

University of Missouri Bulletin Law Series

Volume 5 *December 1914*

Article 2

1914

Conditions Subsequent in Conveyances in Missouri

Manley O. Hudson

Follow this and additional works at: <https://scholarship.law.missouri.edu/lr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Manley O. Hudson, *Conditions Subsequent in Conveyances in Missouri*, 5 Bulletin Law Series. (1914)
Available at: <https://scholarship.law.missouri.edu/lr/vol5/iss1/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in University of Missouri Bulletin Law Series by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

CONDITIONS SUBSEQUENT IN CONVEYANCES IN MISSOURI

1. *Importance Of The Topic.*

Though the learning surrounding the subject of conditions has lost some of its importance because of the infrequency with which conditions are now enforced by entry for breach,¹ it has by no means become obsolete in the modern law of conveyancing. Cases still arise to which the common law rules are applicable, as instanced in three recent Missouri decisions,² and the strictness of those rules, due to the disfavor with which the law regards conditions, seems to justify this special study of the Missouri decisions relating to the subject.

2. *Implied Conditions.*

At common law, as a consequence of tenure, every estate was held subject to certain implied conditions, called conditions in law.³ These conditions in law were invented for the protection of lords against their tenants and for the punishment of the latter in the event of a denial of a lord's paramount title. Thus, a tenant for life held his estate on condition that he should not attempt to alien to a stranger in fee.⁴ Even where tenure is conceived to be still in existence,⁵ implied conditions are now

1. "In England, for nearly, if not quite, two centuries, the remedy by entry for breach of condition attached to a conveyance in fee simple has been practically obsolete." Gray, *Perpetuities* (2d ed.) § 282, note. See Sugden, *Powers* (8th ed.) 106. A mortgage is nothing more or less than a conveyance on condition. See Kales, *Future Interests in Illinois*, § 17, *et seq.* But the limits of this study do not permit an analysis of our mortgage law on this basis.

2. *Bredell v. Westminster College* (1912) 242 Mo. 317; *K. C. etc. Ry. Co. v. Young* (1912) 167 Mo. App. 524; *Smith v. Eagle Coal & Mercantile Co.* (1913) 170 Mo. App. 27. See also *Lackland v. Walker* (Mo., 1914) 169 S. W. 275.

3. Co. Litt. 215a, 233b; Tiffany, *Real Property*, § 67.

4. *Archer's Case* (1597) 1 Co. 66b; Reeves, *Real Property*, § 713.

5. For a discussion of the question whether tenure still exists in the United States, see Gray, *Perpetuities* (2d ed.) §§ 22 and 23. The writer has found no reference to this question in the Missouri reports.

important only in leases. According to many American decisions,⁶ terms for years are still held subject to an implied condition that the tenant will not disclaim his landlord's title. The term, implied condition, may also be used to embrace statutory conditions which will be separately treated in this study.⁷

3. *Express Conditions.*

Any interest in land or chattels may be conveyed or transferred conditionally. The condition need not be expressed in writing except where the statute of frauds requires a writing for the conveyance or transfer.⁸ In determining whether a condition exists, the intention of the parties must govern,⁹ and an intention that a condition shall postpone the vesting or occasion the divesting of an estate must be clearly expressed.¹⁰ In the early law, much stress was laid on the particular words with which the condition was introduced,¹¹ there being greater liberality in construing leases for years. But more recently any words which clearly indicate the necessary intention will suffice.¹² The artistic and proper words for a condition are "provided," "so as," and "on condition."¹³ In *Adams v. Lindell*,¹⁴ the condition was introduced by the words "so long as," but these words ordinarily denote the limitation or duration of the estate.¹⁵

But conditions are regarded with such exceeding disfavor that wherever possible it will be found that no condition was intended. The effect of the aptest words of condition may be overcome by other expressions or by the effect of the instru-

6. Tiffany, *Real Property*, § 52.

7. *Vide post*, p. 27.

8. In *Halbert v. Halbert* (1855) 21 Mo. 277, a slave was transferred on a condition expressed orally. A lease may be assigned on condition. *Doe d. Freeman v. Bateman* (1818) 2 B. & Ald. 168.

9. *St. Louis v. Wiggins Ferry Co.* (1886) 88 Mo. 612; *Mott v. Morris* (1912) 249 Mo. 137.

10. *Morrill v. Wabash Ry.* (1888) 96 Mo. 174; *Reynolds v. Reynolds* (1910) 234 Mo. 144.

11. Litt., §§ 328-31. See *Rawson v. School District* (1863) 7 Allen (Mass.) 125.

12. Tiffany, *Real Property*, § 68.

13. *Stirwell v. St. Louis & Hannibal Ry. Co.* (1889) 39 Mo. App. 221.

