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COMPENSATION FOR POSSIBILITIES OF REVERTER AND POWERS OF TERMINATION UNDER CONDEMNATION LAW

Condemnation of land has increased greatly in recent years, resulting in a reevaluation of traditional ideas and their applicability to modern circumstances. The purpose of this note is to contrast the traditional handling of possibilities of reverter and powers of termination in eminent domain proceedings with the more recent handling of these interests, and to set forth the position that California has taken with respect to them.

Possibilities of reverter and powers of termination are lumped together in this note, and by the courts,¹ for they pose the same valuation problems in condemnation. The primary valuation difficulty is that, although both are considered to be contingent interests,² neither is subject to the Rule Against Perpetuities.³ They may, therefore, continue as contingent interests forever. The differences between these two interests do become significant, however, once the limiting event or condition subsequent has occurred. For example, the possibility of reverter immediately becomes a possessory estate regardless of the owner's intention, while the power of termination does not become possessory until the owner manifests his election that the granted estate is forfeited.⁴ These mergers of interests, however, present little difficulty, as the handling of the award in these cases is largely uncontroversial.⁵

¹ Browder, *The Condemnation of Future Interests*, 48 VA. L. REV. 461, 472 (1962) (citing cases); see, e.g., *Puerto Rico v. United States*, 132 F.2d 220, 221 (1st Cir. 1942); *People ex rel. Department of Pub. Works v. Fresno*, 210 Cal. App. 2d 500, 504, 26 Cal. Rptr. 853, 855 (1962); *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 467-68, 232 P.2d 55, 58 (1951); 1 RESTATEMENT OF PROPERTY § 53 (1936).

² See *Johnson v. Los Angeles*, 176 Cal. 479, 486, 168 P. 1047, 1049 (1917); *Strong v. Shatto*, 45 Cal. App. 29, 35, 187 P. 159, 162 (1919); L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 29 (2d ed. 1966).

³ L. SIMES, *supra* note 2, at 118.

⁴ See *People ex rel. Department of Pub. Works v. Fresno*, 210 Cal. App. 2d 500, 504-05, 26 Cal. Rptr. 853, 855-56 (1962) (general discussion of these differences).

⁵ Where the limiting event has occurred it is obvious that the holder of the possibility of reverter is entitled to the entire award as he is then the holder of the entire fee. In the case of a power of termination, however, the holder of the non-possessory estate must take certain steps to effect a forfeiture. If he fails to take such steps within a reasonable time, he will be found to have waived his right of re-entry. See Browder, *supra* note 1, at 474.

Majority Position

For the most part the courts have refused to allow possibilities of reverter and powers of termination to share in any condemnation award.⁶ In doing so the courts have generally relied on one or more of three grounds: 1) the interest that the owner has in a possibility of reverter or power of termination is too remote and speculative; 2) the owner's interest is taken at the same time as the possessory estate and, therefore, there is no disuser during the existence of the future interest that would result in the forfeiture of the possessory estate; 3) the performance of the condition is excused by operation of law.

The most common ground for denying recovery is that possibilities of reverter and powers of termination are too speculative, remote, or contingent to be subjected to valuation.⁷ The leading authority is a New York case, *First Reformed Dutch Church v. Crowell*,⁸ which held that any rights inherent in these interests were mere possibilities and "possessed no value capable of estimate."⁹ Similarly, a New Hampshire court¹⁰ found that there was "no method by which the value of the interest could be assessed which would rise above the dignity of a guess"¹¹ so that it was a "matter too indefinite and vague for pecuniary estimation."¹² A Massachusetts court¹³ reached the same conclusion, stating that such interests were "too remote and contingent to be the subject of an estimate of damages."¹⁴ The federal courts have also generally denied participation in condemnation awards to the owners of possibilities of reverter and powers of termination.¹⁵ For example, in *Puerto Rico v. United States*¹⁶ it was held that these interests were only speculative and that "it is elementary law that damages cannot be assessed by mere guesswork."¹⁷

⁶ Browder, *supra* note 1, at 472.

