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RECENT CASE NOTES

DEEDS—CONDITIONS SUBSEQUENT—IS AN ESTATE FORFEITED ON CEASING TO USE LAND FOR PURPOSES SPECIFIED IN GRANT?—In 1842, one Burks made a warranty deed of one acre of his 173-acre tract to township trustees. Grantees were “to have and to hold the same with all the privileges and appurtenances belonging thereto . . . forever, upon the conditions and stipulations following, that the land be used and held . . . for school purposes and the same shall not be alienated or diverted from the purposes of this grant.” The deed also required trustees to fence in the acre. The trustees took possession and erected a school which was used until 1928. In 1856 Burks conveyed the 173-acre tract, “except an encumbrance given on one acre for school purposes and described in the lease given to the trustees”, to the party under whom P claims. In 1929, there being no further need for a school, the land was advertised for sale by the trustees. P now sues to quiet title to the acre. *Held*, the land did not revert to P upon abandonment for school use. Although the language created a condition subsequent, the purpose for which the condition was made had been fulfilled by 86 years continuous use. *Jordan v. Hendricks*, 173 N. E. 288, App. Ct. of Ind., Nov. 14, 1930, following *Sheets v. Vandalia Ry. Co.*, 174 Ind. App. 597. *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. 442, in accord.

It is impossible, both at the common law (Tiffany on Real Property III, p. 2306; *Langdon v. Ingram's Guardian*, 28 Ind. 360) and by modern statutes (Burns 1926 Sec. 13416) to place an absolute restraint on alienation in a grant in fee simple. It is possible, however, in several ways to restrict the use to which land conveyed may be put by language in the deed. Merely stating the use to which land is to be put is not sufficient, as “For the use of X seminary” (*Heaston v. Board*, 20 Ind. 398) or “for school purposes” (*Hanna v. Washington Township*, 73 Ind. App. 382; *Newpoint Lodge v. Newpoint*, 138 Ind. 141; *Cook v. Liggett*, 88 Ind. 211; *Scantlin v. Garvin*, 46 Ind. 262). One way is by designating the grantee a trustee to carry out the purpose designated in the trust, *Runson v. Unbridge*, 1 Allen 125, 83 Am. Dec. 670. Failure to properly use the land does not forfeit the estate but merely gives ground for equitable relief. *Taylor v. Campbell*, 50 Ind. App. 515; *Gharkey v. Garat*, 20 Ind. 39. Another scheme is to give the grantee not a fee but a mere right of user for the purposes specified. Then on ceasing to use it as required the grantee's interest ceases and it reverts to the grantor. *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869. Some states hold that dedication of land for school purposes comes under this category and that the dedication ceases when its use ceases. *Board of Education v. Inhabitants of Van Wert*, 18 Ohio St. 221; *School Dist. No. 2 of Johnson Co. v. Hart*, 3 Wyo. 563, 29 Pac. 741. Since it is not settled in Indiana just what estate a dedication of land to the state does convey, it might be argued with reasonable plausibility that the deed in the principal case was of this character. It does not appear whether the deed was gratuitous. The deed conveying the 173 acres treated it as of this character. But in the analogous cases of grants of right of way, similar deeds gave a

