

Washington Law Review

Volume 21 | Number 4

11-1-1946

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Recommended Citation

Jane E. Dowdle, Comment, *Judicial Interpretation of Conveyances in Consideration of Support*, 21 Wash. L. Rev. & St. B.J. 228 (1946).

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WASHINGTON LAW REVIEW

and

STATE BAR JOURNAL

Published Quarterly, in January, April, July and November of Each Year
by the Washington Law Review Association, at the Law School
of the University of Washington. Founded by John T
Condon, First Dean of the Law School

SUBSCRIPTION PRICE: \$1.20 PER ANNUM

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COMMENT

JUDICIAL INTERPRETATION OF CONVEYANCES IN CONSIDERATION OF SUPPORT*

The problem of construing the legal effect of a conveyance of land by a grantor in consideration of support and maintenance during the remainder of his life by the grantee has been presented quite frequently to the courts. This type of transaction has been regarded as *sui generis* and hence not controlled by the usual rules applicable to conveyances of land the consideration for which is the promise of the grantee to perform certain acts in the future. The presumption is that the primary purpose of the grantor is to secure the personal performance by the grantee of the obligation assumed. The consideration is not regarded as an ordinary obligation, but rather one of peculiar character, imposing on the grantee certain burdens which *he* must perform if he would retain the property conveyed.

The question usually arises when the grantor seeks to rescind and cancel the conveyance because of the failure of the grantee to perform, or when either the grantee or the grantor has died. As a general rule, courts of equity have upheld the rescission and cancellation of such contracts, regardless of the type of estate created, and without any assumption that there is an executory contract involved. Actually, there is both a contract and a conveyance in the ordinary agreement, but the courts almost always stress the contract. Widely different theories have been used by the courts to explain the results, depending in part at least upon the words used in the conveying instrument as an indication of the intention of the parties concerned. Relief to the grantor by cancelling or setting aside the conveyance has been given on one of several grounds. First, that the neglect or refusal of the grantee to comply with his contract raises a presumption that he did not intend to comply with it in the first instance, and hence the contract was fraudulent in its inception. Second, the court finds a condition by using rules of judicial construction, thereby holding obligations which in form rest in covenant to rest in condition. Third, the relief granted rests on the broad theory that failure of consideration is in and of itself a ground for rescission. Fourth, the court feels that the remedies at law are inadequate. Fifth, equity will grant a reconveyance, because the conveyance creates an implied trust which has been renounced by the grantee.¹ But before the

* A thorough and exhaustive search of the authorities from the approach of the analysis used in this paper was made with very little success. Since the courts almost never discuss the estate concept in their decisions of the cases presenting the problem, there is no legal writing on the subject. Instead the courts are primarily concerned with aiding the grantor either by enforcing the promise of the grantee to support the grantor, if possible, or by decreeing a cancellation of the deed. The reason for this attitude on the part of the courts arises out of the fact that in the usual case of this type, the grantor has little or no wealth besides the land which he has conveyed. As a result, the only discussion of the problem with which the paper is concerned was found in the treatises, and annotations dealing with the equitable remedies of rescission and cancellation of deeds.

¹ 4 THOMPSON ON REAL PROPERTY (Perm ed., 1940) § 2058; 1 TIFFANY ON REAL PROPERTY (3rd ed., 1939) § 216; 12 C. J. S. Cancellation of Instruments § 30; 9 AM. JUR. Cancellation of Instruments § 31; 76 A. L. R. 743

court can determine whether or not to grant a cancellation of the instrument, it must first seek to determine the precise estate or relationship which the transaction brought into being. This paper is an analysis attempting to determine the estates probably created in the light of the Washington decisions.

The preliminary step is to see what the cases seemingly hold as to the estates created by the inter-vivos transfer between the grantor and the grantee. Though the Washington court has never discussed the problem, the cases give some light upon the attitude of the court. There are several possibilities: An estate on a conditional or so-called "special" limitation,² a fee on condition subsequent, a life estate in the grantor with a remainder in fee in the grantee, or a fee simple with a covenant by the grantee to perform the contract accompanied by a condition subsequent giving the grantor the right to terminate the estate of the covenantor on its breach. The most widely prevailing and perhaps the most satisfactory construction is that there is an estate in fee with either an express or implied condition subsequent. In discussing this problem Tiffany says:

Such a conveyance is not usually in terms on condition that the support be furnished, but it is occasionally so expressed, and in view of the ordinary attitude of the courts in favor of divesting the grantee's title upon his failure to furnish support, the analogy between such conveyances and those subject to a condition subsequent is sufficiently close to justify their consideration in the same connection.³

It is well to note, however, that even the courts which do interpret the conveyance as one on condition subsequent, (and the Washington court is one of them) do not necessarily follow all the ordinary rules for such estates, as to forfeiture for breach, waiver of a breach and right of re-entry.