14. (1878) 5 Mo. App. 197, 72 Mo. 198.

15. Reeves, *Real Property*, § 711.

ment judged as a whole. In *Stilwell v. St. Louis & Hannibal Ry. Co.*,¹⁶ the court expressed the opinion that the words "on condition," or words of like import, were not sufficient within themselves to create a condition. But in numerous cases, they have been given that effect.¹⁷ The tendency is to treat stipulations as covenants,¹⁸ or trusts,¹⁹ instead of conditions. Where the conveyance is expressly made for a certain purpose, the fulfillment of the purpose is not a condition subsequent unless clearly so intended.²⁰ Where the conveyance is made in "consideration" of something to be done by the grantee, the doing of the act is not a condition subsequent even though there is no other consideration for the conveyance,²¹ unless clearly so intended.²² A total failure of consideration does not occasion a forfeiture of the estate conveyed.²³ But conditions may be expressed inartistically as "consideration" for the conveyance.²⁴ It would seem entirely proper to consider whether a valuable consideration has passed for the conveyance, in determining

16. (1889) 39 Mo. App. 221. In this case there was a strong dissent.

17. *Weinreich v. Weinreich* (1885) 18 Mo. App. 364.

18. *Roanoke Investment Co. v. K. C. & S. E. Ry. Co.* (1891) 108 Mo. 50; *Studdard v. Wells* (1894) 120 Mo. 25; *Anderson v. Gaines* (1900) 156 Mo. 664; *Gratz v. Highland Scenic R. R. Co.* (1901) 165 Mo. 211.

19. In *Weinreich v. Weinreich* (1885) 18 Mo. App. 364, the court seems to have thought there was both a condition and a trust. In *Kennett v. Plummer* (1859) 28 Mo. 142, the court refused to decide whether the grant was on condition or in trust. In *Hoke v. Central Township Farmers' Club* (1905) 194 Mo. 576, the condition was stated as one of the terms of a "trust."

20. *Hand v. St. Louis* (1900) 158 Mo. 204; *Mott v. Morris* (1912) 249 Mo. 137. In *Stilwell v. St. Louis & Hannibal Ry. Co.* (1889) 39 Mo. App. 221, the court said, "The nonfulfilment of the purposes for which a conveyance by deed is made will not of itself defeat an estate." See *Rawson v. School District* (1863) 7 Allen (Mass.) 125. In this connection, *Mullanphy v. Peterson* (1827) 1 Mo. 758, is a bit of legal curiosity.

21. *Studdard v. Wells* (1893) 120 Mo. 25, was probably such a conveyance, though a money consideration was expressed. See also *McAnaw v. Tiffin* (1898) 143 Mo. 667; *Gratz v. Highland Scenic R. R. Co.* (1901) 165 Mo. 211.

22. *Laberee v. Carleton* (1865) 53 Me. 211.

23. Cf. *Hubbard v. K. C. etc. R. R. Co.* (1876) 63 Mo. 68.

24. *Helton v. St. Louis etc. Ry. Co.* (1887) 25 Mo. App. 322; *Wood v. Ogden* (1906) 121 Mo. App. 628. But cf. *Stilwell v. St. Louis & Hannibal Ry. Co.* (1889) 39 Mo. App. 221.

whether it shall be construed to be on condition,²⁵ and courts should be more strict where such a consideration exists. But apparently this consideration has had little weight in the Missouri decisions.²⁶ On this principle, words in a will may be given the effect of creating a condition which would not be so construed if contained in a deed given for consideration.

A provision for the forfeiture of an estate on the happening of some event or the doing of some act is strong evidence that a conveyance on condition was intended. But a right of re-entry, as the creator's right to terminate an estate is usually called, need not be expressly reserved.²⁷ As stated in *Brooks v. Gaffin*,²⁸ "such a right is a necessary incident of the condition, and if the condition is broken the right of possession immediately arises." In *Roberts v. Crume*²⁹ and *Haydon v. St. Louis, etc. R. R. Co.*,³⁰ the absence of such a provision seems to have weighed with the court in its conclusion that no condition was intended. But in numerous cases, conditions have been found to exist where no right of re-entry was reserved.³¹ Conversely,

25. *Ecroyd v. Coggeshall* (1898) 21 R. I. 1; Tiffany, Real Property, § 68.