⁷ *E.g.*, *Beard's Erie Basin, Inc. v. New York*, 142 F.2d 487, 489 (2d Cir. 1944); *Puerto Rico v. United States*, 132 F.2d 220, 222 (1st Cir. 1942); *United States v. 16 Acres of Land*, 47 F. Supp. 603, 604 (D. Mass. 1942); *Romero v. Department of Pub. Works*, 17 Cal. 2d 189, 194-95, 109 P.2d 662, 665 (1941); *People ex rel. Department of Pub. Works v. Fresno*, 210 Cal. App. 2d 500, 515, 26 Cal. Rptr. 853, 862 (1962); *People ex rel. Department of Pub. Works v. Los Angeles*, 179 Cal. App. 2d 558, 574, 4 Cal. Rptr. 531, 542 (1960); *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544, 547 (1878); *Lyford v. Laconia*, 75 N.H. 220, 226, 72 A. 1085, 1089 (1909). *See generally* 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 119, at 516 (2d ed. 1953).

⁸ 210 App. Div. 294, 206 N.Y.S. 132 (1924).

⁹ *Id.* at 295, 206 N.Y.S. at 134.

¹⁰ *Lyford v. Laconia*, 75 N.H. 220, 72 A. 1085 (1909).

¹¹ *Id.* at 226, 72 A. at 1089.

¹² *Id.* at 228, 72 A. at 1090.

¹³ *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544 (1878).

¹⁴ *Id.* at 547.

¹⁵ *E.g.*, *Beard's Erie Basin, Inc. v. New York*, 142 F.2d 487, 489 (2d Cir. 1944).

¹⁶ 132 F.2d 220 (1st Cir. 1942).

¹⁷ *Id.* at 222.

The second ground, that there is no reversion or breach of the condition during the *existence* of the future interest,¹⁸ also had its beginnings in the *Croswell* decision.¹⁹ That court had reasoned that the seizure was of the entire title at the same instant and that there was, therefore, no interval of time during which a reverter could occur. When the church ceased the specified use, the possibility of reverter was no longer in existence. Thus, “[a]t the moment of appropriation there had been no disuser.”²⁰ In *United States v. 2.02 Acres of Land*,²¹ the court specifically relied on *Croswell* in adopting this ground for denying recovery.²²

The third ground for denying recovery is that the condition is excused by operation of law.²³ The courts hold that the owner of the possessory estate has not voluntarily ceased the required use of the land, but has been compelled to do so by the condemning authority. Compliance with the condition is therefore excused and no forfeiture results: “[I]t is uniformly held that realty does not revert where the use specified in the deed is discontinued solely because of a taking under the power of eminent domain.”²⁴ The courts generally first determine that the interest has not become possessory on either of the last two grounds, then hold that the interest has no value in and of itself, being too speculative and remote. Under this approach, the owner of the interest is entitled to no more than nominal damages.²⁵

Critique

It is apparent that the courts that have adopted the general rule of denying compensation to the holder of the possibility of reverter or the power of termination, regard interests in land as having no value apart from actual possession of the land. They simply disregard “any interest the likelihood of whose eventuality cannot be gauged.”²⁶ By so disregarding these interests they have, of course, avoided the real problem—the valuation of these interests. One court,²⁷ in examining

¹⁸ See, e.g., *id.* at 221-22.

¹⁹ *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 295, 206 N.Y.S. 132, 133-34 (1924).

²⁰ *Id.*, 206 N.Y.S. at 134.

²¹ 51 F. Supp. 56 (S.D.N.Y. 1943), *aff'd sub nom.*, *Westchester County Park Comm'n v. United States*, 143 F.2d 688 (2d Cir. 1944).

²² *Id.* at 61.

²³ See, e.g., *People ex rel. Department of Pub. Works v. Los Angeles*, 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960); *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 232 P.2d 55 (1951); *Lyford v. Laconia*, 75 N.H. 220, 72 A. 1085 (1909); *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132 (1924). *Contra*, *Lancaster School Dist. v. Lancaster County*, 295 Pa. 112, 144 A. 901 (1929).

²⁴ *State v. Independent School Dist. No. 31*, 266 Minn. 85, 91, 123 N.W.2d 121, 126 (1963) (citing cases).

²⁵ Cases cited note 23 *supra*.

²⁶ L. ORGEL, *supra* note 7, at 516.

