land to be held "so long as a church is kept up on said lot and not to be used for any other purpose, and if at any time they should be discontinued or fail, the title to said lot to revert back to me (the grantor) and my heirs". A school house was immediately erected on the premises and was used for school and church purposes until 1878, when a church building was erected on an adjacent lot and the school building ceased to be used for church purposes. The use of the building for school purposes was continued uninterruptedly until 1936 when the school board offered the premises for sale, but such sale was never consummated. In 1937 the school furniture was removed from the building and was placed in a high school building newly erected on an adjoining tract of land. During that year, however, the school board resumed the use of the old building for laboratory purposes in connection with the high school. The offer to sell was also definitely withdrawn. The plaintiff as an heir of Matthews, the original grantor, instituted suit to recover the land. He claimed that the title thereto had reverted because there had been an abandonment of the purposes for which the land had originally been conveyed. The court, proceeding upon the assumption that Matthews' deed had created in the school board a fee simple *on condition subsequent*, held that the

<sup>28</sup> In 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §220, n. 81, the author, citing authorities, points out that: "The term 'base fee' is perhaps more properly applied only to the estate which arises in the grantee of a tenant in tail upon the barring of the issue in tail by any act which is ineffectual to bar the reversion expectant on the estate tail. . . . The term 'qualified fee' is by Preston and Challis applied to an estate which is limited to a man and certain of his heirs only, as to a man and the heirs of his father; but such an estate . . . has rarely, if ever, occurred."

In order to obviate much of the confusion which has arisen in the law from the use of indiscriminate and divergent terminology, the Restatement has steered away from the use of such terms as "base fee", "conditional fee", "qualified fee", and "fee on conditional limitation" and has designated it "fee simple determinable". See 1 RESTATEMENT, PROPERTY (1936) Introductory Note to Ch. 4; also, §44.

<sup>29</sup> 214 N. C. 121, 198 S. E. 584 (1938).



plaintiff was not entitled to recover for two reasons: (1) that, upon the facts presented, there had been no abandonment of the premises for school purposes; (2) that, since for fifty-nine years the heirs of the grantor had acquiesced in the non-user of the premises for church purposes, any right of forfeiture, which might have been exercised by them by reason of such non-user, would be deemed to have been waived and lost by lapse of time, and, therefore the right of re-entry barred.

This case is of interest to us at this point in our discussion because, on the basis of the *language* employed by the grantor in the deed, there would seem to be an almost perfect set-up for the creation of a *fee determinable* and not a fee on condition subsequent. The clause "*so long as*<sup>30</sup> a church is kept up on said lot and not to be used for any other purposes" would seem to place a special limitation upon the estate already generally limited and to mark out further the utmost period of time the estate in the school board could endure. The additional provision—"and if at any time they should be discontinued or fail, the title to said land to revert back to me (the grantor) and my heirs"—would seem simply to spell out what would happen automatically by operation of law.<sup>31</sup> In other words, if the deed had contained only the first clause, "*so long as . . . etc.*", and nothing else, the estate in the school board would have, upon the happening of the contingency stipulated in the clause, ceased and determined by its own limitation and the full fee simple title would have automatically reverted to the grantor or his heirs. As Professor Simes says: "No express words of reverter are necessary. Indeed, they would seem to be mere surplusage if present."<sup>32</sup> Clearly, if *A*, owning a tract of land in fee simple, should convey the same "*to B for life and at his death to revert back to me or my heirs in fee simple*", he has spelled out what would have happened anyway by operation of law. In law, *A* would have attained precisely the same objective if he had used the normal, short-hand statement—"to *B for life*". If, as the court held in the instant case, the grantor Matthews created a fee on condition subsequent, the land would not have, upon the failure of the grantee to maintain a church upon the premises, "*reverted*" to the grantor or his heirs—this, despite the provision that the title should "*revert*".<sup>33</sup> As we shall later point out, an estate on condition subsequent does not automatically come to an end upon the breach of the condition. It continues in effect until the grantor or his heirs elect to terminate it and re-vest the title in them-

<sup>30</sup> Italics ours.

<sup>31</sup> See 1 RESTATEMENT, PROPERTY (1936) §44(1), illustration 17, V.

<sup>32</sup> 1 SIMES, FUTURE INTERESTS (1936) §181.

<sup>33</sup> Phelps v. Chessun, 34 N. C. 194, 199 (1851); Robinson v. Ingram, 126 N. C. 327, 85 S. E. 612 (1900).

selves either by actually re-entering upon the land or by bringing a suit in ejectment to recover it.<sup>34</sup>

If we concede the soundness of the foregoing argument that, on a technical basis, the court should have found that the grantor created a fee determinable estate, is there any rational basis upon which we may justify the decision of the court that the grantor set up an estate in fee simple upon condition subsequent? We think there is, for several reasons. First of all, a court is not absolutely bound by the technical or nontechnical *language*, used by the draftsman of an instrument, in its endeavor to arrive at a construction consonant with what it deems to be the probable intent of the party grantor in such an instrument. Obviously such an intent must be found by a scrutiny of the instrument according to the whole tenor thereof. Secondly, the court undoubtedly was influenced in its decision that the deed created a fee on condition subsequent because of the appearance in the deed of a clause of condition followed by provision for a "reversion" of the title if the condition were not fulfilled. This conclusion could be logically reached by virtue of the fact that our court has consistently held that a fee on condition subsequent *can not* be created unless the instrument purporting to create it contains language expressly providing for forfeiture, or reentry, or "reversion" upon breach of the stipulated condition.<sup>35</sup> In the third place, the most compelling factor which would justify the court in reaching the conclusion that Matthews had created a fee on condition subsequent, was the fact that for fifty-nine years after the grantee had ceased to use the premises for church purposes, neither the grantor nor his heirs had asserted any right to the property. Obviously, if the deed had been construed to create a fee determinable, the title to the land, immediately upon the cessation of its use for church purposes, would have automatically reverted to the grantor or his heirs, and the status of their title would be considerably clouded by virtue of the continued use and occupation by the grantees for the succeeding fifty-nine years. Whether or not the grantees would have acquired the title by fifty-nine years of adverse possession would depend in turn upon the answer to the question: had the grantees continued to hold the land under the original deed and therefore in subordination to the grantor, or had they begun to assert title *in their own right* as of the time they discontinued the use of the land for church purposes. The court solved the problem of title by deciding that the deed had created a fee on condition subse-

<sup>34</sup> *Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280 (1915).

<sup>35</sup> *Braddy v. Elliott*, 146 N. C. 578, 60 S. E. 507 (1908); *Shannonhouse v. Wolfe*, 191 N. C. 769, 133 S. E. 93 (1926); *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. (2d) 845 (1939). These and many other cases will be considered in a subsequent part of this article which will deal directly with the problem of how an estate on condition subsequent may be validly created under the North Carolina law.

quent. This meant, of course, that the grantees had a fee simple subject to be defeated only if and when the grantor or his heirs should elect to reclaim the land within a reasonable time after the condition was breached. The right of forfeiture, not having been exercised for fifty-nine years, was deemed by the court to have been waived and lost by lapse of time. The grantor's right of reentry—his "string" tied to the grantee's fee—was severed and destroyed; his grantee now held an indefeasible fee simple estate in the land. Thus on a practical, economic basis the title to the land was cleared. For these several reasons we feel that the court was justified in construing the deed to have created a fee simple on condition subsequent instead of a fee determinable.

However well decided the foregoing case may have been from the standpoint of desirability of result, it does create for the conveyancer this very practical problem: *how* may a technical fee simple determinable be created in North Carolina? What terminology should be used in the deed or will? We suggest that perhaps it might be done in the following way. Suppose *A*, who owns a tract of land in fee simple, desires to convey said land to the town of Chapel Hill to be used for park and playground purposes but also desires that the title to the land, upon the cessation of such uses, should return automatically to him or his heirs. Conceivably, *A* might word the deed to effectuate this purpose as follows: "*A* conveys the premises herein described to the Board of Aldermen of the Town of Chapel Hill, and their successors in office, *so long as* the said land is used for park and playground purposes, *and no longer*; it being the express intention of the grantor hereby to convey to the said grantees a fee simple determinable estate in said land and not a fee simple estate on condition subsequent; and, when the said premises cease to be used for park and playground purposes, then at that time the title to said premises shall automatically by operation of law and without reentry or suit on his or their part, be revested in the said grantor, *A*; or if *A* be dead, in his heirs".

