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CONDITIONS SUBSEQUENT AND RELEASE OF RIGHT TO RE-ENTER FOR BREACH.—To harmonize the apparently antithetic and to reconcile the apparently irreconcilable are the problems of the law. As time moves on, the things to be adjusted frequently become more divergent and the distance between them must be spanned. The common law, statutes, *stare decisis* are aids for covering part of the way, but they very often fail to bridge the greater gap caused by ever-changing social and economic conditions.

In the law of Property, particularly, we face this situation, for the artificialities of the common law prove absolutely inadequate to meet the needs of the present.

To remedy this may be considered the function of legislation, but enactments come often as a result of difficult situations which have confronted the judiciary. What, before the action of the legislature, is to be the basis for judicial decision? Expediency is unappealing to one with a personal concept of justice. And yet, when a problem is presented in which the merits of both sides seem equally balanced, is not social expediency—the value of the result to society —a very sane determinant?

An interesting question has been presented in the case of The Trustees of Calvary Presbyterian Church of Buffalo v. Putnam, decided by the Court of Appeals in July of this year. The facts of the case are these: In 1862, George and Harriet Palmer conveyed property in Buffalo, New York, to the Trustees of Calvary Presbyterian Church. A condition in the deed, of which there were several, prescribed that the premises should be perpetually maintained for religious purposes, and there was a covenant that on the breach of that condition the grantors or their heirs could re-enter and take possession, and the Church's estate would cease. Palmer died in 1864, two years after the execution of the deed. Some years later, all the living heirs at law and next of kin of the original grantor, for a consideration and by the terms of a quitclaim deed, released the premises absolutely from the condition in the deed. In April, 1926, the plaintiffs brought action to obtain a declaratory judgment of their rights and relations with the then-existing heirs who claimed a re-entry right notwithstanding the quitclaim deed. The question presented was whether the heirs of the original grantor could, by quitclaim deed to the original grantee, before condition broken, transfer the title of the plaintiffs into a fee simple absolute, or whether their deed is limited in its effects to a release of their re-entry right *in case of a breach during their lives.* Were they, as the Appellate Division asked, but "a mere conduit through which flowed by representation of the original grantor a right of re-entry after breach *to the heirs of that time?*"

Before discussing the decision and questions pertaining thereto, it is necessary to place in review the common law rules and decisions explanatory of them, which served as a guide in determining the question.

It is a well-known rule of construction that where possible to so interpret the intention of the parties, courts will construe a condition subsequent in a deed as a covenant, because the law abhors forfeitures.[1]

Conditions subsequent tend to destroy estates [2] and their rigorous exactment by the grantor of the grantee is "a species of *summum jus*," [3] hardly to be considered conscionable conduct. However, where the condition subsequent does exist, a kind of estate is created in the grantee known as a fee simple determinable or base or qualified fee.[4]

At common law what is left in the grantor or his heirs after the base or determinable fee (without reservation of rents) is not an estate, but a mere right to re-enter upon breach of the condition and enjoy a revesting of the estate.[5] Nor have the Revised Statutes changed this, for the class of expectant estates include reversions and future estates,[6] "the former what is left in the grantor or his heirs to commence in possession on the determination of the particular estate granted [7]; the latter is one limited to commence in possession at a future day with or without the intervention of a precedent estate or on the lapse of time or otherwise of a precedent estate created at the same time." [8]

But in the case of a grant upon condition subsequent, there is no estate left in the grantor, nor is one created to commence at a future day, either vested or contingent.[9] The whole title is in the grantee [10] with a mere possibility of reverter to the grantor or his heirs at the

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[1] Craig v. Wells, 11 N. Y. 315 (1854); Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655 (1890); Woodruff v. Woodruff, 44 N. J. Eq. 349 (1889).

[2] Woodworth v. Payne, 74 N. Y. 196 (1878); 4 Kent Comm., 129, cited in Nicoll v. N. Y. & Erie R. R., 12 N. Y. 121 (1854).