26. In *Roberts v. Crume* (1902) 173 Mo. 572, the court went to the limit in holding that the devise was not subject to a conditional limitation. In *McRoberts v. Moudy* (1885) 19 Mo. App. 26, the court said that "the doctrine of reversion applies only to the instance of a donation for a charity, and not to that of a vendor or grantor of land in fee for a valuable consideration paid." This is probably a statement of the obsolete notion that on the dissolution of a corporation its lands revert to the donor. *Morrill v. Wabash Ry.* (1888) 96 Mo. 174. See Gray, Perpetuities (2d ed.) §§ 48-51a; Kales, Future Interests in Illinois, § 126; Challis, Real Property (3d ed.) 467. In *Wood v. Kice* (1890) 103 Mo. 329, the court said, "A donor has the right to impress upon his gift such conditions as he sees fit; but when one buys and pays for property it is his in equity even before he gets a deed for it and the grantor's right to fetter its alienation is more limited, than in the other case, if allowed at all." Clearly a grantor has no right to annex any conditions unless they were stipulated for in the contract for the conveyance.

27. *Stilwell v. St. Louis & Hannibal Ry. Co.* (1889) 39 Mo. App. 221. But cf. *Knoepker v. Redel* (1905) 116 Mo. 62.

28. (1905) 192 Mo. 228, 251.

29. (1902) 173 Mo. 572. This was really a case of conditional limitation.

30. (1909) 222 Mo. 126.

31. *Hubbard v. K. C. etc. R. R.* (1876) 63 Mo. 68; *McClellan v. St. Louis & Hannibal R. R. Co.* (1890) 103 Mo. 295.

conditions have been found to exist where no apt words of condition were present, but a provision that the conveyance should be void on the happening of an event.³²

4. *Construction Of Conditions.*

Since the law favors the vesting of estates, conditions will be construed, where possible, as subsequent rather than precedent, as providing for the divesting of the estate instead of postponing its vesting.³³ It would seem that where the condition involves a consideration for the conveyance, the disposition should be to call it precedent. If, on the other hand, the condition involves the doing of some act on the land,³⁴ or of some act which can be done more easily if the grantee possesses the land, the disposition should be to call it subsequent. Such is a condition that the grantee support the grantor or some one else.³⁵ In *Wood v. Ogden*,³⁶ a devise "upon consideration" that the devisee support and maintain the testator's widow, was held to be on condition subsequent.³⁷ If precedent, the condition will be construed strictly in favor of the estate's vesting; if subsequent, it will be construed strictly against its being divested.³⁸

Conditions subsequent must be sharply distinguished from special limitations and conditional limitations. A grant to A and his heirs provided that if A should enter the clergy the grantor may re-enter, is a grant on condition subsequent. But a grant to A and his heirs so long as he or they shall not enter the clergy, is a grant subject to a special limitation. In the latter case A has a determinable, sometimes called a base or qualified fee,

32. *Knight v. K. C. etc. R. R. Co.* (1879) 70 Mo. 231. The right to declare a forfeiture expressly reserved in a lease is equivalent to a reservation of the right to re-enter. *Geer v. Zinc Co.* (1907) 126 Mo. App. 173.

33. *Weinreich v. Weinreich* (1885) 18 Mo. App. 364; *Jones v. Jones* (1909) 223 Mo. 424. See 2 Jarman, Wills (6th ed.) 1475.

34. As in *Jones v. Jones* (1909) 223 Mo. 424.

35. *Alexander v. Alexander* (1900) 150 Mo. 413.

36. (1906) 121 Mo. App. 668.

37. *Moore v. Wingate* (1873) 53 Mo. 398. But cf. *Studdard v. Wells* (1893) 120 Mo. 25.

38. As instanced in *Goode v. St. Louis* (1892) 113 Mo. 257.

and the grantor has a possibility of reverter.³⁹ Both are in a sense grants on condition—in the first, the grantor has a contingent right of re-entry, an exercise of which will have the effect of substituting the grantor for the grantee in the estate; in the second, the grantor by reason of his possibility of reverter may come into possession of what he had before the grant which has been determined.⁴⁰ The essential difference is that the estate on condition will become voidable, not void, when A enters the clergy, whereas the determinable fee will end entirely when A or his heirs enter the clergy, “by the intrinsic force of the limitation.”⁴¹ Possibilities of reverter may have been abolished by *Quia Emptores*,⁴² but there is no Missouri decision to this effect. The question has lost much of its importance since it is possible for the special limitation to give rise to a resulting use in the grantor under the statute of uses,⁴³ but it may still arise in connection with the rule against perpetuities.⁴⁴

Grants on conditions and grants subject to special limitations were both possible at common law. Neither the right of entry⁴⁵ nor a possibility of reverter could be reserved to a stranger. But with the introduction of shifting interests by the statute of uses, it became possible by a conditional limitation to cut short one estate in order to create another.⁴⁶ Thus, a conveyance by way of use to A and his heirs forever, but if the University of Missouri should be moved from Columbia during A's life or within twenty-one years thereafter, then to B and his heirs. A takes a fee simple subject to a conditional limitation, sometimes erro-

39. Challis, *Real Property* (3d ed.) 82; Tiffany, *Real Property*, § 116; Reeves, *Real Property*, § 711 *et seq.* See *Roanoke Investment Co. v. K. C. & S. E. Ry. Co.* (1891) 108 Mo. 50.