Since, as we have shown, it is possible to create a fee simple determinable in North Carolina, obviously a determinable estate of lesser dignity can be created. Indeed our court has so held in the case of *Stancil v. Calvert*.<sup>36</sup> In that case where *A* agreed to let *B* put a saw-mill, houses and fixtures on *A*'s land for the purpose of carrying on the business of sawing lumber *as long as B wished*, and when *B* wished he could remove the mill, fixtures, etc., it was held that *B* had a life interest in the land necessary to the business, determinable sooner at *B*'s option. The estate may last for *B*'s life or it may come to an end sooner at *B*'s option. In such a case *A* holds both a possibility of reverter should *B* exercise his option to quit the lumber business before

<sup>36</sup> 60 N. C. 104 (1863).

his death and also a true reversion in fee should *B* continue the business until his death. A determinable life estate of more frequent occurrence is created when a testator devises real estate to his wife *during her widowhood*, or to her until she remarry.<sup>37</sup>

Like a life estate, a tenant's estate for years may be subject to a special limitation by which such estate may come to an end upon the happening of some contingency before the end of the term.<sup>38</sup> Here again the lessor will have both a possibility of reverter and a reversion in fee expectant upon the termination of the determinable estate for years.

#### ESTATES ON CONDITION

For the purposes of this article our discussion of estates on condition will be confined, for the most part, to estates on condition subsequent—their creation and some of their incidents, and a comparison of them with estates on special limitation under the North Carolina law.

Before we enter into a discussion of the specific problems involving estates on condition, some generalizations concerning such estates seem to be in order. An estate on condition expressed in the grant itself occurs where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition; and a condition subsequent is one which operates upon an estate already created or vested, rendering it liable to be defeated if the condition is broken.<sup>39</sup> As to the distinction between estates on condition precedent and on condition subsequent, our Court states: "There is this familiar distinction between a condition precedent and a condition subsequent: If the condition is precedent, inasmuch as the estate does not vest at all until such condition happens, the effect of its being unlawful or impossible is that the estate dependent upon it fails, and the grant or device becomes wholly void; and where a condition precedent consists of several parts united by copulative conjunction, each part must be performed before the estate can vest. A condition subsequent, if it has any effect, defeats an estate already vested; but if such condition is impossible or unlawful at the time of creating the estate, or becomes impossible by the act of the feoffor or the act of God, it leaves the estate an absolute and unconditional one, since it is the condition itself that is or becomes void."<sup>40</sup>

<sup>37</sup> *In re Will of R. C. Miller*, 159 N. C. 123, 74 S. E. 888 (1912).

<sup>38</sup> See *Stedman v. McIntosh*, 26 N. C. 291, 295 (1844); 1 *TIFFANY, REAL PROPERTY* (3d ed. 1939) §§148, 219.

<sup>39</sup> Such is the definition of an estate on condition given by the North Carolina court in *Hall v. Quinn*, 190 N. C. 326, 328, 130 S. E. 18, 20 (1925), citing 2 *BLACKSTONE COMM.* \*154.

<sup>40</sup> *Brittain v. Taylor*, 168 N. C. 271, 274, 84 S. E. 280, 281 (1915). This case contains an excellent discussion of estates on condition and of the various incidents arising therefrom.

Perhaps the leading case in North Carolina involving an estate on condition precedent is *Tilley v. King*.<sup>41</sup> In that case the testator devised land to his widow for life, "and if Powell H. Tilley stays with us until after our deaths, and takes care of us, then I give and bequeath this tract of land to him forever." It was held that the requirement that Powell H. Tilley should remain with the testator and his wife and care for them until their deaths constituted a condition precedent to the vesting of the estate in the land devised to him; that this was so on the clear words of the will notwithstanding there was no ulterior limitation over of such estate.

It is often difficult to determine from the wording of a deed or will whether the condition is to be regarded as precedent or subsequent. "Whether a condition is a precedent or subsequent one depends upon the intention of the grantor or testator to be gathered from the whole instrument. Whether it be precedent or subsequent is a question purely of intent, and the intention must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject matter to which it relates."<sup>42</sup>

A case might be put which, conceivably, would give a court some trouble in ascertaining whether the maker of the instrument intended to create an estate on condition precedent or one on condition subsequent. For example, suppose *A* by deed conveys a tract of land "to *B* and his heirs provided *B* supports me (*A*) for the rest of my life; but if *B* fails to do so then this deed is to be void."<sup>43</sup> Must *B* support *A* for the rest of *A*'s life as a condition precedent to the vesting of any title in *B*; or does *B* take title immediately, subject to divestment if *B* fails to support *A*? The court construing this instrument would probably arrive at the conclusion that *B* took an immediate estate in the land subject to divestment if he failed to perform—that the estate was upon a *condition subsequent*. In arriving at this conclusion the court would be aided by some generally accepted rules of construction. If possible, the construction will be in favor of the condition as subsequent, rather than precedent, so that the grantee or devisee may have an estate liable to be divested rather than one whose vesting is deferred.<sup>44</sup> The North Carolina court states the rule as follows: "If the act on which the estate depends does not necessarily precede the vesting of the estate,

<sup>41</sup> 109 N. C. 461, 13 S. E. 936 (1891). See also *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751 (1896).

<sup>42</sup> *Helms v. Helms*, 137 N. C. 206, 211, 49 S. E. 110, 112 (1904).

<sup>43</sup> The North Carolina court had difficulty with a substantially similar fact situation in *Helms v. Helms*, 137 N. C. 206, 49 S. E. 110 (1904).

<sup>44</sup> *St. Peter's Church v. Bragaw*, 144 N. C. 126, 56 S. E. 688 (1907); 1 TRIFANY, REAL PROPERTY (3d ed. 1939) §194.

but may accompany it or follow it, if this is to be collected from the whole instrument, the condition is subsequent."<sup>45</sup> Evincive of their general hostility to conditions, the courts tend to construe conditions precedent in favor of vesting the estate and conditions subsequent against divesting it.<sup>46</sup>

#### ESTATES ON CONDITION SUBSEQUENT

According to the Restatement of Property "an estate in fee simple subject to a condition subsequent is created by an otherwise effective conveyance which contains (1) some one of the following phrases, namely, 'upon condition that', or 'provided that', or a phrase of like import; and also (2) a provision that if a stated event occurs, the conveyer 'may enter and terminate the estate hereby conveyed', or a phrase of like import".<sup>47</sup> Suppose, then, that *A*, the owner of Blackacre in fee simple transfers by a validly executed deed or will the land "to *B* and his heirs upon the express condition that if an apartment building is erected upon the premises hereby conveyed, *A* may enter and terminate the estate hereby created". *A* has created in *B* a fee simple estate but it is subject to a condition subsequent—"if an apartment house is erected upon the premises". Upon the happening of that event *A* or his heirs, at their election, may forfeit *B*'s estate and take the land. Unlike a fee determinable, the happening of the contingency does not cause the land automatically to revert back to *A*; the fee will continue in *B* until *A* exercises his option to retake the land.<sup>48</sup> The right retained by *A* after creating in *B* the fee on condition subsequent is called "a right of entry for condition broken", or, a "power of termination". It will be recalled that the interest left in *A* after he created a fee determinable, or fee on special limitation, in *B* was denominated a "possibility of reverter". The courts often confuse the technical distinction between the two by calling them, interchangeably, "possibilities of reverter". In this respect a roll call would find the North Carolina court on the list of offenders.<sup>49</sup>

<sup>45</sup> *Helms v. Helms*, 137 N. C. 206, 49 S. E. 110 (1904); *Lynch v. Melton*, 150 N. C. 595, 64 S. E. 497 (1909).

<sup>46</sup> *Barco v. Owens*, 212 N. C. 30, 192 S. E. 862 (1937); 1 *TIFFANY, REAL PROPERTY* (3d ed. 1939) §193.

<sup>47</sup> 1 *RESTATEMENT, PROPERTY* (1936) 139, §45(j-1); also, *in re* apt words to create an estate on condition subsequent, see 1 *TIFFANY, REAL PROPERTY* (3d ed. 1939) §190, and *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. (2d) 845 (1939).

<sup>48</sup> *Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280 (1915).