[3] Woodworth v. Payne, *supra*.

[4] Leonard v. Burr, 18 N. Y. 96 (1858). It has been contended that the Statute of Quia Emptores by putting an end to tenure between grantor and grantee put an end as well to determinable fees and the possibility of reverter thereon (Gray Perp. 2nd Ed. pp. 131–132). The great weight of authority, in this country, however, sustains the existence of this type of estate; North Adams First Universalist Society v. Boland, 155 Mass. 171 (1892); Pettit v. Stuttgart Normal Institute, 67 Ark. 430 (1899); Crozier v. Cundall, 99 Ky. 202 (1896); 1 Jones Real Prop. 630–631; 2 Washburn Real Prop. 4th Ed. 390; Nicoll v. N. Y. & Erie R. R., *supra*; Upington v. Corrigan, 151 N. Y. 143, 45 N. E. 359 (1896).

[5] Vail v. L. I. R. R., 106 N. Y. 283, 12 N. E. 607 (1887); 4 Kent Comm. 370, cited in Nicoll v. N. Y. & Erie R. R., *supra*.

[6] 1 R. S. 723, Secs. 9, 10, 12; R. P. L. Sec. 36.

[7] R. P. L. Sec. 39.

[8] R. P. L. Sec. 37.

[9] Nicoll v. N. Y. & Erie R. R., *supra*; Underhill v. Saratoga & Washington R. R., 20 Barb. 455 (1855); Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997 (1911).

[10] Nicoll v. N. Y. & Erie R. R., *supra*; Vail v. L. I. R. R., 106 N. Y. 283–287, 12 N. E. 607 (1887).

time the condition is broken.[11] Even there, the estate in the grantee does not cease until re-entry by the grantor or his heirs.[12]

The mere right to re-enter for breach of condition is not an assignable interest, nor was it at the common law.[13] The policy that prohibited its assignment at the common law was that it promoted litigation and so "to prevent *maintenance* and the multiplicity of contentions, no possibility, right, title or anything not in possession nor vested in right could be granted or assigned to strangers." [14]

The same policy which prohibited their release to strangers would encourage the releasing by the grantor to the grantee of his right to re-enter, either before or after a breach of the condition,[15] and so we find that the grantor could release his right to re-enter at any time to the grantee. However, were he to attempt to assign it to another, though it was ineffectual for the purpose, it served to extinguish it in himself or his heirs.[16] The anomaly here presented is interesting. "How is it that what does not pass does not remain," [17] and yet these are the subtleties of mediæval English law.

Besides being unassignable both at common law and by statute, a possibility of reverter is neither descendable nor devisable.[18] There is no estate to devise or upon which descent could operate [19] and it passes to the heirs of the grantor, and to his heirs only,[20] on his death, if he has not released it in his lifetime or lost it by attempted assignment, not by force of descent, but as representatives of the legal person of the grantor.[21]

This is the position in which the heirs of George Palmer stood, when in 1893 they gave a quitclaim deed to the plaintiff releasing all their rights, title and interest and covenanted with the plaintiff that they would not at any time or in any manner enter upon or interfere with the enjoyment of the premises by the plaintiff or its successors or assigns, nor in any manner seek to enforce the covenants and conditions of the deed of 1862.

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[11] 37 L. R. A. 794; Upington v. Corrigan, *supra.*

[12] 1 R. S. 748, Secs. 23, 24, 25; 2 Kent Comm. 123.

[13] Miller v. Emans, 19 N. Y. 384 (1859).

[14] *Ibid*; People v. Wainwright, 237 N. Y. 467, 143 N. E. 647 (1924).

[15] Southwick v. N. Y. Christian Missionary Society, 151 A. D. 116 (1912) aff'd 211 N. Y. 515 (1914); Fowler Real Prop. 2nd Ed. 313; Washburn Real Prop. 4th Ed. Chap. 14, Sec. 26; 10 R. C. L. 653.