40. Leake, *Property in Land* (2d ed.) 162; Gray, *Perpetuities* (2d ed.) § 31 *et seq.*

41. *Adams v. Lindell* (1878) 5 Mo. App. 197, 72 Mo. 198; *Hoselton v. Hoselton* (1901) 166 Mo. 182, *semble*; *Henderson v. Hunter* (1868) 59 Pa. St. 335. See also *Dumey v. Schoeffler* (1857) 24 Mo. 170.

42. Professor Gray expresses this view. *Perpetuities* (2d ed.) § 31 *et seq.* See also, Kales, *Future Interests in Illinois*, § 124 *et seq.* The statute *Quia Emptores* was made a part of Missouri law in 1816. 1 Mo. Terr. Laws, p. 436.

43. *Pollard v. Union National Bank* (1877) 4 Mo. App. 408.

44. Gray, *Perpetuities* (2d ed.) §§ 41, 774 *et seq.*

45. *Knight v. K. C. etc. R. R. Co.* (1879) 70 Mo. 231.

46. See Gray, *Restraints on Alienation* (2d ed.) § 22, note.

neously called a determinable fee; B has a valid shifting interest,⁴⁷ which would have been bad at common law before the statute of uses as an attempt to limit a fee on a fee.

The distinction between a condition and a conditional limitation was neglected by the Missouri court in *Witherspoon v. Brokaw*,⁴⁸ and in *Roberts v. Crume*,⁴⁹ but it was very properly stated in *Hoselton v. Hoselton*.⁵⁰

5. *Validity Of Conditions.*

In general, it is possible for one who is conveying property to annex any condition he may desire.⁵¹ It must always be stated sufficiently clearly to enable a court to determine what the condition is, and when the event has happened. In *Jones v. Jones*,⁵² the testator devised lands to his son provided he should be capable after an expiration of twenty years "of a prudent exercise, control and ownership of said real estate, and that no further danger shall exist or be apprehended on account of" his spendthrift tendencies. The court held that since no one was designated to determine these questions, the condition subsequent was too indefinite and uncertain and therefore void.

Conditions must also conform to the policy of the law. A condition in total restraint of marriage is void,⁵³ but a reasonable restraint on marriage, such as re-marriage by a widow,⁵⁴ or mar-

47. If created by will, it would be a valid executory devise. See Kales, *Future Interests In Illinois*, § 125. Some doubt may have been cast on the possibility of creating such interests in Missouri by the decision of *Simmons v. Cabanne* (1903) 177 Mo. 336. See Gray, *Perpetuities* (2d ed.) § 68a, note. But it has been dispelled by the later decisions. *Sullivan v. Garesche* (1910) 229 Mo. 496.

48. (1900) 85 Mo. App. 169.

49. (1902) 173 Mo. 572.

50. (1901) 166 Mo. 182.

51. *Baker v. C. R. I. & P. R. R. Co.* (1874) 57 Mo. 265. In *Gratz v. Highland Scenic R. R. Co.* (1901) 165 Mo. 211, the court said that "one of the requirements of the law is that a condition carrying forfeiture must be reasonable."

52. (1909) 223 Mo. 424.

53. *Williams v. Cowden* (1850) 13 Mo. 211; *Knost v. Knost* (1910) 229 Mo. 170.

54. *Walsh v. Matthews* (1847) 11 Mo. 131; *Dumey v. Schoeffler* (1857) 24 Mo. 170. The statutory estate of homestead is conditioned on the widow's re-marriage. *Chrisman v. Linderman* (1906) 202 Mo. 605. The question of the validity of a restraint on a widower's re-

riage to a certain person,⁵⁵ or into a certain sect⁵⁶ or race,⁵⁷ is valid.⁵⁸ Here it is important to distinguish between a condition restraining marriage and a limitation until the grantee marries—the latter will be construed as a provision for support, wherever possible, and therefore valid.⁵⁹ A condition against the grantee's enjoying the premises granted in any way is void for repugnancy.⁶⁰ A condition against alienation in any way, attached to a fee simple, is void because of the public interest in the alienability of all lands,⁶¹ but such a condition annexed to a life estate or a term for years is good. A condition that a fee simple shall not be alienated to particular persons is good. If a condition involves the neglect of some legal duty, or the performance of some illegal act, it is void. Such is a condition against a wife's living with her husband, or against a child's living with its father. In *Witherspoon v. Brokaw*,⁶² the testator devised property to his niece "so long as she may live separate and apart from her husband" and upon her reunion with him to

marriage does not seem to have arisen in Missouri. The *dictum* in *Knost v. Knost* (1910) 229 Mo. 170, 178, would not allow such restraint. It would seem that re-marriage by a widower and by a widow should be restrainable on the same terms, though the widow by re-marrying gains a right to support whereas the widower does not. The decisions have generally drawn no distinction. *Waters v. Tazewell* (1856) 9 Md. 291, cited by the Missouri court in *Knost v. Knost*, is no authority for such a distinction since the Maryland court's decision of *Bostick v. Blades* (1882) 59 Md. 231. See also *Allen v. Jackson* (1875) 1 Ch. Div. 399.