<sup>49</sup> In cases involving fees on condition subsequent our court almost invariably speaks of the interest left in the grantor as a possibility of reverter. See, for example, *Helms v. Helms*, 137 N. C. 206, 209, 49 S. E. 110, 111 (1904); *Sharpe v. North Carolina R. R.*, 190 N. C. 350, 352, 129 S. E. 826, 827 (1925); *Methodist Protestant Church v. Young*, 130 N. C. 8, 13, 40 S. E. 691, 693 (1903) where the court said: "There must remain in the grantor at least a *possibility of re-*

Logically, it would seem that there should be very little difference in the estate created in *B*, whether *A*, in his deed or will, says "to *B* and his heirs *so long as* no apartment house is erected on the premises" or "to *B* and his heirs *provided that* no apartment house is erected on the premises". In each instance *B* has a fee simple which may continue for its natural duration and yet, due to the contingency named therein, may possibly determine before the end of such period. Technically, however, the law sees more than a *verbal* distinction between the two estates: in the former *B* is said to have a determinable fee—a fee on special limitation; in the latter he is said to have a fee on condition subsequent. Tiffany differentiates the two estates as follows: "There is, however, a fundamental distinction between an estate on condition and one on special limitation, in that, while in the former case the words which provide for the termination of the estate on a contingency are not regarded as part of the original limitation of the estate, but are considered to provide for the cutting off of the estate before its proper termination, in the case of an estate on special limitation the words of contingency are regarded as part of the limitation itself, and so as not cutting off an estate previously limited, but as merely naming an alternative limit to the duration of the estate".<sup>50</sup> Since a determinable fee comes to an end, upon the happening of the contingency, by virtue of its own special limitation, there is no estate left in the grantee and necessarily the right of possession automatically reverts to the grantor. Since in a fee on condition subsequent the contingency named is not regarded as a part of the original limitation of the estate (i.e., "to *B* and his heirs") the estate is not automatically ended *by the breach of the condition*. The estate in fee continues in *B* until *A* reverts the title in himself by exercising his right of entry. At common law it was held that an actual entry upon the land was necessary, for the reason that, since the estate was created by a solemn act, viz., a grant and livery of seisin, it must be defeated and restored to the grantor by an act equally solemn. "But", says our court in *Brittain v. Taylor*,<sup>51</sup> "this view has long since ceased to obtain, and any act equivalent to an entry is now considered as sufficient in place of an entry, and numerous cases hold that a possessory action may be maintained upon the breach of a condition subsequent without a prior re-entry or demand of possession, such an action being equivalent thereto".

---

verter, which, while not an estate, is in itself a right coupled with the contingent right of entry".

<sup>50</sup> 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §217. For an excellent discussion distinguishing the two types of estates, see *Board of Chosen Freeholders v. Buck*, 79 N. J. Eq. 472, 82 Atl. 418 (1912).

<sup>51</sup> 168 N. C. 271, 275, 84 S. E. 280, 282 (1915).

Occasionally, the courts themselves are confused by the technical distinction, just discussed, between fees determinable and fees on condition subsequent. The Ohio court, in considering a case<sup>52</sup> whose facts would normally call for a fee determinable,<sup>53</sup> devoted almost the entire opinion to a discussion of *estates on condition subsequent*, and held that since the deed in question contained no provision for a reversion of the property to the grantor, only a covenant regarding the use of the property was created. Similarly, the North Carolina court in *Sharpe v. North Carolina Railroad Company*,<sup>54</sup> on a set of facts which were recognized by the court as creating a fee on condition subsequent,<sup>55</sup> held that "the bare possibility of a reverter under a condition subsequent is not assignable at common law", but may be released. The court then said: "Such provisions providing for a forfeiture upon breach of condition subsequent create a *determinable fee*,"<sup>56</sup> and proceeded to cite numerous authorities, including the leading Massachusetts case of *First Universalist Society v. Boland*<sup>57</sup> and the North Carolina case of *Hall v. Turner*,<sup>58</sup> which dealt with the creation and validity of technical *fees determinable* and not with fees on condition subsequent.

It would seem obvious that, if a fee simple on condition subsequent may be created, a life estate or an estate for years may be created subject to such a condition. For instance *A* may convey property "to *B* for life, provided *B* live in Durham". And, one of the most common instances in which an estate on condition subsequent is created is where *A* leases property to *B* for a term of years and stipulates that if a certain covenant, such as the payment of rent or the making of repairs, is not performed by *B*, the lessor may declare the lease forfeited and re-enter on the premises. Assuming that *A* is the owner of the premises in fee simple, in both instances he has retained a reversion in fee and also has a right of entry for condition broken. Both estates may continue for their normal duration or may be cut short by *A* upon *B*'s breach of the stipulated condition.

<sup>52</sup> *In re Matter of Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N. E. 218 (1929).

<sup>53</sup> *R* granted property to the trustees of the M. E. Church . . . "so long as said lot is used for church purposes". See dissenting opinion to the effect that the deed created a determinable fee.

<sup>54</sup> 190 N. C. 350, 129 S. E. 826 (1925).

<sup>55</sup> The Railroad Company conveyed land to *F*, with the provision that "if the said . . . [*F*] . . . keep up or maintain any house of ill-fame or house for the sale of . . . liquors or for any species of gaming on said lot or any part thereof, then in that case their right, title and property in and to the lot aforesaid shall be forfeited and revert to the North Carolina Railroad Company."

<sup>56</sup> *Italics ours.*

<sup>57</sup> 155 Mass. 171, 29 N. E. 524 (1891).

<sup>58</sup> 110 N. C. 292, 14 S. E. 791 (1892), discussed in the first part of this article under the heading of *Estates on Special Limitation*.



THE CREATION OF ESTATES ON CONDITION SUBSEQUENT IN  
NORTH CAROLINA

We come now to a consideration of the problem: how may an estate on condition subsequent be validly created under the North Carolina law? We shall be concerned first with the creation of conditions *expressed* or "in deed"; conditions *implied*, or "in law", will be discussed later.

North Carolina agrees with the majority view that conditions subsequent, which work a forfeiture of the estate conveyed, should be strictly construed, as such conditions are not favored in the law and are to be taken most strongly against the grantor to prevent forfeiture.<sup>59</sup> In *Vinson v. Wise*,<sup>60</sup> our court said: "a clause in a deed will be construed as a covenant, unless apt words of condition are used, and even then it will not be held to create a condition unless it is apparent from the whole instrument and the circumstances that a strict condition was intended". Obviously, whether or not an estate on condition subsequent or some other estate was created is a matter of intention on the part of the parties, and such intent must be arrived at upon a construction of the instrument as a whole. To ascertain this intention, the court will look "to the circumstances attending the transaction, the situation of the parties, and the state of the thing granted."<sup>61</sup>

It being conceded that the North Carolina court will construe strictly conditions subsequent, the further question arises: *how* strictly will it construe them? The answer will depend somewhat upon the ritualistic significance given by the court to the words or phrases used by the grantor or testator to express his intention. In *Shields v. Harris*,<sup>62</sup> the court said: "To every good expressed condition is required an external form, that is, sufficient words to declare an intent in the party to have the estate conditional; and an internal form, that is, such matter as whereof a condition may be made. Shep. Touchstone, vol. 1, \*126 (241) . . . The usual and proper technical words [are] such as 'provided', 'so as', 'on condition', or those mentioned by Lord Coke when he says: 'words of condition are *sub conditione, ita quod, proviso*', or the words '*si*' or '*quod contingat*' and similar terms with the clause of forfeiture or re-entry. Coke on Littleton, 203a, 203b, 204a. . . Although certain words are appropriate for the creation of a condition, no particular words are necessarily required, for rules of construction

<sup>59</sup> *Hinton v. Vinson*, 180 N. C. 393, 104 S. E. 897 (1920); *Shields v. Harris*, 190 N. C. 520, 130 S. E. 189 (1925); *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. (2d) 845 (1939); 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §192.

<sup>60</sup> 180 N. C. 393, 396, 104 S. E. 897, 899 (1920).

<sup>61</sup> *Vinson v. Wise*, 180 N. C. 393, 398, 104 S. E. 897, 899 (1920).

<sup>62</sup> 190 N. C. 520, 524, 525, 130 S. E. 189, 191 (1925).

are guides to find the intention of the parties expressed by the whole instrument."