²⁷ *Midwestern Developments, Inc. v. Tulsa*, 374 F.2d 683 (10th Cir. 1967).

the reasoning of a prior decision that it had cited favorably, simply stated that "such interests were not possessory and too uncertain to admit of compensation, therefore, not property in the constitutional sense."²⁸

But the issue may not be so easily avoided, since "the preferred view today is that *all* varieties of future interests are existing interests."²⁹ Possibilities of reverter and powers of termination are contingent interests in land³⁰ and contingent interests have "achieved status as a protectable interest for many purposes."³¹ Most states have provided that possibilities of reverter are freely alienable³² and powers of termination are becoming so in more and more states.³³ Should not these interests be entitled to a just compensation when taken by condemnation?

The fact that they cannot be given an exact value should not be a deterrent to valuation. The Supreme Court³⁴ has stated that at times the determination of a just compensation "involves, at best, a guess by informed persons"³⁵ and that "[w]here, for any reason, property has no market [value], resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety."³⁶

Possibilities of reverter and powers of termination are "property interests possessing at times considerable value"³⁷ apart from the possibility that they may become possessory. The grantor may convey the land for the purpose of attracting certain business or institutions into an area where he has other holdings. For example, a property owner that desires a railroad to locate near his property might convey a portion of his land for a nominal sum on the condition that a railroad be constructed on such land.³⁸ By reserving in himself and

²⁸ *Id.* at 687.

²⁹ 1 AMERICAN LAW OF PROPERTY § 4.1, at 407 (A.J. Casner ed. 1952) (emphasis added).

³⁰ Cases cited note 2 *supra*.

³¹ 1 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 136, at 117 (2d ed. 1956).

³² 1 AMERICAN LAW OF PROPERTY § 4.70, at 530 (A.J. Casner ed. 1952); 2 R. POWELL, THE LAW OF REAL PROPERTY § 281 (1967); see 2 RESTATEMENT OF PROPERTY § 159 (1936).

³³ 2 R. POWELL, *supra* note 32, at § 282; see, e.g., CAL. CIV. CODE §§ 699, 1046.

³⁴ *United States v. Miller*, 317 U.S. 369 (1942).

³⁵ *Id.* at 375.

³⁶ *Id.* at 374.

³⁷ Comment, *The Effect of Condemnation Proceedings Upon Possibilities of Reverter and Powers of Termination*, 38 U. DET. L.J. 46 (1960).

³⁸ See, e.g., *Romero v. Department of Pub. Works*, 17 Cal. 2d 189, 191, 109 P.2d 662, 663 (1941) ("one dollar and the benefits to be derived from the construction and operation of [the] railroad . . ."); *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 232 P.2d 55 (1951).

his heirs a possibility of reverter or a power of termination, the grantor seeks to ensure that the railroad will locate there and that if they do not, he will have his land back. Such an interest is a valuable asset to the grantor. Similar situations arise where land is conveyed to a church or hospital and the grantor desires to be sure that the land will be used exclusively for such purposes.³⁹ It is also common for a grantor to seek to ensure that certain undesirable businesses, such as taverns or factories, will not locate there.⁴⁰ In all such cases the grantor has specifically refrained from conveying all that he has and, in most cases, what he has conveyed is less valuable than it would be with no restrictions placed on its use. To give the entire condemnation award to the grantee, which is based on the value of the land for the best possible use, would be to pay him for rights that in fact he never had.

One final problem with the general rule is that it can be used to defeat the interest of the grantor or his heirs. In one instance⁴¹ a school seeking to acquire an athletic field had initially desired to purchase the land, but resorted to eminent domain on learning that a condition in the deed precluded any sale.⁴² The school thereby defeated the interest of the grantor and his heirs, leaving them with nothing to show for the interest they once had held. The owner of the determinable fee, however, who had paid only a nominal consideration for the property, found himself substantially enriched. This is certainly not just compensation. A minority of courts, recognizing these inequities, have arrived at methods of valuating and protecting these interests.

Minority Positions

The Mississippi court, in *Hemphill v. State Highway Commission*,⁴³ after inquiring into the nature of future interests in general, concluded that the mere fact that an estate is not vested does not mean that it is not protected under federal law.⁴⁴ The court then "decline[d] to follow the majority rule which denies compensation

³⁹ See, e.g., *Lutes v. Louisville & N.R.R.*, 158 Ky. 259, 164 S.W. 792 (1914) (church); *United Baptist Convention v. East Weare Baptist Church*, 103 N.H. 521, 176 A.2d 325 (1961) (church); *State v. Federal Square Corp.*, 89 N.H. 538, 3 A.2d 109 (1938) (library); *In re Cook's Will*, 243 App. Div. 706, 277 N.Y.S. 26 (1935) (hospital); *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294, 206 N.Y.S. 132 (1924) (church); *Banner Baptist Church v. Watson*, 193 Tenn. 290, 246 S.W.2d 17 (1951) (church).