[16] Wagner v. Wallowa County, 71 Oreg. 337 (1914). In L. R. A. 1916 F., 311, the possible reasons given for the rule are: 1—a jealousy of maintenance which penalizes any attempt to transfer; 2—a dislike of conditions attempting to promote uncertainty of titles; 3—a disinclination of law and of equity to enforce forfeitures.

[17] L. R. A. 1916 F. 311.

[18] Upington v. Corrigan, *supra.*

[19] *Ibid.*

[20] This is because of the technical common law doctrine that one out of possession may not enter unless he or his ancestor has theretofore been seised. L. R. A. 1916 F. at 132.

[21] Upington v. Corrigan, *supra.*

"All their rights" becomes the subject of discussion. The Appellate Division[22] and the Court of Appeals in affirming their decision,[23] defined these rights to be the rights of the ancestor whom the heirs represent and in him was the power, first, to re-enter in case of a breach and, second, to rid the grant of the condition for all times by a release before or after the breach of it, thereby extinguishing in his heirs the possibility of ever acquiring an estate. Both of these powers the Court of Appeals held to be transmitted to the heirs of 1893 in their representative capacity. It was said by Judge O'Brien, speaking for the unanimous court,[24] "No rule of law is invoked which would tend to prevent the living heirs, prior to a breach, from waiving a right or a possible right of which they could thereafter divest themselves. No reason presents itself for the creation of such a rule. If, prior to the release by the heirs in 1893, plaintiff had violated the conditions, they, in their representative capacity, had also been vested with power either to stand passive or approve actively of the violation. *They could have exercised or have refrained from exercising any power which would have existed in the grantor had he been alive. They represent him and his possible rights."* Effectively then, there has been foreclosed against the present heirs all possible rights in the property.

The decision is, of course, conclusive. There are, however, some interesting questions that remain in one's mind.

In Upington v. Corrigan, the Court said that there devolved upon the heirs in their position as representators "the bundle or aggregate of the rights which resided in and survived the death of the grantor, their ancestor." On that contention it was held that the heirs had a right of re-entry when the condition was breached. If they have any rights that one they certainly possess, for that comes to the grantor from the very nature of the grant, and through him by representation to the heirs. But this is the first time that a Court has been asked to decide whether the other right also survives, whether the heirs have the other right of the grantor—the right to release a grant from its condition, *for all times,* before a breach.

It is interesting to note that while the common law favored settling of estates and thereby gave the grantor this right of release, it nowhere appears that the right which is in the grantor to release for all times before a breach is also in his heirs. If that was the intention of the common law, it has not been so set forth, though it might be felt that the reasons which would allow it in the grantor would allow it to his heirs. On the other hand, the actual right to release for all times before breach might more logically exist in him who made the condition than in those who took their representative

[22] Trustees of Calvary Presbyterian Church v. Putnam, 221 A. D. 502, 224 N. Y. S. 651 (4th Dept. 1927).

[23] *Aff'd,* 249 N. Y. 111 (1928).

[24] *Ibid.,* 116 (Italics ours).

capacity from his very failure to do so. Might it not be assumed that, since the grantor failed in his lifetime to rid the grant of its burden, all his representatives take is the continuing right which he passed on to them, the right to re-enter *if* and *when* that right vested in them which would be at the time of a breach of the condition; and, if that did not occur in their lives, they are legally but the perpetuators of it until it shall vest, or, to refer again to the Appellate Division's statement, a mere "conduit through which, *after breach* of condition subsequent, flowed the right of re-entry *in favor of heirs existing at that time.*" (Italics ours.)

It has always been held that that is the time when the right ripens into an actuality, the time which determines in what heirs the right of re-entry will vest and *who will have* the right to represent the grantor.[25] Can any heirs really be said to represent the original grantor before that time?