Assuming that the proper subject matter—"the internal form"—for the creation of a valid<sup>63</sup> condition subsequent is present in the instrument, what words will the North Carolina court deem to be sufficient "to declare an intent in the party to have the estate conditional" so as to work a forfeiture? It is generally recognized by the authorities<sup>64</sup> that the use of the apt words—"on condition that", "upon the express condition", "provided", "so that", "but if", and similar language—are sufficient in themselves to create a condition subsequent with right of entry for the breach thereof, and that it is not essential to the creation of the condition that there be also included in the instrument an *express clause* providing for a re-entry or for a reverter or for a forfeiture. Yet the North Carolina court has reached the acme in strictness of construction by holding that regardless of the other language used in the instrument, a condition subsequent is not created unless the grantor or testator *expressly* reserves the right to re-enter, or provides for a forfeiture or for a reversion, or that the instrument shall be null and void.<sup>65</sup> It seems, therefore, that if the instrument contains both the apt words to create a condition and an express clause of re-entry, reverter, or forfeiture, our court will *generally* hold that an estate on con-

<sup>63</sup> The scope of this article does not contemplate a discussion of conditions impossible of performance: (see *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751 (1896); *Lynch v. Melton*, 150 N. C. 595, 64 S. E. 497 (1909)); nor of illegal conditions: (see *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218 (1905)); nor of conditions in restraint of marriage: (see *Monroe v. Hall*, 97 N. C. 206, 1 S. E. 651 (1887); *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218 (1905); *In re Will of Miller*, 159 N. C. 123, 74 S. E. 888 (1912); *Gard v. Mason*, 169 N. C. 507, 86 S. E. 302 (1915); *Bryan v. Harper*, 177 N. C. 308, 98 S. E. 822 (1919)); nor of conditions in restraint of alienation: (see *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122 (1896); *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785 (1904); *Norwood v. Crowder*, 177 N. C. 469, 99 S. E. 345 (1919); *Douglass v. Stevens*, 214 N. C. 688, 200 S. E. 366 (1938)); nor of repugnant conditions: (see *Barco v. Owens*, 212 N. C. 30, 192 S. E. 862 (1937)).

<sup>64</sup> 1 SIMES, FUTURE INTERESTS (1936) §163; 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §190.

<sup>65</sup> *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415 (1904); *Braddy v. Elliott*, 146 N. C. 578, 60 S. E. 507 (1908); *Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280 (1915); *First Presbyterian Church v. Sinclair Refining Company*, 200 N. C. 469, 157 S. E. 438 (1931); *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. (2d) 845 (1939); *Williams v. Thompson*, 216 N. C. 292, 4 S. E. (2d) 609 (1939). But see *Lynch v. Melton*, 150 N. C. 595, 64 S. E. 497 (1909) where the testatrix devised land to her niece "provided she lives with her said uncle until she becomes free, by age or marriage, otherwise to go as the law directs". The child was forced to leave the home of her uncle because of the latter's insanity. The court recognized the validity of the condition but held that, because of impossibility of performance, the niece took an absolute fee in the land. See also *Douglass v. Stevens*, 214 N. C. 688, 200 S. E. 366 (1939), where the testator devised land to his children "with the condition that they shall in no wise either sell or mortgage said property for a period of not less than 50 years". The court held that "the condition subsequent" was void as being an absolute restraint on alienation.

dition subsequent has been created.<sup>66</sup> But, even in such a situation, we find the court searching for and seizing upon any circumstance which will justify a construction hostile to a condition and the forfeiture consequent upon a breach thereof. Some interesting cases have been found. In *Robinson v. Ingram*<sup>67</sup> a father, by deed dated December 12, 1865, conveyed property in trust to two of his sons, the property to be managed by them for the support of their father and mother during their lives and after their deaths to divide the property equally among the grantor's children. The trust deed contained this clause: "That if the trustees should violate any of the trust embraced in the foregoing conveyance, then the said conveyance to be utterly null and void and the property revert to the grantor and his heirs". On February 27, 1882, one of the trustees together with some of the other children mortgaged the land, described in the trust deed, to secure a loan. On the 24th of February, 1882, the sheriff under executions against the grantor had levied on the land and sold his interest to the defendant. The grantor outlived his wife and died in 1894. The plaintiffs, claiming both as heirs of the grantor and by virtue of the trust deed, sued in 1899 to recover the land. The defendants claimed under the execution sale and further claimed that since the trustee and other children had mortgaged the land, and since the trustees had failed to support the grantor—these two circumstances avoided the deed of trust, put the title to the land back in the grantor and subjected his land to the execution and sheriff's deed, under which they claimed. Although the court sent the case back for retrial because of the failure to join proper parties, it held that the trustee's mortgage was invalid; that no title

<sup>66</sup> *Methodist Protestant Church v. Young*, 130 N. C. 8, 40 S. E. 691 (1902). (One Harris conveyed to trustees of a church land upon which to build a church; that "if such church discontinue the occupancy of said lot in the manner aforesaid, then this deed shall become null and void and the said lot or parcel of ground shall revert to the said W. A. Harris and his heirs and assigns forever."); *Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280 (1915) ("The said deed is made on this special trust: That the said . . . Taylor is to feed, clothe, and kindly care for the said Margaret Taylor all her natural life, and should the said . . . Taylor fail to feed, clothe and kindly care for the said Margaret Taylor, then this deed is to be null and void."); *Huntley v. McBrayer*, 169 N. C. 75, 85 S. E. 213 (1915) (*H* and his wife conveyed land to the parties of the second part in consideration that the latter support the former as long as the grantors or either of them should live, "but if the parties of the second part should fail to comply with their part of the agreement this is all void and of no effect."); *Sharpe v. North Carolina R. R.*, 190 N. C. 350, 129 S. E. 826 (1925) (See note 55, *supra*, for language held by the court to be effective to create a condition subsequent in this case); *Bernard v. Bowen*, 214 N. C. 121, 198 S. E. 584 (1938) (Land conveyed to school commissioners for the purpose of enabling them to build a schoolhouse and church, said land to be held "so long as church is kept on said lot and not to be used for any other purpose, and if at any time they should be discontinued or fail, the title to said lot to revert back to me (the grantor) and my heirs"). Cf., especially with the *Bernard* case, *Blue v. Wilmington*, 186 N. C. 321, 119 S. E. 741 (1923).

<sup>67</sup> 126 N. C. 327, 35 S. E. 612 (1900).

passed to the defendant by the levy and sale made by the sheriff since at that time the grantor had no interest subject to sale under execution; that he had only the right to be supported out of the profits of the property during his life, which he had received. The court said: "The proposition that any violation of the trust embraced in the deed would nullify and avoid the conveyance, and that the property would revert to the grantor or his heirs, is not sound. It assumes the clause to be self-executing. The learning as to conditions . . . is altogether inapplicable. The title passed absolutely by the deed, and *that clause is only a covenant* (italics ours), agreement by the parties, that if the grantees should violate any of the trusts declared, then the property *ipso facto* should revert to the grantor without any entry or other form of transmitting title to real estate. It would seem not to have been so considered by the grantor, in as much as he lived ten years or more after the breach now complained of, receiving the support provided in the deed, and without any assertion of right claimed for the alleged violation of duty on the part of the grantees. The courts in such cases will look to the good sense and sound equity, to the object and spirit of the contract. Courts of equity will not *aid* in divesting an estate for the breach of a covenant, a contract, when a just compensation can be made in money or other valuable thing, but will relieve against forfeitures claimed by strict construction of any common law rule."<sup>68</sup> Thus we see the court refusing to give effect to the apparent condition stipulated in the trust deed—especially in view of the fact that the grantor continued to recognize the validity of the trust after the supposed breach and that strangers, claiming adversely to the trust, were seeking to take advantage of the stipulation in the trust. Perhaps it might also be inferred from the case that our court is averse to the creation of a trust with a condition subsequent so that a right of entry would exist.<sup>69</sup>

In *Saint Peters Church v. Bragaw*,<sup>70</sup> land was conveyed to the plaintiff church by a deed which contained the following provision: "In the conveyance of this property to the parties of the second part, they are required, first, to inclose the tomb of Augustus Harvey and wife with an iron railing; second, they shall not allow this property to be used for a cemetery; third, in case the second party should abandon said property, it shall revert back to the McNair heirs, parties of the first part". Plaintiff contracted to sell the property to the defendant but the latter refused to complete the contract. His defense was that the plaintiff could not make good title to the land by reason of the fact that the third clause, set out above, was a condition subsequent and

<sup>68</sup> Robinson v. Ingram, 126 N. C. 327, 331, 332, 35 S. E. 612, 614 (1900).

<sup>69</sup> 1 SIMES, FUTURE INTERESTS (1936) §163, n. 23.