⁴⁰ By limiting the use to which the land may be put, the grantor can prevent undesirable elements from acquiring or locating on the land. For example, a conveyance for residential purposes only would achieve this purpose.

⁴¹ *State v. Independent School Dist. No. 31*, 266 Minn. 85, 123 N.W.2d 121 (1963).

⁴² *Id.* at 90, 123 N.W.2d at 125.

⁴³ 245 Miss. 33, 145 So. 2d 455 (1962).

⁴⁴ *Id.* at 48, 145 So. 2d at 462, citing 1 L. SIMES & A. SMITH, *supra* note 31, at § 136.

to owners of all future interests taken by the state. There is no rational basis for such a general doctrine. It is not equitable, and it is not consistent with other legal principles related to such existing estates in land"⁴⁵ In support of valuation the court pointed out that one "who possesses an interest which he can sell has an interest for which he ought to be paid upon taking or condemnation by the state."⁴⁶

The harshness of the general rule was apparent to the American Law Institute as well. Section 53(c) of the Restatement of Property provides that the holder of the possibility of reverter or power of termination is entitled to participate in the award when it is found that the happening of the condition or limiting event is "*imminent*." However, no guidelines were provided as to what was to be considered imminent. The Institute in recognizing this noted that "[n]o more definite rules for the division of the award between the owner of the estate in fee simple defeasible and the owner of the future interest have been established either by decision or by statute."⁴⁷ The Institute left this for the courts and legislatures to work out for themselves. The result has been that while the section has been widely recognized by the courts,⁴⁸ the necessary imminence that would justify participation in the award has been found in only a few instances.⁴⁹ Courts have shown such reluctance to find this requisite imminence⁵⁰ that one court was led to conclude "that the owner of the future interest is not adequately protected by [the Restatement] rule"⁵¹

Recently, some courts have found a more effective means of protecting these interests. The basic principle behind these latter decisions is that "in a condemnation situation, the parties are not contending over an indivisible parcel of real estate but rather over a sum of money which can be divided between the parties if necessary

⁴⁵ *Hemphill v. State H'way Comm'n*, 245 Miss. 33, 51, 145 So. 2d 455, 463 (1962).

⁴⁶ *Id.*

⁴⁷ 1 RESTATEMENT OF PROPERTY § 53(c) (1936).

⁴⁸ *E.g.*, *United States v. 1,111.15 Acres of Land*, 44 F. Supp. 449 (E.D. Ill. 1942); *People ex rel. Department of Pub. Works v. Fresno*, 210 Cal. App. 2d 500, 517, 26 Cal. Rptr. 853, 863 (1962); *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 474-75, 232 P.2d 55, 62-63 (1951); *see People ex rel. Department of Pub. Works v. Los Angeles*, 179 Cal. App. 2d 558, 574, 4 Cal. Rptr. 531, 541-42 (1960) (applying rule but not mentioning Restatement by name).

⁴⁹ *See, e.g.*, *United States v. 2,184 Acres of Land*, 45 F. Supp. 681 (W.D. Ark. 1942); *Chew v. Commonwealth*, 400 Pa. 307, 161 A.2d 621 (1960).

⁵⁰ *See, e.g.*, *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 232 P.2d 55 (1951), in which the court determined that the various breaches of conditions subsequent were not sufficient to give rise to the exercise of the power of termination.

⁵¹ *State v. Independent School Dist. No. 31*, 266 Minn. 85, 95, 123 N.W.2d 121, 129 (1963).

in the interest of substantial justice."⁵² The results of these decisions may be divided into three basic categories: (1) the entire award goes to the holder of the defeasible fee who holds it on the same condition as that on which he held the land; (2) a lump sum award is divided between the parties; or (3) a combination of these two.