While before the condition is breached the heirs at that time may promise not to exercise their right to re-enter *if it comes within their power to do so,* but if that power does not come to them but vests later in others, can it be said that these others would be cut off from their rights by the release of a right which was never in fact vested?

One may argue that, since the right of re-entry is neither an estate nor interest in real property,[26] subsequent heirs lose nothing, but that does not prove the right in previous heirs to release the estate from its condition before a breach. Then, too, as the Court of Appeals points out, if the condition were breached, the heirs in existence at that time might remain passive or approve of the violation or act upon it and later resell the property, all of which would deprive the present heirs of any rights. *But in case of a breach, they would have had a right in fact to do these things while before the breach no such right in fact exists.*

It is evident, as suggested by the Appellate Division, that collusion might also readily deprive subsequent heirs, were they not cut off by the quitclaim deed. The grantee might agree to breach the condition, in which case the heirs would enter and then, for a consideration, deed over the property to the grantees unencumbered. Under the decision of the case, heirs who feel that a breach is unlikely during their lives, may for an attractive consideration, release against those to come. This element merely shows the real effect of the decision, a virtual abolition by this means of the determinable estate.

In allowing the representative capacity of the heirs to extend to a right to release the grant of its condition for all times, prior to a breach, the courts are carrying out their evident attitude towards determinable fees. In effect these fees cause the same difficulties regarding marketability of titles and quieting of estates, which the

[25] Towle v. Remsen, 70 N. Y. 303 (1877); Puffer v. Clark, 202 Mich. 169 (1918).

[26] Nicoll v. N. Y. & Erie R. R., *supra*; People v. Wainwright, *supra.*

Statute against Perpetuities aims to remedy, and they are not included under it.[27] But the grantors of these fees have been practically subject to penalties for so fettering estates. Their rights of re-entry have been held extinguished by a conveyance therof by deed to a third person before entry for breach of condition, even though such conveyance be to a son of the grantor who, upon his death becomes his heir.[28] Such holding was on the ground that the father thereafter could make no entry or claim as he had no interest; neither could the son as he was a stranger to the condition.

It is not socially expedient that property be fettered. Besides, the prayer of the grantee is appealing. The Trustees in the instant case may be unable, for example, to carry on financially the burden of church work. They may sell their property,[29] but its title is not unembarrassed nor unhampered as long as it can be used only for a particular purpose. No one would say that it is. This is disadvantageous and until, by legislative enactment, estates which tie up property in this manner are abolished, the rights of the parties, when they are to a degree difficult to determine, may probably in the last analysis be best determined by what is socially beneficial, making for certainty of title, unhampered use of property, quieting of estates and greater marketability. This has been the evident policy of the law.

" 'After all, the question whether a given opinion is a danger to society is a question of the times, and is a question of fact.' The truth is that a changing sense of the exactions of utility and justice has evoked a changing law." [30]

G. M. B.

EXEMPTION OF COMPENSATION AWARDS FROM EXECUTION.—The recent decision of the Court of Appeals in the case of Surace v. Danna,[1] is an interesting example of the liberal construction the courts are disposed to give to the provisions of the Workmen's Compensation Law. The precise point involved presents a question vitally affecting the value of the award; and one which follows the granting of every award in such logical sequence, that it is surprising that it has not been presented for judicial determination before now. The defendant had an award of $3,500. made in a lump sum, under the Workmen's Compensation Law,[2] for injuries sustained in the

[27] 30 Cyc. 1474.
[28] Rice v. Boston & Worcester R. R., 12 Allen (Mass.) 141 (1866); Hooper v. Cummings, 45 Me. 359 (1858).
[29] Pettit v. Stuttgart, *supra.*
[30] Cardozo, "Paradoxes of Legal Science," at p. 24, citing Bowman v. The Secular Society.

[1] 248 N. Y. 18, 161 N. E. 315 (1928).
[2] N. Y. Cons. Laws, Ch. 67.