55. *Graydon v. Graydon* (1872) 23 N. J. Eq. 229.

56. *In re Knox* (1889) 23 L. R. Ir. 542.

57. *Hodgson v. Halford* (1879) 11 Ch. Div. 959.

58. On the general subject of conditions in restraint of marriage, see the valuable note in Gray's Cases on Property (2d ed.) Vol. VI, p. 31.

59. *Jones v. Jones* (1876) 1 Q. B. D. 279; *Mann v. Jackson* (1892) 84 Me. 400. It would be more difficult to find that a provision for support was intended where the grantee or devisee is a man.

60. *Smith v. Clark* (1856) 10 Md. 186. Cf. *McDowell v. Brown* (1855) 21 Mo. 57.

61. *McDowell v. Brown* (1855) 21 Mo. 57. Forfeitures for alienation, by conditions or conditional limitations, should be carefully distinguished from restraints on alienation. The subject of restraints on alienation cannot be adequately treated within the limits of this study. For a discussion of the Missouri cases, see Gray, Restraints on Alienation (2d ed.) § 240 *et seq.*

62. (1900) 85 Mo. App. 169. In *Newkerk v. Newkerk* (1805) 2 Caines (N. Y.) 345, a condition requiring the devisee to live in a particular town was held void as being capricious.

his son; and other property to the niece's daughter "so long as she shall be kept from the control and custody of her father," and to his son thereafter. Both conditional limitations were held to be void. The court distinguished between a provision the object of which is to prevent a resumption of the marriage relation, and one the object of which is merely to provide for a wife during her misfortune.

Rights of entry for conditions broken seem to be "within both the letter and the spirit of the rule against perpetuities,"⁶³ and in England they are held to be subject to the rule.⁶⁴ But, in America, they have been exempted from the application of the rule.⁶⁵ The question has not been decided by the Missouri court.⁶⁶ In *Clarke v. Inhabitants of Brookfield*,⁶⁷ the court adverted to a five-year condition as being unobjectionable "on the ground of any possible remoteness in the time limited for its fulfillment." In numerous cases⁶⁸ where no time limit was set for the breach, it has been assumed that the conditions were valid, and it is probably too late to raise objection to the possible remoteness of a right of re-entry.

6. Enforcement of Conditions.

It has long been common to speak of a deed as a contract,⁶⁹ but the modern tendency is to restrict the use of the word contract to transactions out of which promissory obligations arise. The execution and delivery of a deed and its acceptance by the grantee do not necessarily make a contract.⁷⁰ Deeds are usually

63. Gray, *Perpetuities* (2d ed.) § 299 *et seq.*

64. *In re Hollis Hospital* (1899) 2 Ch. 540.

65. *French v. Old South Society* (1871) 106 Mass. 479; *Tiffany, Real Property*, § 155.

66. 3 Law Series, Missouri Bulletin, p. 18.

67. (1884) 81 Mo. 303.

68. *Adams v. Lindell* (1880) 5 Mo. App. 197, 72 Mo. 198; *Weinreich v. Weinreich* (1885) 18 Mo. App. 364; *Brooks v. Gaffin* (1905) 192 Mo. 229; *Hoke v. Central Township Farmers' Club* (1905) 194 Mo. 576; *Bredell v. Westminster College* (1912) 242 Mo. 316.

69. *Henderson v. Hunter* (1868) 59 Pa. St. 335.

70. But a lessee who accepts a lease which reserves rent becomes liable for the rent. So if a grantee accepts a deed which recites his assumption of a mortgage debt, he is liable for the debt. *Heim v. Vogel* (1879) 69 Mo. 529. But this may be on an implied promise for the benefit of a third person. *Fitzgerald v. Barker* (1879) 70 Mo. 685. Cf. *Weinreich v. Weinreich* (1885) 18 Mo. App. 364.

given as the result of a contract for a conveyance, but where only the grantor signs, there can be only a unilateral undertaking and this is contractual in the proper sense only when it is promissory, as where the grantor covenants.⁷¹ The grantee, by his acceptance, need do no more than give his assent to taking the title.