The first category has resulted chiefly where the grantor has conveyed the land on a condition that it be used for some charitable purpose.⁵³ *In re Cook's Will*,⁵⁴ a New York decision, held that where land had been conveyed to a hospital on the condition that it be used only for the hospital, the proceeds of the condemnation award were to be deposited in a separate fund. The hospital was entitled to the income from this fund on the condition that it be used only for hospital purposes. This result is subject to the criticism that the hospital, which had a defeasible fee in the property taken, got no more than is the customary condemnation award for a life estate under similar circumstances.⁵⁵ However, the limitation in this case is analogous to a life estate, for if the land were no longer used for hospital purposes the hospital would necessarily cease to exist.

In a later New Hampshire decision,⁵⁶ land was conveyed on the condition that it be used solely for Baptist worship. Upon condemnation of the land, the court established a constructive trust in the amount of the award, under which the church could utilize all the funds, so long as they were used for Baptists purposes. This result seems more equitable than that of the *Cook* decision, as it preserves the intent of the grantor as nearly as possible and also provides some measure of assurance that this intent will be carried out.⁵⁷

The second category of cases has resulted in a division of the lump sum award between the parties. In *State v. Independent School District No. 31*,⁵⁸ the Minnesota court adopted this method, recognizing that possibilities of reverter and powers of termination were not adequately protected by the Restatement rule,⁵⁹ and held that in "some situations the possibility of reverter may have more than nominal

⁵² Comment, *supra* note 37, at 54.

⁵³ Cases cited note 39 *supra*.

⁵⁴ 243 App. Div. 706, 277 N.Y.S. 26 (1935).

⁵⁵ See L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 116 (2d ed. 1966). It is arguable that mere "income for his life might be said to fall short of full compensation for a fee simple." *Id.*

⁵⁶ *United Baptist Convention v. East Weare Baptist Church*, 103 N.H. 521, 176 A.2d 325 (1961).

⁵⁷ The results in these cases may be explained by the particular circumstances which would allow an application of the cy-pres doctrine, but this would not prevent a similar handling of non-charitable limitations or conditions.

⁵⁸ 266 Minn. 85, 123 N.W.2d 121 (1963).

⁵⁹ *Id.* at 95, 123 N.W.2d at 129. This particular case has been cited in a later federal decision as an example of special circumstances that would allow the holder of such a future interest to participate in the award. See *Midwestern Developments, Inc. v. Tulsa*, 374 F.2d 683, 688 (10th Cir. 1967).

value."⁶⁰ This division of the lump sum award is based on the fact that valuation in condemnation is predicated on market value and that often limitations upon the use of property prevent its being used in the most beneficial way.⁶¹ The court found that since the restricted use is not taken into account in determining the amount of the award, which is based on the value of the land for its best possible use, an inequity often results.⁶² Consequently, the owner of the defeasible fee should be entitled only to that proportion of the award that the value of his restricted interest bears to the unrestricted value, with the balance going to the holder of the possibility of reverter. Where the restricted use has a value equal to or greater than the reasonable market value, the holder of the future interest is only entitled to a nominal award.⁶³ It is worth noting that the court felt inclined to take this approach even though no attempt was made by the owner of the possibility of reverter to establish the value of his interest.⁶⁴

The third method of handling possibilities of reverter and powers of termination by the minority courts is that adopted by the Ohio court in *Ink v. Canton*.⁶⁵ It is a synthesis of the first two methods. In that case, the land under condemnation had been conveyed to the city on the condition that it be used as a public park.⁶⁶ The court stated that where the grantee has paid full market value for the property, compensation to the grantor should be denied since any award paid to him would amount to a windfall.⁶⁷ But where the grantee paid little or nothing for the fee, the amount by which the value of the unrestricted fee exceeds the value of the restricted fee should be paid to the grantor. Since the grantor in *Canton* expressly refrained from conveying the whole estate to the grantee, and received nothing for what he did convey, the court concluded that at the time of appropriation by the state the grantor was entitled to the difference in the value of the property as measured with and without restrictions.⁶⁸ In such a situation, the court held the right not too remote or contingent for purposes of valuation.⁶⁹

The court next considered the argument that the whole award should go to the grantee because the grantor's condition, imposed only to compel the grantee to make a specified use of the property, had been excused by the condemnation and was no longer effective.⁷⁰

⁶⁰ *State v. Independent School Dist. No. 31*, 266 Minn. 85, 96, 123 N.W.2d 121, 129 (1963).