In several cases the Washington court has treated the estate as being on condition subsequent, without anywhere specifically discussing the problem. The court has more usually been concerned with the equitable aspects of the situation. Nevertheless, in two cases the court states that the conveyance is on a condition, and since it regarded the title as having passed at the time of the signing of the instrument, it must necessarily mean it is a condition subsequent.

For example in *Payette v Ferrier*,⁴ one of the most important Washington cases on the problem, the court said:

The right of the parent to a return rests upon the inability of his child to render the service or perform the condition upon which he was entrusted with the property.⁵

The facts of the case were: A widower had conveyed his farm to his daughter and her husband in 1882 by an instrument which recited that the consideration for the conveyance was the promise of the grantees to support the grantor for the remainder of his life. In 1883, the daughter and her husband mortgaged the premises to one Jacobus to

² This is also called a determinable fee. RESTATEMENT, PROPERTY (1936) § 23; 1 TIFFANY *op cit supra* note 1, § 220.

³ 1 TIFFANY *op cit supra* note 1 at 373.

⁴ 20 Wash 479, 55 Pac 629 (1899); affirmed on rehearing, 31 Wash 43 71 Pac 546 (1903).

⁵ *Id.* at 483.

secure an alleged debt. The daughter died in 1891, and her husband in 1892. Several years later the grantor sued the administrator of the estates of the grantees to establish a lien on the land for support which had not been furnished him for 1893 and subsequent years, or in the alternative, for cancellation of the deed and mortgage. The trial court entered a decree granting the plaintiff a lien on the land for the support for 1893 and on, but refused to rescind the conveyance. On appeal, the supreme court rescinded the deed on two grounds (1) the death of the grantee, and (2) because of the mortgage of the property by the grantee. In support the court cited the Wisconsin case of *Bogie v Bogie*⁶ which holds that conveyances of this type are peculiar and must be dealt with on principles not applicable to ordinary conveyances.

Another case in which the court in effect found a condition subsequent was *Ford v Kimble*.⁷ There Levi and Rebecca Ford entered into an agreement with their son David, on December 1, 1881, under which they deeded all their real property to him in consideration of their maintenance and support during the remainder of their natural lives. By mistake in the deed the land was stated to be in Section 20 instead of the correct section, 25. On the same day, David and his wife, in conformity with the agreement, leased the farm back to his father and mother for the rest of their lives at a nominal rental. David Ford then went into possession and lived with his parents. In 1892 the mistake in the deed was discovered, and in July of that year Levi and Rebecca made a quit-claim deed of their farm to their daughter Clara, correctly describing the land. David's wife having died in the meantime, David and his minor son, by guardian *ad litem*, brought an action to set aside the quit-claim deed on the ground of fraud, and to reform the deed he had received from Levi and Rebecca Ford. The court cancelled the quit-claim deed and entered a decree that the deed to David and his wife be reformed to contain the agreement of David to support his parents, and that:

upon failure to so properly maintain, care for and support them, then said deed shall become void and said property revert to said Levi and Rebecca Ford⁸

Although the language as used by the court seems to create an estate on "special limitation", in view of the attitude of the court it is more probable that an estate on condition subsequent was meant.

From the approach of the court in the two decisions above, it would seem that the grantee has an estate in fee, but if he breaches the agreement, the grantor can ordinarily do any one of three things. That is, he may waive the breach, sue to rescind the conveyance, or sue at law for damages. If the grantor waives the breach, his heirs cannot subsequently upon his death sue for a forfeiture of the estate.⁹ Some courts take the view that where the contract for support is embodied in a separate instrument from the conveying instrument only an action for damages will lie.¹⁰ This is not the view of the Washington court, how-

⁶ 41 Wis 219 (1876)

⁷ 41 Wash. 573, 84 Pac 414 (1906)

⁸ *Id.* at 576

⁹ 26 C J S Deeds § 148; *Wilkes v Groover*, 138 Ga 407, 75 S E 353 (1912)

¹⁰ *Lavelly v. Nonemaker*, 212 Cal. 380, 298 Pac. 976 (1931); *Dixon v Milling*, 102 Miss 449, 59 So 804, 43 L R A (N S) 916 (1912); *Anderson v Gaines*, 156 Mo 664, 57 S W 726 (1900)

ever. When the grantor seeks to rescind the contract and cancel the conveyance, one authority states that:

even when the conveyance is regarded as subject to such a condition, and the condition is referred to as a basis for the grant of relief, the relief which is given is occasionally equitable in character, that is, it takes the form of a decree for rescission or cancellation of the conveyance, rather than of a re-entry or action of ejectment, as in the ordinary case of a conveyance subject to a condition subsequent¹¹

However, there are some cases which hold that there must be a re-entry by the grantor, or its equivalent.¹² This appears to refer in the ordinary case to the necessity of an actual assertion by the grantor of his intention to claim a forfeiture.¹³

In at least one Washington case, *Gardner v Frederick*,¹⁴ the court has based the decrees of rescission merely on the injustice of allowing the grantee to retain the land without performing the promise on the faith of which the conveyance was made to him. This was done with no statement as to what type of estate in the grantee was being defeated.