The foregoing analysis shows that a grantee's acceptance of an estate on condition does not necessarily obligate him to perform the condition, although a consequence of his failure to perform it may be his losing the estate conveyed. Conditions are frequently framed as provisions for forfeiture on breach of covenant,⁷² and in such cases have their foundation in the contract. But an action on the covenant may be maintained after the condition is waived.⁷³

In several Missouri cases, there have been *dicta* which would seem to sanction the specific enforcement of conditions, analogous to the specific performance of contracts. It was first suggested in *Baker v. C. R. I. & P. R. R.*,⁷⁴ that the grantor of a right of way might "bring his bill for specific performance" of a condition concerning fencing, or recover damages for the breach, "or he may proceed to build the fences and compel the company to pay therefor." In *Hubbard v. K. C., etc. R. R. Co.*,⁷⁵ the plaintiff conveyed a right of way by an instrument which stipulated for a "depot to be located" on the land. The court treated this as a condition subsequent, and held that the plaintiff could not recover damages for a wrongful entry, but added that he might have "claimed the damages resulting from their appropriation of his land under false pretenses," and that he had "his remedy by a proceeding in equity for specific performance."⁷⁶ In *Knight v. K. C., etc. Ry.*,⁷⁷ the grant of a right of way was on condition

71. Langdell, *Summary of Contracts* (2d ed.) § 112.

72. *Walker v. Engler* (1860) 30 Mo. 130; *Powers Shoe Co. v. Odd Fellows Hall Co.* (1908) 133 Mo. App. 229.

73. *Gannett v. Albee* (1869) 103 Mass. 373.

74. (1874) 57 Mo. 265.

75. (1876) 63 Mo. 68.

76. In *Aiken v. Albany, Vermont and Canada R. R. Co.* (1857) 26 Barb. (N. Y.) 289, specific performance was actually given in a very similar case.

77. (1879) 70 Mo. 231. In *Alexander v. Alexander* (1900) 156 Mo. 413, the conception of a condition as creating an obligation led to an improper result. *Vide post*, p. 17.

subsequent, which constituted in the language of the court "a matter of contract between the parties." But, in spite of these *dicta*, it is conceived that a grantee has not, by reason of his acceptance alone, any obligation to perform a condition, and that the true doctrine was stated in *Clarke v. Inhabitants of Brookfield*,⁷⁸ where the court said that "no personal obligation is imposed on the grantee. It is not as it might have been, a covenant as well as a condition. The trustees were not bound to build on these lots."⁷⁹ It follows that there should be no specific enforcement of a condition in equity,⁸⁰ though of course a contract growing out of the transaction might be enforced specifically.

The "condition" in *Weinreich v. Weinreich*,⁸¹ that the grantee pay money to a third person, seems to have been regarded as both a condition and a trust, the latter being specifically enforceable; but it was not so held.

7. Who May Take Advantage Of Breach Of Condition.

The common law rule that a right of entry for condition broken can be reserved only to the grantor and his heirs,⁸² has frequently been stated by the Missouri court.⁸³ If the condition

78. (1884) 81 Mo. 503.

79. See *Jackson v. Florence* (1819) 16 Johns. (N. Y.) 47; *Palmer v. Plank-Road Co.* (1854) 11 N. Y. 376, 389; *Close v. Burlington Ry.* (1884) 64 Iowa 149.

The doctrine of the text has nothing to do with the enforcement of a public use for which land may have been dedicated. *Goode v. St. Louis* (1892) 113 Mo. 257. In *Helton v. St. Louis, etc. Ry. Co.* (1887) 25 Mo. App. 322, it was suggested that the grantor might restrain the grantee's use of the premises until the condition should be performed; but this seems to have been based on a misconception of *Evans v. Mo. etc. Ry. Co.* (1877) 64 Mo. 453.

80. There is some recognition of this in *Jones v. St. Louis etc. Ry. Co.* (1883) 79 Mo. 92. Apparently, no attempt has been made in Missouri to have a condition specifically enforced.

81. (1885) 18 Mo. App. 364.

82. *Tiffany, Real Property*, § 75. But the proposition in the text does not prevent the creation of a condition which involves the grantee's doing something for a stranger, as paying money to him, *Pierce v. Lee* (1906) 197 Mo. 480; or supporting him, *Alexander v. Alexander* (1900) 156 Mo. 413.