⁶¹ *See id.* (citing cases and other authorities).

⁶² *See id.* at 96-97, 123 N.W.2d at 129.

⁶³ *Id.* at 97, 123 N.W.2d at 129-30.

⁶⁴ *Id.* at 92, 123 N.W.2d at 126.

⁶⁵ 4 Ohio St. 2d 51, 212 N.E.2d 574 (1965).

⁶⁶ *Id.* at 52, 212 N.E.2d at 575.

⁶⁷ *Id.* at 55, 212 N.E.2d at 577.

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ *See id.* at 55-56, 212 N.E.2d at 577.

The court found that, regardless of this argument, it "does not represent a reason for giving the grantee the value of something he has not lost (i.e., the amount, if any, by which the value of the property taken exceeds its lesser value for the restricted use that the grantee could have made of it) where the grantor expressly refrained from conveying that something to him."⁷¹ The court then pointed out that in the usual situation involving possibilities of reverter or powers of termination there is only land to be awarded, while in the case of eminent domain there is an award of money, which can and should be divided where the situation dictates.⁷²

The court further provided that since the city had undertaken a fiduciary responsibility by accepting the conveyance, any money that the city received should be held in trust subject to the same conditions under which the property was held, and any money not used for Ink Park purposes should revert to the grantor.⁷³ This solution was possible because only a portion of the park was taken by the condemning authority, and it was not an undue burden to require that the award be used in conjunction with the remaining portion of the park. In this way the court prevented the city from being unjustly enriched, while also assuring that the award given would be used for the purposes specified in the original conveyance and not for other purposes.

There are two more minority approaches that should be mentioned. First, some courts have directly controverted the majority position, holding that the grantor alone is entitled to the award.⁷⁴ The rationale for such a position has been that the taking by the government amounts to a *breach* of the conditions imposed by the grantor, and the land, therefore, reverts to the grantor. However, in at least one instance⁷⁵ where the court awarded the entire judgment to the grantor, it did so only to give effect to the particular intent of the grantor, which by the terms of his deed indicated that a taking by eminent domain would *in fact* operate as a breach of the condition regardless of the city's power to prevent it.⁷⁶ The position of other cases giving the grantor the entire award cannot be so justified. As such, their position is untenable and almost universally rejected.⁷⁷

A second possible approach would be to use the Internal Revenue Service method of valuating future interests for Federal Gift Tax

⁷¹ *Id.* at 56, 212 N.E.2d at 577-78.

⁷² *Id.* at 56-57, 212 N.E.2d at 578, citing 1 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 2013 (1966); Comment, *The Effect of Condemnation Proceedings Upon Possibilities of Reverter and Powers of Termination*, 38 U. DET. L.J. 46, 54 (1960).

⁷³ *Ink v. Canton*, 4 Ohio St. 2d 51, 58, 212 N.E.2d 574, 579 (1965).

⁷⁴ *E.g.*, *Pedrotti v. Marin County*, 152 F.2d 829 (9th Cir. 1946); *Crowl v. Tidnam*, 198 Okla. 650, 181 P.2d 549 (1947); *Lancaster School Dist. v. Lancaster County*, 295 Pa. 112, 144 A. 901 (1929).

⁷⁵ *Pedrotti v. Marin County*, 152 F.2d 829 (9th Cir. 1946).

⁷⁶ *See id.* at 831.

⁷⁷ *See* cases cited note 24 and text accompanying note 24 *supra*.

purposes by the use of actuarial tables.⁷⁸ While this solution necessarily would be limited to situations where the particular contingency is dependent on the life of a particular person, or the outliving of one person by another, it remains, nevertheless, as a possibility.

California Position

California requires that each separate estate or interest in land shall be valued individually in condemnation proceedings.⁷⁹ Possibilities of reverter and powers of termination should fall within this provision since the courts hold that they are interests in property.⁸⁰ However, the Supreme Court of California, in its only decision directly in point, has adopted the majority position denying compensation for reversionary interests. *Romero v. Department of Public Works*⁸¹ dealt with the condemnation of a narrow strip of land held by a railroad under a deed that was given on the consideration of one dollar plus "benefits to be derived by [the grantor] from the construction and operation of a railroad . . ."⁸² The deed provided that the land was to be used only for railroad purposes and that if such use ceased, the land was to revert to the grantor.⁸³ The court found that the performance of the condition was made impossible by operation of law, and that since the limiting event had not occurred prior to condemnation, the future interest was too speculative and remote to have any compensable value.⁸⁴ The court did recognize that possibilities of reverter and powers of termination should have a separate valuation, but only where the land taken has some special value to the owner apart from the use of the land, such as the value of mineral rights.⁸⁵ The effect was to award the railroad the value of the land for its best possible use even though the lesser value for the restricted use was acquired for only a nominal sum.