<sup>70</sup> 144 N. C. 126, 56 S. E. 688 (1907).

that the sale of the land would constitute an abandonment of the property and a breach of the condition, which would cause a reversion of the land to the McNair heirs. On the trial it was admitted that there had been no violation of the first clause as to the enclosure of the Harvey tomb, nor of the second clause forbidding the use of the premises as a cemetery. The court, construing strictly the third clause, held in favor of the plaintiff: that the sale of the land did not constitute an abandonment of the property, in that the intention of the McNairs was to have the premises constantly occupied by someone. The net effect of the decision was to eliminate the condition contained in the third clause and cut off the right of entry in the original grantors. But the court was still troubled as to whether by the second requirement, that the property should not be used as a cemetery, another condition was annexed to the estate, or whether that prohibition should be regarded merely as a stipulation or *covenant* to be enforced by a resort to the equitable power of the court for the purpose of restraining its violation. However, the court decided that this clause should not be construed as a condition subsequent but rather as a covenant or a restrictive clause, the observance of which could be compelled by a court of equity. In reaching this conclusion the court justified itself as follows: "The clause under consideration has no provision for a forfeiture, while the next and last clause has one, showing clearly the former was intended to operate as a covenant and not as a condition subsequent, a breach of which may involve a forfeiture of the estate conveyed by the deed."<sup>71</sup>

A similar situation which gave the court a chance to construe the language used strictly in favor of a covenant and against a condition subsequent, was presented in the case of *Carolina and Northwestern Railway Company v. Carpenter*.<sup>72</sup> Land was conveyed by a manufacturing company to the railroad for a right of way: "Provided said railway company locates or causes to be located within twelve months from this date, or within three months after it begins to operate trains over said strip or track, a sidetrack, flagstation, and other conveniences given other mill companies, at some suitable point on said manufacturing company's lands." In the habendum clause of the deed appeared the following provision: "But this deed of conveyance is made upon the express consideration that the said premises shall not be used or occupied by the said railroad company, its successors or assigns, for any other purpose or purposes than the building thereon of railway tracks or other works and structures necessary or incident to the operation of a railroad line . . . through . . . said land, such use and occupation to commence within two years from this date, and in the event such use of

<sup>71</sup> *St. Peter's Church v. Bragaw*, 144 N. C. 126, 133, 56 S. E. 688, 691 (1907).

<sup>72</sup> 165 N. C. 465, 81 S. E. 682 (1914).

the said premises shall not be commenced within the said period, or in the event the said premises should ever thereafter cease to be used by said railway company . . . for the purpose aforesaid, then this deed of conveyance shall be null and void. In a civil action by the railroad company to enjoin the defendants (including the grantor manufacturing company) from asserting exclusive rights of possession and user of the plaintiff's siding, freight station and right of way, the defendants justified their position on the ground that the proviso in the descriptive part of the deed was a condition subsequent, the failure to perform which divested the plaintiff's title and revested it in the defendant manufacturing company. The court held for the plaintiff. It took the position that conditions subsequent working a forfeiture of the estate conveyed should be strictly construed, as such conditions are not favored in the law, and are to be taken most strongly against the grantor to prevent forfeiture; that if the grantor had intended the proviso set out in the descriptive part of the deed should ever take effect as a condition subsequent, he would have inserted it among the conditions subsequent expressly enumerated in the habendum; that since the proviso contained no words of forfeiture and nothing to indicate that a failure to perform it would avoid the deed, it should be treated merely as a covenant for the breach of which an action for damages would lie. Thus we see our court, even in situations where express conditions subsequent are recognized, grasping at every straw to save the conveyance from the ignominy of forfeiture.

While, as we have already pointed out *express* conditions subsequent will be most strictly construed against forfeiture and will be construed by our court as covenants unless clear words of re-entry or forfeiture or reverter are inserted in the instrument, there are a few special situations where a condition will be *implied in law* and forfeiture will take place even though not expressly provided for in the instrument. This is especially true in this state where the instrument involved is a mining lease.<sup>73</sup> Here is the usual set-up: *A*, for a nominal consideration, conveys Blackacre to *B* and his heirs for a term of 99 years giving *B* the right to mine the land for minerals. *B* agrees to pay *A* as royalty one tenth of the net proceeds of all minerals taken out. *B* will operate a mine on the premises for a few years and then stop. His failure to work the mine will operate in contemplation of law as a forfeiture of his rights under the lease, just as though an express provision had been inserted that he should forfeit all rights under it if his mining operations should be abandoned for a reasonable time. Says our court: "When his rights were once so lost, it was not necessary for the plain-

<sup>73</sup> *Conrad v. Morehead*, 89 N. C. 31 (1883); *Maxwell v. Todd*, 112 N. C. 677, 16 S. E. 926 (1893); *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434 (1895).

tiff [A] to re-enter, since the estate had vested in Pepper [B] for a particular purpose, which appeared upon the face of the instrument, and not subject only to the performance of an act to be done *dehors* which should give the right of re-entry and render it necessary to assert the claim to the forfeiture by such public act."<sup>74</sup>

Another situation in which it is said that a condition with forfeiture is implied is where growing timber is sold with a right to cut and remove trees of a certain size within a specified time. Although Dean Mordecai<sup>75</sup> and our court in *Shields v. Harris*<sup>76</sup> speak of timber deeds as conditional transactions and place them in the same category as mining leases, they should more properly be classified as *determinable* fees, or fees on special limitation. Even in the case of *Davis v. Frazier*<sup>77</sup> where timber was conveyed "subject to the following terms and conditions [as to manner of cutting, use of machinery, location of tram roads, etc.] . . . and all the timber not so cut and removed within five years from May 25, 1905, shall revert to and become the property of the party of the first part and her heirs and assigns", the court held that the instrument conveyed to the grantees "a base or qualified fee in the timber, determinable as to all timber not cut and removed within the time specified, i.e., five years. . . ."<sup>78</sup> Furthermore, our court has held in numerous other cases that deeds for standing timber convey a fee simple interest in such timber as realty, determinable as to all such timber as is not cut and removed within the time specified in the deed.<sup>79</sup> "At the expiration of that time the estate in so much of the timber as had not been cut and removed would revert to the vendor, or, at least, the timber would become his absolute property."<sup>80</sup> In other words, the land would *automatically revert* to the vendor—a distinct characteristic of *determinable* fees.

An implied condition, or condition in law, also exists in North Caro-

<sup>74</sup> *Hawkins v. Pepper*, 117 N. C. 407, 415, 23 S. E. 434, 436 (1895).

<sup>75</sup> 1 MORDECAI'S LAW LECTURES (2d ed. 1916) 548, 549.

<sup>76</sup> 190 N. C. 520, 130 S. E. 189 (1925).

<sup>77</sup> 150 N. C. 447, 64 S. E. 200 (1909).

<sup>78</sup> Cf. *Hinton v. Vinson*, 180 N. C. 393, 104 S. E. 897 (1920) where timber of a certain size was conveyed by a deed which contained the clause: "And the party of the second part accepts this deed with the condition that he . . . will erect no mill on streams leading into the fish pond on said land . . . without making full compensation therefor." The problem discussed was whether the clause created an estate on condition subsequent or a mere covenant. This case is distinguishable from the ordinary timber deed since it contained a provision relating to activity *on the land* and was not confined to the cutting and removal of timber within a specified time.

<sup>79</sup> *Bateman v. Kramer Lumber Company*, 154 N. C. 248, 70 S. E. 474 (1911); *Lumber Company v. Corey*, 140 N. C. 462, 53 S. E. 300 (1906); *Bunch v. Elizabeth City Lumber Company*, 134 N. C. 116, 46 S. E. 24 (1903); *Williams v. Parsons*, 167 N. C. 529, 83 S. E. 914 (1914).

<sup>80</sup> *Bunch v. Lumber Company*, 134 N. C. 116, 120, 46 S. E. 24, 26 (1903).

lina by force of a statute<sup>81</sup> which, in effect, provides that where real property is leased orally or in writing for a term and the lease fixes a definite time for the payment of rent reserved therein, there shall be implied a forfeiture of the term upon the lessee's failure to pay after the lessor or his agent makes demand upon the lessee for all rent past due; and that the lessor may forthwith enter and dispossess the tenant without having declared a forfeiture or reserved the right of re-entry in the lease. The statute was passed to protect landlords who made verbal or written leases and forgot to make provision in their leases for re-entry or non-payment of rent when due. As a consequence, it often happened that an insolvent lessee would avoid payment of rent, refuse to vacate, and stay on until his term expired.<sup>82</sup> But this statute must be read in connection with another statute<sup>83</sup> which provides that if the lessor brings suit to recover the demised premises upon forfeiture for the non-payment of rent and the tenant before judgment pays or tenders payment of the rent due plus interest and the costs of the action, all further proceedings in the action shall cease. The tenant is thus, by statute, given a species of equitable relief against forfeiture—his payment of the principal with interest thereon plus accrued costs being regarded as compensating for non-payment of the principal when due.<sup>84</sup>

We return now to a further consideration of express conditions. The North Carolina court, as we have already pointed out,<sup>85</sup> has held that a valid estate on condition subsequent is *not* created unless the grantor or testator clearly expresses his intent to state a condition by using, *in addition* to other language in the instrument, words which give him the right to re-enter, or to declare a forfeiture, or to have the property revert to him upon breach of the condition. Assuming that these all-important words are missing from the instrument, we are confronted with the problem of determining the effect of their absence upon the court's construction of the *other language* in the instrument which is not sufficient in itself to create a condition. As a general proposition our court has held that either a covenant, a trust, an equitable charge, or a fee simple absolute with no strings attached has been created by the language used. As to which one of these has been created will depend, in turn, upon the actual language used, the situation of the parties litigant, the change in circumstances since the instrument was

<sup>81</sup> N. C. CODE ANN. (Michie, 1939) §2343.