The Washington court, in discussing the obligation to support has stated that it is personal and cannot be assigned or transferred without the grantor's consent. In an early case, *Payette v Ferrier*, the court said:

The duty of support is a personal and continuing one. It is not assignable, but to be performed by them only, so when the child attempts to transfer or assign, the parent has a right of rescission or cancellation of the conveyance. The covenants of the grantees are personal and die with them.¹⁵

In another Washington case, the court adhered to the view of the *Payette* case, *supra*, and said that:

The obligation of David, the son, to his aged parents, was personal, and could not be avoided or assigned to any other person without the parents' consent.¹⁶

In the latest case to present the problem, the court upheld the converse of the proposition. That is, although the services are personal, they can be assigned with the consent of the grantor.¹⁷

Clearly, the statement that the services are personal sounds more in covenant than condition, but a breach of a covenant does not affect the estate conveyed. Since the obligation is personal to the grantee, it would seem to be a personal covenant and not one running with the land, but the cases are not clear on the point. The court in effect held that this personal obligation did create some sort of a charge on the land in one case, in that where the grantee had mortgaged the property the court regarded it as having the same effect as a deed, and

¹¹ 1 TIFFANY ON REAL PROPERTY (3rd ed. 1939) 373

¹² *Wilkes v Groover*, 138 Ga. 407, 75 S. E. 353 (1912); *Richter v Richter*, 111 Ind. 456, 12 N. E. 698 (1887); *Blum v Bush*, 86 Mich. 206, 49 N. W. 142 (1891)

¹³ This can be done by an actual entry, a demand for possession or at the very least a declaration of intention to claim a forfeiture.

¹⁴ 96 Wash. 324, 165 Pac. 85 (1917)

¹⁵ *Payette v Ferrier*, 20 Wash. 479, 483, 55 Pac. 629 (1899)

¹⁶ *Ford v Kimble*, 41 Wash. 573, 578, 84 Pac. 414 (1906)

¹⁷ *Hesselgrove v Mott*, 23 Wn. (2d) 270, 160 P. (2d) 521 (1945)

thus an attempt by the grantee to rid himself of the obligation¹⁸ It is clear that the land involved in the conveyance is regarded as essential to the performance of the contract

In *Gustin v Crockett*¹⁹ the court cancelled the deed which on its face seemingly created in the grantor a life estate in the property with a remainder in fee in the grantee When the grantee had the grantor evicted twice from the land under writs of restitution, the court felt it was a breach of the agreement, and caused the grantee to forfeit the estate In that case the plaintiff was purchasing seven lots on installment payments When he became unable to pay off the remainder of the purchase price, he borrowed the money from his deceased son's former wife, Laura Crockett, and her husband, in return for a conveyance of the property to the daughter-in-law The court apparently construed the deed as passing a fee title to the grantee subject to the condition that the grantor be allowed to live on the property for the rest of his life²⁰ The plaintiff lived on the property for several years, during which he made improvements and paid the taxes Meanwhile, the defendant Laura Crockett had deeded the property to her husband and they had mortgaged it Thereafter the grantor was twice ejected from the land under writs of restitution Although there was no agreement for support involved, the court treated it as the same sort of a conveyance, and decreed a forfeiture for breach of the agreement

Another aspect of the problem arises where the grantee does perform the agreement, but dies before the grantor The courts of the various states are split on the result For example, some courts hold that where the grantee performed the contract until the date of his death no reconveyance can be had by the grantor²¹ If on the death of the grantee, his heirs refuse to comply with the conditions of the deed, a cancellation of the deed is authorized in some courts²² This result is in line with the usual result where a true condition subsequent is found²³ Other jurisdictions hold that so long as anyone in privity with the deceased grantee's infant children, to whom title passed, complies with the contract, the deed will not be cancelled Washington, in contrast with the majority, follows the view that the death of the grantee puts an end to the obligation to support, and the grantor is entitled to rescission of the contract, even though the grantee performed up until his death This is in conformity with the Washington view that the contract for support is personal in character, the grantor being entitled to the care and attention of the person who promised to furnish the support In the *Payette* case the grantor was allowed to rescind as against the ad-