83. *Kennett v. Plummer* (1859) 28 Mo. 142; *Knight v. K. C. etc. R. R. Co.* (1879) 70 Mo. 231; *Jones v. St. Louis etc. Ry. Co.* (1883) 79 Mo. 92.

is in a devise, the right of re-entry is really reserved to the testator's heirs.⁸⁴ If it is desired that a stranger shall benefit by the breach of a condition, the result may be accomplished by means of a conditional limitation operating under the statute of uses.⁸⁵ But a stranger cannot take advantage of a condition. In *Kennett v. Plummer*,⁸⁶ the court did not decide whether the grant was on condition or in trust, but held that in either event a trespasser could take no advantage of it. In *Knight v. K. C., etc. R. R.*,⁸⁷ it was held that as against every one except the grantor the grantee's right of way continued unaffected by breach of the condition. In *Ellis v. Kyger*,⁸⁸ the court held that a widow had no dower in lands which her husband had conveyed, she joining in the conveyance, even after breach of a condition subsequent, prior to entry by her husband.

Nor could the grantor, at common law, assign his right of entry for breach of an express condition,⁸⁹ the common-law principle being that "nothing in action, entry or re-entry can be granted over."⁹⁰ An attempted assignment by the grantor has the effect of destroying the right of re-entry entirely.⁹¹ By the statute of Henry VIII,⁹² an assignee of the reversion was permitted to take advantage of a condition attached to an estate for life or years. This statute is generally conceived to exist in the United States as a part of the common law.⁹³ It must so exist in Missouri,⁹⁴ for in *Metropolitan Land Company v. Manning*,⁹⁵

84. Such was the condition in *Pierce v. Lee* (1906) 197 Mo. 480.

85. *Vide ante*, p. 7.

86. (1859) 28 Mo. 142.

87. (1879) 70 Mo. 231.

88. (1886) 90 Mo. 600.

89. The right of entry for breach of a condition in law is assignable. 2 Washburn, *Real Property* (6th ed.) § 954.

90. *Litt.*, § 347; *Tiffany, Real Property*, § 75; *Reeves, Real Property*, § 721.

91. *Rice v. Boston & Worcester R. R. Co.* (1866) 12 Allen (Mass.) 141; *Tinkham v. Erie Ry. Co.* (1866) 53 Barb. (N. Y.) 393.

92. (1540) 32 Henry VIII, c. 34.

93. *Kales, Future Interests in Illinois*, § 29; *Stockbridge Iron Co. v. Cone Iron Works* (1869) 102 Mass. 80, in which the court said that the statute refers "only to conditions to do anything incident to the reversion, and not to conditions to do or not to do collateral acts."

94. It was probably included in the adoption of "appropriate statutes of the British Parliament" in 1816. 1 Mo. Terr. Laws, p. 436.

95. (1902) 98 Mo. App. 248. The cases cited by the court, *Allen v. Kennedy* (1886) 91 Mo. 324, and *Hendrix v. Dickson* (1896) 69 Mo.

the lessor's assignee was permitted to enforce a forfeiture for breach of condition, though the question of assignment was not well considered.⁹⁶

It was contended in *Ellis v. Kyger*,⁹⁷ that the statute⁹⁸ authorizing the conveyance "of lands, or of any estate or interest therein" had abrogated the rule that a right of entry for condition broken, annexed to a fee simple, cannot be assigned; but the court did not consider the point. In *Moore v. Wingate*,⁹⁹ the assignment by the grantor was made after entry for breach, but the court seemed to approve the contention that the right could not be assigned,¹⁰⁰ though the statute was not considered. Until a decision to the contrary, it cannot safely be assumed that the statute applies to rights of re-entry, though its terms are broad enough to include them.

Nor can a right of entry for condition broken be devised,¹⁰¹ and a residuary devise should not be construed to include it.¹⁰² This may, however, have been changed by the statute as to wills,¹⁰³ which permits a man to devise "all his estate, real, personal and mixed, and all interest therein," and a woman to devise "her land, tenements or any descendible interests therein."

App. 197, were both cases of covenants which will of course pass to an assignee.

96. In *Farwell v. Easton* (1876) 63 Mo. 446, the lessor had assigned and taken a re-assignment, and he was permitted to claim a forfeiture.

97. (1886) 90 Mo. 600.

98. Now Revised Statutes 1909, § 2787. This statute seems to have been enacted in its present form in 1866. Revised Statutes 1866, c. 109, § 1. It has been held to permit the conveyance of a contingent remainder. *Godman v. Simmons* (1892) 113 Mo. 122; *Sikemeier v. Galvin* (1894) 124 Mo. 367. In *Brown v. Fulkerson* (1894) 125 Mo. 400, the court said that "all interests in real estate are vendible under the laws of this state."

99. (1873) 53 Mo. 398.

100. Citing *Nicoll v. N. Y. & Erie R. R. Co.* (1852) 12 Barb. (N. Y.) 460; and *Warner v. Bennett* (1863) 31 Conn. 468. See also *Jones v. St. Louis etc. Ry. Co.* (1883) 79 Mo. 92. In *McClellan v. St. Louis & Hannibal R. R.* (1890) 103 Mo. 295, the grantor's assignee was not permitted to recover, but the question was not discussed.