<sup>82</sup> This explanation is found in *Ryan v. Reynolds*, 190 N. C. 563, 565, 130 S. E. 156, 158 (1925).

<sup>83</sup> N. C. CODE ANN. (Michie, 1939) §2372.

<sup>84</sup> *Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612 (1900); *Carolina and Northwestern R. R. v. Carpenter*, 165 N. C. 465, 81 S. E. 682 (1914); 1 *TIFFANY, REAL PROPERTY* (3d ed. 1939) §215.

<sup>85</sup> See note 66, *supra*.



made, the object to be attained by the conveyance, and perhaps upon other factors. More specifically, the problem might best be approached by hewing out rough factual categories into which the North Carolina cases might be placed. The cases seem to fall into three such categories: (1) cases where a condition subsequent was intended but the conveyor used only such words as "provided" or "upon condition", or words of similar import, to introduce the so-called clause of condition; (2) cases where land is conveyed with a provision that the grantee shall, in consideration of the conveyance, support and maintain the grantor for life; (3) cases where land has been conveyed for a specified use or purpose, such as that of a church, school, or cemetery. These categories are not mutually exclusive.

As falling within the first category, two cases may be commented upon. In *Hinton v. Vinson*,<sup>86</sup> the plaintiff conveyed timber of a certain size and kind to the defendant. The deed contained the following clause: "and the party of the second part accepts this deed with the condition that he, his heirs and assigns, will erect no mill on the streams leading into the fish pond on said land . . . without making full compensation therefor". The defendant erected a mill on a stream leading to the pond and so polluted the water with sawdust that the pond below was rendered unfit for fishing. The defendant had cut and removed \$30,000 worth of timber. The plaintiff sued on the theory that the clause in the deed had created a condition subsequent, and that the defendant, having breached the condition, had forfeited all his rights under the timber deed. Plaintiff sought not only to enjoin defendant from further entering upon the land and cutting timber thereon, but also to recover \$30,000 as the value of the timber already cut and \$5,000 for damages done to the fish pond. The court held that the provision in the deed was a *covenant*, and not a condition subsequent, no words of forfeiture having been used; that a breach of the covenant could be adequately atoned for by the payment of damages; that it would be unfair to allow the plaintiff both to recover the land and mulct the defendant in such heavy damages. Although the case was sent back for a new trial, two judges, who concurred on that point, vigorously disagreed with the majority view that a covenant and not a condition subsequent was created by the clause. They felt that the words "with this condition" clearly and unambiguously indicated the intention of the parties to create a condition subsequent. In *First Presbyterian Church v. Sinclair Refining Company*<sup>87</sup> land was conveyed to the trustees of a church for general church purposes "provided always and upon condition" that the church continue in com-

<sup>86</sup> 180 N. C. 393, 104 S. E. 897 (1920).

<sup>87</sup> 200 N. C. 469, 157 S. E. 438 (1931).

munication with its national organization and remain subject to the authority of the church's general assembly. The church, having always complied with these provisions, leased the property to the defendant. One of the clauses in the lease was as follows: "Lessor . . . warrants that it has an indefeasible title in fee simple to said demised premises. . . ." The defendant questioned whether the church had an indefeasible title in fee simple to the demised premises and had the right to lease them for filling station purposes. The court held that the church owned the land in fee simple absolute; that the provision in the deed did not create a condition subsequent, there being no provision giving the grantor the right to re-enter for condition broken nor any language showing an intent that the property should revert to the grantor. The court said: "Even if the language used in the instant case . . . is construed as a condition subsequent, by the breach, of which the fee simple estate may be defeated, in view of all the facts agreed contained in the statement submitted to the court, such breach is so improbable that for the purposes of this decision, such condition subsequent should be disregarded. It is too remote to affect the title of the church to the lot or parcel of land described in the lease." Both this case and the *Hinton* case<sup>88</sup> afford ample evidence of the hostility of our court to conditions subsequent and of its desire to approach functionally the problem presented by each individual case, and, if need be, to write a condition subsequent out of existence to attain a desirable result.

The second category—support cases. Quite frequently an elderly person will convey land to his child or other relative in consideration of a promise by the grantee to support the grantor during the balance of the grantor's life. The grantee then breaches his promise to support. The type of relief available to the grantor depends upon what construction the court puts upon the clause providing for the grantor's support. In *Helms v. Helms*,<sup>89</sup> our court said: "A conveyance in consideration of support to be furnished the grantor or another person does not create a condition unless apt words of condition are used, and even then it will not be held to create a condition unless it is apparent from the whole instrument that a strict condition was intended". Sufficiently apt words to create an estate on condition subsequent in such a situation were found in the leading case of *Brittain v. Taylor*,<sup>90</sup> where John Taylor agreed "to feed, clothe, and kindly care for . . . Margaret Taylor all of her natural life, and should the John G. Taylor fail to feed,

<sup>88</sup> See note 86, *supra*.

<sup>89</sup> 135 N. C. 164, 168, 169, 47 S. E. 415, 417 (1904), quoting I JONES, CONVEYANCING (1896) §646.

<sup>90</sup> 168 N. C. 271, 84 S. E. 280 (1915).

clothe and kindly care for the said Margaret Taylor, then this deed to be null and void". In this case as well as in *Huntley v. McBrayer*,<sup>91</sup> another case involving support, the magic formula for the creation of a condition subsequent lay in the words "this deed to be null and void". If these, or words of like import, are missing from the instrument, then the meaning and effect of the provision for maintenance has received different constructions, depending upon the placing of the provision and upon other terms of the instrument in which it appears.<sup>92</sup> In some of the cases the provision has been dealt with as a personal covenant.<sup>93</sup> In the cases of *Perdue v. Perdue*, *Ricks v. Pope*, and *Goldsboro Lumber Company v. Hines Bros. Lumber Company*,<sup>94</sup> the language construed by the court to create only a personal covenant was, respectively, as follows: "It is my will and desire that the said William Thomas Perdue shall take care of his grandmother . . . , and also of his mother . . . during their lifetime, and also to take care of his two sisters . . ."; "That the said Elizabeth Johnson, for and in consideration of the sum of twenty dollars per year, said amount to be paid annually by said Isaac Pope to said Elizabeth A. Johnson, so long as she shall live . . . do bargain and sell, transfer and convey to the said Isaac Pope . . ."; "and if my present wife should survive me she shall have her life right to and in said premises and lands for her support and for the support of said minor heirs". In other cases the provision for support has been construed to constitute a charge on the rents and profits from the lands, and not upon the corpus thereof.<sup>95</sup> In *Gray v. West* and *Wall v. Wall*,<sup>96</sup> respectively, the language was as follows: "Arey Gray is to have her support out of the land"; grantor conveyed land "reserving to herself the possession, use and control of the tract of land for and during her natural life and reserving also the care and support of her daughter, Margaret . . . , for and during the life of the said Margaret". In a majority of the cases the court has construed the provision for support as constituting an equitable lien or charge upon the land itself which will follow the land into the hands of purchasers.<sup>97</sup> Illustrative language

<sup>91</sup> 169 N. C. 75, 85 S. E. 213 (1915).

<sup>92</sup> *Bailey v. Bailey*, 172 N. C. 671, 90 S. E. 803 (1916).

<sup>93</sup> *Taylor v. Lanier*, 7 N. C. 98 (1819); *McNeely v. McNeely*, 82 N. C. 183 (1880); *Ricks v. Pope*, 129 N. C. 52, 39 S. E. 638 (1901); *Perdue v. Perdue*, 124 N. C. 161, 32 S. E. 492 (1899); *Goldsboro Lumber Company v. Hines Bros. Lumber Company*, 153 N. C. 49, 68 S. E. 929 (1910).

<sup>94</sup> See note 93, *supra*.

<sup>95</sup> *Gray v. West*, 93 N. C. 442 (1885); *Wall v. Wall*, 126 N. C. 405, 35 S. E. 811 (1900).

<sup>96</sup> See note 95, *supra*.