In more recent California cases the rule set forth in the Restatement of Property has been recognized, yet no court has found such imminence of the terminating event that would allow the holder of the possibility of reverter or power of termination to share in the

⁷⁸ See Treas. Reg. 25.2512-5(d). See also 5 R. POWELL, *THE LAW OF REAL PROPERTY* § 666, at 112-21 (1967).

⁷⁹ "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess: 1. *Value*. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein." CAL. CODE CIV. PROC. § 1248(1).

⁸⁰ *Johnston v. Los Angeles*, 176 Cal. 479, 168 P. 1047 (1917); *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159 (1919); see 29 CALIF. L. REV. 525, 526 (1941).

⁸¹ 17 Cal. 2d 189, 109 P.2d 662 (1941).

⁸² *Id.* at 191, 109 P.2d at 663.

⁸³ *Id.* at 191, 109 P.2d at 664.

⁸⁴ *Id.* at 194, 109 P.2d at 665.

⁸⁵ *Id.* at 195, 109 P.2d at 665.

award.⁸⁶ In *Santa Monica v. Jones*⁸⁷ the court determined that the land had been conveyed to the railroad on a condition subsequent as in the *Romero* case. The deed stipulated that if the land was not used for railway purposes, or the railway should cease to run a daily passenger service, or any structures not necessary to the operation of the railroad were constructed thereon, the land would revert to the grantor.⁸⁸ Relying directly on *Croswell* the court held that the taking by the government did not amount to a breach of the condition, and even if it were a breach, the heirs had not elected to declare a forfeiture of the possessory estate.⁸⁹ The court found that forfeiture was not imminent even though the railroad had made application on several occasions to discontinue passenger service.⁹⁰

In finding no imminence the court cited a New York case, *Carter v. New York Central Railroad*,⁹¹ as authority. However, while the question of imminence was raised in the New York case, the actual decision was based on a determination that the possibility of reverter had no "value capable of estimate."⁹² Moreover, the California court even went so far as to say that a breach of the condition subsequent prior to condemnation would not entitle the heirs of the grantor to participate in the award.⁹³ The court did not go into the question of a special value apart from the use of the land, which was raised in *Romero*, but simply stated that no such value was alleged.⁹⁴ This result was reached despite the fact that California requires a separate valuation of all interests in the land.⁹⁵

In *People ex rel. Department of Public Works v. Los Angeles*,⁹⁶ land had been conveyed to the City of Los Angeles for the purposes of a public park. The land was deeded on the condition that it be used exclusively for a public park to be known as Griffith Park. The state subsequently condemned part of the land for the construc-

⁸⁶ See *People ex rel. Department of Pub. Works v. Fresno*, 210 Cal. App. 2d 500, 517, 26 Cal. Rptr. 853, 863 (1962); *People ex rel. Department of Pub. Works v. Los Angeles*, 179 Cal. App. 2d 558, 574, 4 Cal. Rptr. 531, 541-42 (1960); *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 474-75, 232 P.2d 55, 62-63 (1951).

⁸⁷ 104 Cal. App. 2d 463, 232 P.2d 55 (1951).

⁸⁸ *Id.* at 468, 232 P.2d at 58-59.

⁸⁹ *Id.* at 472-73, 232 P.2d at 61.

⁹⁰ *Id.* at 471, 232 P.2d at 60.

⁹¹ 73 N.Y.S.2d 610 (Sup. Ct. 1947).

⁹² *Id.* at 614.

⁹³ *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 473, 232 P.2d 55, 61 (1951). This holding caused one writer to comment that such reasoning represented blind adherence to the rule of *Croswell*. Comment, *The Effect of Condemnation Proceedings Upon Possibilities of Reverter and Powers of Termination*, 38 U. DET. L.J. 46, 50 (1960).

⁹⁴ See *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 474, 232 P.2d 55, 62 (1951).