fee upon a condition subsequent. *Paul v. Railway*, 51 Ind. 527; *C. C. C. & St. L. R. R. v. Corbin*, 91 Ind. 557; *Jeffersonville R. R. v. Barbour*, 89 Ind. 375. And where even a nominal consideration is paid for the deed, the state gets a fee. *Higbee v. Rodeman*, *supra*. A third method is to grant an estate in fee to continue "as long as" the land is properly used, or "until" it ceases to be so used or with words of similar import, thus creating a determinable fee which terminates as soon as the use ends, the land thereupon reverting to the grantor or his heirs and assigns. *Boling v. Miller*, 133 Ind. 632, 33 N. E. 354; *Pulse v. Osborn*, 30 Ind. App. 631, 64 N. E. 59; *Fall Creek School Tp. v. Schuman*, 55 Ind. App. 232. But see *Higbee v. Rodeman*, *supra*, and *Carter v. Bronson*, 79 Ind. 14, where determinable fees were ignored. Another quite common method is to insert a covenant in the deed, breach of which will not forfeit the estate but will merely give rise to an action for damages. *Brady v. Gregory*, 49 Ind. App. 345. The usual method of accomplishing the grantor's purpose is by attempting to convey a present estate in fee, subject to a condition that if at any future time the use is abandoned the grantees estate becomes voidable upon the reentry of the grantor or his heirs. *Lafayette & W. Gravel Road Co. v. Vanclain*, 92 Ind. 153; *Scott v. Stipe*, 12 Ind. 74. This type of estate differs from Trusts and Covenants in that breach by the grantee may forfeit his entire title (*Cross v. Carson*, 8 Blachb. 138, 44 Am. Dec. 742), and from determinable fees and mere rights of user because the estate does not end immediately on breach but only when the grantor or heir retakes possession. *Lindsey v. Lindsey*, 45 Ind. 852; *Bayer v. Tressler*, 18 Ind. 260; *Paul v. Railway*, 51 Ind. 527. The courts have not favored conditions subsequent because of the harshness of forfeiture, *Sumner v. Darnell*, 128 Ind. 38, 27 N. E. 162, 13 L. R. A. 173; *Taylor v. Campbell*, *supra*. They usually construe doubtful clauses as either covenants (*Brady v. Gregory*, *supra*), or as a trust, *East Chicago Co. v. East Chicago*, 87 N. E. 17, 171 Ind. 654; *Taylor v. Campbell*, *supra*. The Indiana cases evidence much difficulty in distinguishing between covenants and conditions and the cases are apparently in hopeless confusion. *Sheets v. Vandalia Ry.*, *supra*; *Indianapolis R. R. Co. v. Hood*, 66 Ind. 580. Where there is a clear unmistakable intention of the grantor as shown by the language of the deed and the surrounding circumstances (*Scantlen v. Garven*, 46 Ind. 262) to create a condition, the Indiana courts will give effect to it. *Sumner v. Darnell*, *supra*. E. g., where the condition was made part of the consideration, *Scott v. Stipe*, *supra*; *Cory v. Cory*, 86 Ind. 567; *C. C. C. & J. R. R. v. Corburn*, *supra*. *Sumner v. Darnell*, *supra*, contra. Provisions that the land shall be used forever or permanently for a given purpose denote a condition. *Taylor v. Campbell*, *supra*. Express stipulation for forfeiture on breach is always held to be a condition, *Royal v. Aultman & Taylor Co.*, 116 Ind. 424. Use of the words "on condition", "provided that" and others of like meaning do not of themselves establish a condition but are merely indicative of the grantor's intent. *Brady v. Gregory*, *supra*. It all depends on the grantor's intent, and the seemingly hopeless farrago is avoided by the later Indiana cases holding that even where there is a condition it may be subsequently fulfilled by long use, thus avoiding forfeiture and reaching the same result

as if it had been a covenant. *Hunt v. Beeson*, 18 Ind. 380; *Higbee v. Rodeman*, *supra*; *Sheets v. Vandalia*, *supra*.*

The principal case could easily have been construed as a covenant. The agreement to fence was clearly of this nature. But the same result was obtained by finding the condition substantially performed by 86 years continuous use.

At all events P could not obtain the title here since he was holding from an assignee of the grantor, and the rights of reentry after breach of a condition subsequent cannot be assigned by the grantor but must be exercised only by him or his heirs. *Thompson v. Thompson*, 9 Ind. 323; *Van Horn v. Mercer*, 64 N. E. 531, 29 Ind. App. 27; *Paul v. Railway*, *supra*.

J. S. G.