<sup>97</sup> *Woods v. Woods*, 44 N. C. 290 (1853); *Laxton v. Tilley*, 66 N. C. 327 (1872); *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415 (1904); *Bailey v. Bailey*, 172 N. C. 671, 90 S. E. 803 (1916); *Cook v. Sink*, 190 N. C. 620, 130 S. E. 714 (1925); *Marsh v. Marsh*, 200 N. C. 746, 158 S. E. 400 (1931).

which was held to create an equitable charge on the land may be found in *Helms v. Helms* and *Cook v. Sink*.<sup>98</sup> In the former the provision read: "and it is further understood and agreed between the parties that the above lands shall stand good for the support and maintenance of the said Elmira Helms during her natural life"; in the latter case there was a devise to the testator's son and daughter but "if either of them fail to see that their mother don't suffer their care, if either of them fail to take care of her, their part to go to some one who will take care of her. . . ."

In connection with the support cases the policy of our court is forcefully stated in *Helms v. Helms*<sup>99</sup> as follows: "The uncertainty into which titles would be thrown is a strong reason for construing provisions for support as covenants and not conditions, is recognized by the courts. To treat them as mere personal covenants, having no security for their performance save the personal liability of the grantee would often lead to injustice, leaving persons who had made provision for support in old age or sickness without adequate protection or relief. The courts have almost uniformly treated the claim for support and maintenance as a charge upon the land which will follow it into the hands of purchasers. In this way the substantial rights of both grantor and grantee are preserved. 'The grantee, by accepting the deed and entering into possession under it becomes bound by the agreement providing for the support of the grantor, and the provision for support thus becomes equivalent to a life annuity'. Devlin on Deeds, sec. 807."

The third category—where land has been conveyed for a specified use or purpose. Quite frequently land is conveyed to the trustees of a church or school or other institution with a provision in the deed that the property is to be used for religious, educational, or other specified purposes, but no clause of re-entry or reverter or forfeiture is included in the deed. Time passes; the trustees find that the land has become unsuitable for the purpose specified (or the property ceases to be used for the particular purpose) and want to sell the land. A buyer is found but he refuses to complete the deal because he is afraid that the trustees hold the land upon condition subsequent and can not give good title thereto. Under such circumstances many lawsuits have arisen in North Carolina, and our court has consistently held that where no words of reverter or forfeiture or re-entry are included in the deed no intention to create a condition subsequent will be found, and a mere statement of the purpose for which the property is to be used is not sufficient to create such a condition; and that, generally, the trustees may give a

<sup>98</sup> See note 97, *supra*.

<sup>99</sup> 135 N. C. 164, 171, 47 S. E. 415, 418 (1904).

fee simple title to the property.<sup>100</sup> Sometimes, however, the language will be construed to create a trust,<sup>101</sup> or a covenant.<sup>102</sup>

ALIENABILITY OF POSSIBILITY OF REVERTER AND OF RIGHT OF ENTRY  
FOR CONDITION BROKEN

We shall first examine the law as it applies to the alienability of rights of entry for condition broken. At common law only the grantor or his heirs could, by re-entry, enforce a forfeiture for the breach of a condition subsequent.<sup>103</sup> This rule had its origin in the feudal system of land tenures wherein a condition was implied in law that if the tenant neglected to pay or perform his service, the lord might resume his fief. By analogy, the rule as to who could enforce the forfeiture for breach of the condition implied in law was carried over into situations involving the breach of express conditions.<sup>104</sup> The common law rule, as stated above, still obtains in North Carolina.<sup>105</sup> As a corollary to this rule, it followed that the right of entry for condition broken could not, upon the creation of the condition subsequent, be given to a person other than the grantor or lessor, nor could the grantor or lessor afterwards transfer this right to a stranger. North Carolina still forbids the transfer to a stranger of a right of entry for condition broken.<sup>106</sup> Our court, however, holds that this right of re-entry—invariably called a "possibility of reverter"—may be *released* by the grantor or his heirs to the grantee.<sup>107</sup>

It is difficult to understand why, in North Carolina today, a right of entry for condition broken should not be assignable. At common law a right of entry was regarded as a mere possibility of an estate—a species of chose in action—the assignment of which, according to a rationale imputed to Lord Coke, would be champertous; and the assignment would encourage litigation. However, Tiffany points out that

<sup>100</sup> *St. James v. Bagley*, 138 N. C. 383, 50 S. E. 769 (1905); *Hall v. Quinn*, 190 N. C. 326, 130 S. E. 18 (1925); *Tucker v. Smith*, 199 N. C. 502, 154 S. E. 826 (1930); *First Presbyterian Church v. Sinclair Refining Company*, 200 N. C. 469, 157 S. E. 438 (1931); *Lassiter v. Jones*, 215 N. C. 298, 1 S. E. (2d) 845 (1939); *Williams v. Thompson*, 216 N. C. 292, 4 S. E. (2d) 609 (1939): it is believed, however, that the court erred in holding that no trust was created in this case.

<sup>101</sup> *Shannonhouse v. Wolfe*, 191 N. C. 769, 133 S. E. 93 (1926); *Shields v. Harris*, 190 N. C. 520, 130 S. E. 189 (1925) (Trust was nullified by legislative act).

<sup>102</sup> *Saint Peter's Church v. Bragaw*, 144 N. C. 126, 56 S. E. 688 (1907).

<sup>103</sup> 1 *TIFFANY, REAL PROPERTY* (3d ed. 1939) §208.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Wellons v. Jordan*, 83 N. C. 371 (1880); *Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280 (1915).

<sup>106</sup> *Helms v. Helms*, 137 N. C. 206, 49 S. E. 110 (1904); *Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280 (1915); *Sharpe v. North Carolina R. R.*, 190 N. C. 350, 129 S. E. 826 (1925).

<sup>107</sup> *Huntley v. McBrayer*, 169 N. C. 75, 85 S. E. 213 (1915); *Sharpe v. North Carolina R. R.*, see note 106, *supra*.

the more acceptable theory for the nonassignability rule was "that rights of entry or action are strictly personal, and that one who had merely a right of entry had nothing capable of manual transfer, the only mode of transfer recognized in early times".<sup>108</sup> This reason, or these reasons, furnish no rational basis for the continuation of the rule under modern legal conditions in North Carolina. No citation of authority is necessary for the proposition that choses in action are generally assignable, or that the transfer of an interest in land is effective without any manual or symbolic transfer of the land itself under our "real-party-in-interest" statute.<sup>109</sup> An assignee of the right of entry of a person who has been disseized of his land by an adverse possessor may sue in his own name to recover the land from the adverse possessor.<sup>109a</sup> (A conveyance of this sort was condemned as being champertous at common law.) Why should the assignee of a right of re-entry for condition broken not be permitted to sue in his own name to recover the land upon breach of the condition? Furthermore, since North Carolina has recognized the assignability of contingent remainders and executory interests in favor of ascertained persons,<sup>110</sup> there is no reason why the possibility of an estate represented by the right to enforce a condition subsequent should not be transferable.<sup>111</sup> To these arguments the North Carolina court has given a short answer: "While it is true that contingent interests and choses in action are assignable in equity, and under our code actions may be brought in the name of the assignee, we find no case holding that a bare possibility of reverter comes within this principle."<sup>112</sup> To remedy the situation the North Carolina legislature should pass a statute, similar to those existing in other states,<sup>113</sup> which would specifically make a right of entry for condition broken transferable by deed. England, by statute, many years ago authorized both the devise and assignment of such a right.<sup>114</sup>

However, we must not overlook the fact that North Carolina has already enacted a statute<sup>115</sup> which permits a testator to *devise* (among other things) "all rights of entry for condition broken, and other rights of entry". This language clearly seems broad enough to permit the testator to devise a right of entry whether the condition has been broken or not during his lifetime. But the teeth of the statute have been pulled

<sup>108</sup> 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §209, p. 352.

<sup>109</sup> N. C. CODE ANN. (Michie, 1939) §446.

<sup>109a</sup> *Ibid.*

<sup>110</sup> *Kornegay v. Miller*, 137 N. C. 659, 50 S. E. 315 (1905).

<sup>111</sup> 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §209.

<sup>112</sup> *Helms v. Helms*, 137 N. C. 206, 209, 49 S. E. 110, 111 (1904).

<sup>113</sup> For example? CAL. CIV. CODE (Deering, 1931) §1046; CONN. STAT. (1930) §5033; MICH. COMP. LAWS (Mason's Supp., 1933) §§12966-2.

<sup>114</sup> 1 VICT. c. 26, §3(1837); 8 & 9 VICT. c. 106, §6 (1845).