⁹⁵ CAL. CODE CIV. PROC. § 1248(1).

⁹⁶ 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960).

tion of the Golden State Freeway. The court first determined that the land was held on a condition subsequent⁹⁷ and that there was no breach of the condition prior to condemnation.⁹⁸ The court then concluded that any interest that the heirs had in the land was "so remote, speculative and contingent as to justify no consideration by the court . . ."⁹⁹ As in *Santa Monica v. Jones*, no evidence was presented by the claimant as to the value of his right.¹⁰⁰

The most recent California case is *People ex rel. Department of Public Works v. Fresno*¹⁰¹ in which a large parcel of property was conveyed to the City of Fresno for municipal purposes, including use as a municipal airport, and "for no other purpose."¹⁰² The heirs of the grantor were named as co-defendants in the condemnation proceeding, along with the city. The trial court had determined that the city's interest in the property had terminated, and awarded the entire amount of compensation to the heirs of the grantor.¹⁰³ In overruling the trial court, the appellate court assumed for the purposes of adjudication that the conveyance created a determinable fee,¹⁰⁴ and found that there had been no reversion prior to the taking. Further, since the cessation of the required use was involuntary, the taking itself did not cause a reversion.¹⁰⁵ The court further found that there was no evidence of imminent reversion at the time of condemnation.¹⁰⁶ The court held that the non-compensability rule for "speculative" contingent interests, as developed in prior California cases dealing with conditions subsequent, applied with equal force to the reversionary interest incident to a determinable fee.¹⁰⁷ However, the court did at least recognize those cases that imposed the grantor's conditions upon the award, and indicated that such a provision under the facts of *Fresno* would be proper.¹⁰⁸ Concededly, the city itself had volunteered this stipulation, but the willingness of the court to implement such a provision under the right circumstances may be an indication that some measure of protection will be afforded these interests in California condemnation proceedings.

Conclusion

In the words of a Mississippi court, "there are other soundly rea-

⁹⁷ *Id.* at 570, 4 Cal. Rptr. at 539.

⁹⁸ *Id.* at 575, 4 Cal. Rptr. at 542.

⁹⁹ *Id.* at 574, 4 Cal. Rptr. at 542.

¹⁰⁰ *Id.* at 575, 4 Cal. Rptr. at 542.

¹⁰¹ 210 Cal. App. 2d 500, 26 Cal. Rptr. 853 (1962).

¹⁰² *Id.* at 503, 26 Cal. Rptr. at 854.

¹⁰³ *Id.* at 504, 26 Cal. Rptr. at 855.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 509, 26 Cal. Rptr. at 858.

¹⁰⁶ *Id.* at 517, 26 Cal. Rptr. at 863.

¹⁰⁷ *Id.* at 515, 26 Cal. Rptr. at 862.

¹⁰⁸ *Id.* at 518, 26 Cal. Rptr. at 863 (citing favorably cases noted in section on minority position).

soned cases, in a minority, holding that a future interest in land which is not tenuous and which is capable of evaluation is a compensable right when taken or damaged by the state for public use."¹⁰⁹ Such a result would appear to be dictated in states such as California where future interests are classified as property, and all property interests are required to have a separate valuation in condemnation proceedings.

The recent trend has been in favor of protecting these interests. California apparently recognizes this trend as favorable, as evidenced by its general recognition of the Restatement rule and the language of *Fresno* indicating approval of the imposition of the grantor's conditions upon the grantee's award. It is also important to note that there have been no major California decisions on this point subsequent to the decisions by the Minnesota and Ohio courts, which made the first major breakthroughs in this area.

It is suggested that these interests do have a value in and of themselves, apart from any likelihood of their becoming possessory. Concededly, the condemnation of land by a public authority does not effect a reversion to the grantor or his heirs, or a breach of the condition subsequent. But the mere fact that the interests have not become possessory is no reason to deny their participation in the award. Unfortunately, in so denying participation, the courts have limited themselves by implication to the idea that value lies only in possession of the land or in the possibility thereof. It should be recognized that in certain instances these interests do have independent value, and it is necessary to formulate means of estimating and protecting them.

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¹⁰⁹ *Hemphill v. State H'way Comm'n*, 245 Miss. 33, 50, 145 So. 2d 455, 463 (1962) (citing cases).

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