¹⁸ See note 4 *supra*

¹⁹ 51 Wash 67, 97 Pac 1091 (1908)

²⁰ There is nothing in the case to indicate what the specific words used in the deed were, but the court said: "The agreement on the part of the respondent Laura Crockett and her husband that the appellant should occupy the property during their lives was an integral part of the grant itself, and was in part the consideration for the grant"

²¹ This result is achieved by those courts which use the approach of presumed fraud in the inception of the contract, since if the grantee performs until he dies, there was no fraudulent intent on his part

²² *Cree v Sherfy*, 138 Ind 354, 37 N E 787 (1894); *Cross v Carson*, 8 Blackf (Ind) 138, 44 Am. Dec 742 (1846) In addition see 43 L R A 928, and 34 A L R 136

²³ 1 TIFFANY *op cit supra* note 11, § 190

ministrator of the estates of the deceased grantees. The court held that the death of the grantee was a breach of the condition subsequent. Under the rule as laid down by this case, the heirs of the grantee will not be allowed to perform the contract.

Another question arises where the grantor dies after a breach of the agreement. Most courts regard the agreement involved as being personal to the grantor, in that he is the only one who can rescind the conveyance for failure to perform the contract for support. In the case of *Storey v Gaisford*²⁴ the court recognized the general rule that the grantor is the only one who can seek a forfeiture, but since the grantor had attempted to rescind the contract before his death, the heirs were allowed to have the deeds cancelled.²⁵ The court quoted from the leading case of *White v Bailey* that:

The only other question deemed worthy of consideration is whether any person other than the grantor can prosecute this right of rescission. If the plaintiff were a mere assignee of the cause of action, his right to sue would be gravely doubtful, but he is the representative of the estate to which it belongs, and sues as such. Nor is the cause of action one which dies with the person.²⁶

The probable result of the failure of the grantor to attempt to rescind before his death would be that the court would construe it as a waiver. It is clear, however, that the grantor cannot transfer his power of termination under the common law rules referring to the transferability of such a power, but those rules cease to apply after the grantor has started to exercise his power of termination.²⁷

From the foregoing discussion it is apparent that the courts do not follow the usual construction of an estate on condition subsequent, since if the usual rules were followed, the grantor could rescind the contract for non-performance by the grantee. But the authorities are practically unanimous in holding that the failure to support the grantor can be taken advantage of only by the grantor.²⁸

The remaining problem concerns the attitude of the court toward a conveyance of the type under discussion where the land has been transferred to a third person. If the estate created is a fee simple subject to a condition subsequent, the grantee can pass good title, but the transferee assumes the burden of performing the condition. That is, the condition is a limitation on the estate conveyed, and it is also directly related to the land which is transferred. The grantor can cancel the conveyance if the transferee fails to perform. However, the cases are by no means uniform on this point. One possible distinguishing fact is that some of the deeds contain the agreement, while in others the contract to support is in a separate instrument. The *Payette* case is an example of the first type of conveyance, and the court held there that since the

²⁴ 136 Wash. 378, 240 Pac. 9 (1925).

²⁵ The grantor had attempted to persuade his son, the grantee, to cancel the deeds or reconvey the property to him, but the grantee had refused. Apparently no legal action of any kind had been started before the grantor died.

²⁶ 65 W. Va. 573, 64 S. E. 1019, 1022, 23 L. R. A. (N. S.) 232 (1909).

²⁷ 3 SIMES ON FUTURE INTERESTS (1936) § 716; RESTATEMENT, PROPERTY (1936) § 160.

²⁸ *Malichi v Malichi*, 189 Minn. 121, 248 N. W. 723 (1933); 1 TIFFANY ON REAL PROPERTY (3rd ed., 1939) 380; 26 C. J. S. Deeds § 148.

agreement was embodied in the deed the mortgagee took with constructive notice, and so was in no better position with regards to the breach than was the grantee. In the *Gardner* case, the contract for support was in a separate instrument which had been cancelled by the parties by mutual consent. The court held that the grantor could not get a reconveyance since the property had been conveyed to third persons before the grantor sought rescission of the deed. The distinction appears to be sound, as the transferee shouldn't be forced to forfeit the estate where he has no means of knowing of the existence of the agreement.

In conclusion, although the Washington court has in effect treated the estate created as a fee on condition subsequent, the question has never been in issue and passed upon by the court. It is perhaps more accurate to say that Washington is in accord with the vast majority of states in the viewpoint that such conveyances are based upon a consideration so peculiar that a total or partial failure of this consideration requires relief of a special character and in giving accordingly such relief to the grantor as the circumstances and equities of the particular case may allow.

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