<sup>115</sup> N. C. CODE ANN. (Michie, 1939) §4164.

by the construction placed upon it by our court in the case of *Methodist Protestant Church v. Young*.<sup>116</sup> In that case the court held that if the condition has *not* been broken during the testator's lifetime, he could not devise the *contingent* right of entry; that if and when the condition was broken, the right of entry would pass to his heirs as in the case of an intestacy. A case may be put which will illustrate the effect of this decision. *A* has acquired several tracts of land during his lifetime but he has sold one of these tracts to *B* and his heirs upon a valid condition subsequent. At the time of *A*'s death *B* has not breached the condition. *A*, by his will, devises "all his property of whatsoever kind and where-soever situate" to his wife *C* and her heirs. *C* will take all of *A*'s property except the right of entry retained by *A* in the tract of land conveyed to *B* which right will pass by descent to *A*'s heirs—nieces and nephews, children of *A*'s deceased brothers and sisters. If we assume that these heirs of *A* are scattered throughout the United States, and further that *B* or his heirs or their grantees do not breach the condition for many years to come, how, as a practical matter, is the title to the particular tract of land conveyed to *B* ultimately going to be cleared? If the right of entry had passed to *C* by *A*'s will, the cloud on title could perhaps be removed immediately by *C*'s release to *B* of the right of entry. To cure the defect in the present statute<sup>117</sup> brought about by its construction in *Church v. Young*,<sup>118</sup> an amendment has already been proposed by the Commission on Revision of the Laws of North Carolina Relating to Estates.<sup>119</sup> The pertinent portion of the statute, as amended, would read as follows: "and also to all rights of entry for condition broken, whether any such condition has or has not been broken at the testator's death, all other rights of entry, and possibilities of reverter".

The common law rule which prohibited the sale of a right of entry for breach of condition was changed by statute<sup>120</sup> in England in 1540 in the instance where the grantor or lessor sold or leased an estate for life or for years on condition and thus retained in himself both a reversion and a right of entry. This statute permitted the assignee of the reversion to take advantage of the breach of the condition. This statute has been made a part of the present law of North Carolina.<sup>121</sup>

May we, at this point, consider briefly the effect of an attempted conveyance of a right of entry expectant upon a fee simple estate. According to the majority view in the United States "if an attempt is made to convey a right of entry for breach of condition which is unaccompanied by any reversion, the interest of the conveyor is thereby for-

<sup>116</sup> 130 N. C. 8, 40 S. E. 691 (1902).

<sup>117</sup> See note 115, *supra*.

<sup>118</sup> See note 116, *supra*.

<sup>119</sup> See the second Report of the Commission at pages 84 and 85.

<sup>120</sup> 32 HENRY VIII, c. 34, §1 (1540).

<sup>121</sup> N. C. CODE ANN. (Michie, 1939) §2348.

feited", and the original grantee takes a fee simple absolute.<sup>122</sup> No case directly in point has been found in North Carolina, but a dictum in the case of *Huntley v. McBrayer*<sup>123</sup> leads us to the conclusion that this state would follow the rule of the majority. The reason usually assigned for the rule is that the grantor by attempting to sell the right of re-entry has committed a champertous act—he has sold a potential lawsuit—and should be penalized therefor. It is believed that the courts have merely seized upon this technicality to "cut the string" that prevents the holder of an estate on condition from holding a fee simple absolute.

May possibilities of reverter expectant upon fees determinable be assigned in North Carolina? No case dealing with the question has been found.<sup>124</sup> In several cases<sup>125</sup> our court has declared that "possibilities of reverter" cannot be assigned, but in each case the interest involved was not a possibility of reverter expectant upon a *fee determinable* but was a right of entry growing out of a fee on condition subsequent. However, our conjecture is that, for purposes of assignment, the North Carolina court would treat the possibility of reverter as an interest essentially like a right of entry and would say that it too could not be assigned. We have already suggested that a statute should be passed expressly permitting the sale of a right of entry; we would also include within the terms of this statute a possibility of reverter.

It has been held, even in jurisdictions where possibilities of reverter are inalienable, that an attempted alienation does not forfeit the interest.<sup>126</sup> No cases have been found to indicate what view the North Carolina court would take as to the effect of an attempted alienation of a possibility of reverter.

#### CONCLUSION

In this article we have shown beyond any doubt, that North Carolina has recognized the right of a grantor or testator to create estates which are determinable by virtue of their own special limitations and also estates subject to divestment upon the happening of a condition subsequent. In other words, the conveyancer is allowed to use these devices to qualify or restrict the estate created. In lieu of either of

<sup>122</sup> 3 SIMES, FUTURE INTERESTS (1936) §717. Perhaps the leading case on the point is *Rice v. Boston & Worcester R. R.*, 12 Allen 141 (Mass., 1866).

<sup>123</sup> 169 N. C. 75, 85 S. E. 213 (1915): "A conveyance of the premises by the grantor to a stranger has been held as operating to extinguish the grantor's rights in certain cases."

<sup>124</sup> The case of *Blue v. Wilmington*, 186 N. C. 321, 119 S. E. 741 (1923) has been cited in 3 SIMES, FUTURE INTERESTS (1936) §715, n. 63, for the proposition that a possibility of reverter is inalienable but a close examination of that case will reveal that the court was discussing the alienability of such an interest on the basis of a fee on condition subsequent.

<sup>125</sup> See note 106, *supra*.

<sup>126</sup> 3 SIMES, FUTURE INTERESTS (1936) §717.



these, he also has the choice of a restrictive covenant, an equitable servitude, or a trust—depending upon which device will best effectuate his purpose under the circumstances of the particular situation. Unquestionably the retention by the conveyancer of a possibility of reverter after a fee determinable or of a right of entry after a fee on condition subsequent places the title to the land, so far as the holder thereof is concerned, in a precarious condition.<sup>127</sup> The land may be transferred by the immediate grantee or devisee, but its marketability will be seriously hampered because of the restrictions placed upon it; then, perhaps after many years have passed, if the contingency happens or if the condition is broken, the land will either automatically revert to the grantor or his heirs or it will be subject to divestment at their election. In either case the resultant effect on titles is a drastic one. The ultimate clearance of the title is further impeded by the fact that possibilities of reverter and rights of entry are not within the purview of the rule against perpetuities.<sup>128</sup> Since these things are so, we are led to inquire into the feasibility of placing some legislative curb upon the creation of such defeasible interests in land. Both Massachusetts and Minnesota have, by statute,<sup>129</sup> attempted to place some limits upon the erection of estates on condition subsequent. Both statutes provide, in effect, that conditions or restrictions, which affect the title to real property, shall terminate at the end of thirty years from the effective date of the instrument in which the conditions or restrictions are set up. Massachusetts makes an exception in the cases of gifts or devises for public, charitable or religious purposes. The Minnesota statute tends to minimize the undesirable features of rights of entry by further providing that when a condition "shall become merely nominal and of no actual and substantial benefit" to the party intended to be benefitted, it may be disregarded. The Minnesota statute seems to be the preferable one of the two. No statutes attempting to regulate fees determinable have been found.

As to North Carolina, we are not inclined to suggest that a statute be passed which would have the effect of totally abolishing the right to create a fee determinable or a fee on condition subsequent. Such estates still have some social utility, especially in those cases where there is a gift or devise of property for public, charitable or religious purposes. Nor would we go so far as to recommend that this state adopt a statute, similar to those enacted in Massachusetts or Minne-

<sup>127</sup> See Goldstein, *Rights of Entry and Possibilities of Reverter As Devices to Restrict the Use of Land* (1940) 54 HARV. L. REV. 248; White, *Reversionary Restrictions* (1940) 14 U. OF CIN. L. REV. 524.

<sup>128</sup> 2 SIMES, *FUTURE INTERESTS* (1936) §§506, 507.

<sup>129</sup> MASS. LAWS ANN. (Michie, 1932) c. 184, §23; MINN. STATS. (Mason, Supp. 1940) §8075.

sota, for the purpose of placing *some* check on conditions. A preferable and more flexible plan seems already to be in operation in this state—that of allowing the court, without legislative interference, to construe each case on its facts as it is presented. As we have already pointed out, our court, with an avowed hostility to conditions, has effectively checked their use by stricter than usual requirements for their creation and by a broad constructional policy whereby the court will find no condition at all if the circumstances of the case warrant a finding otherwise. Indeed, we have about come to the conclusion that both fees determinable and fees on condition subsequent have been treated by our court as unwanted guests in our jurisprudential house—but guests, which, by virtue of their age, must be accorded a modicum of respect.