101. *Southard v. Central R. R. Co.* (1856) 26 N. J. L. 13; *Upington v. Corrigan* (1896) 151 N. Y. 143.

102. *Austin v. Cambridgeport Parish* (1838) 21 Pick. 215 is contra. But see Gray, *Cases on Property* (2d ed.), Vol. VI, p. 6, note.

103. Revised Statutes 1909, §§ 535 and 536.

It follows from the non-assignability of rights of re-entry that they cannot be apportioned by the grantor. Thus if a condition be annexed to a term for years the grant of the reversion of a part passes no right of re-entry and the condition is destroyed as to the whole, for it was entire;¹⁰⁴ but if the reversion be granted to one for life, remainder in fee to another, both the life tenant and the remainderman may take advantage of a breach, each during the period of his possessing the land. Apportionment may occur by act of law. If one having a right of re-entry dies, either before or after breach of condition, the right passes to his heirs, each of whom may enforce a forfeiture of his proportional part.¹⁰⁵ Whether, prior to entry, there may be a partition among the heirs, seems very doubtful; the statute¹⁰⁶ authorizing the partition of lands held in joint tenancy, tenancy in common, or coparcenary, does not seem to apply.

8. *Against Whom May Conditions Be Asserted.*

The condition, once annexed, binds the land in spite of any alienation by the grantee. Where a condition is entire, its breach as to any part of the conveyed premises is a breach as to all, and will justify an entry on all. Thus, if A convey to B on condition and B convey a portion to C and a portion to D, a breach by C as to his portion will entitle A to enter on the whole.¹⁰⁷ The continuance of the condition does not depend on the passing of covenants. In *Ruddick v. St. Louis, etc. Ry. Co.*,¹⁰⁸ the grant was on condition subsequent that the grantee furnish passes to the grantor and the grantee covenanted to furnish them. The covenant did not run with the land because "foreign to, independent of and not in any manner connected

104. *Tinkham v. Erie Ry. Co.* (1866) 53 Barb. (N. Y.) 393.

105. In *Cruger v. McLauray* (1869) 41 N. Y. 219, the court permitted an heir to maintain ejectment for his undivided portion. The question might have arisen in *Pierce v. Lee* (1906) 197 Mo. 480, but for the waiver.

106. Revised Statutes 1909, § 2559. This statute has been held to permit the partition of a contingent remainder. *Preston v. Brant* (1888) 96 Mo. 552.

107. *Geer v. Zinc Company* (1907) 126 Mo. App. 173.

108. (1893) 116 Mo. 25.

with it.”¹⁰⁹ But the court held that “the defendant as the successor by purchase to the grantee, took subject to all the conditions and is bound thereby as if it were the original grantee.”

In *Alexander v. Alexander*,¹¹⁰ a testator devised lands to his son, “provided he shall well and faithfully care for and support his mother as long as she shall live.” The mother outlived the son and did not at any time seek provision from him. In a suit to construe the will, the court held that the condition was subsequent and that the land passed to the son’s heirs freed of it. The court confused the condition in the devise with a contractual obligation and found that the condition was “personal” to the devisee. An obligation may be personal but a condition is attached to land and is never personal in any other sense than that it may be such that only one person can perform it. The mother’s support was to continue during her life; her condition might have changed so that she would need it; and for the son’s failure to provide it, there should have been a forfeiture.¹¹¹ In *Messersmith v. Messersmith*,¹¹² the facts of which were very similar to those of *Alexander v. Alexander*, it was conceded that the condition survived the grantee.

In *Wood v. Ogden*,¹¹³ the court felt bound by *Alexander v. Alexander*, but followed it reluctantly. The provision for the devisee’s supporting his mother was stated as the “consideration” of the devise, not as the “condition” of it. The mother, as plaintiff, sought a personal judgment against the son’s widow, and to have her right to support enforced as a charge on the land. But since the provision was construed as a condition,¹¹⁴

109. *Acc. Dickey v. K. C. etc. Ry. Co.* (1894) 122 Mo. 223.

110. (1900) 156 Mo. 413.

111. Some of the testator’s heirs had attempted to pass their interest to others of them, who had entered. The assignment passed nothing, but the assignees had a right of entry by their own inheritance to a portion of the land.

Alexander v. Alexander is not to be explained on the ground that the condition had been waived—it was a breach which continued as long as there was a failure to provide. Only the heirs who had the right of entry could waive breaches, and their waiver, if there was any, did not preclude entry for future breaches. *Farwell v. Easton* (1876) 63 Mo. 446.

112. (1856) 22 Mo. 369.

113. (1906) 121 Mo. App. 628.

114. But cf. *Anderson v. Gaines* (1900) 156 Mo. 664.

it is submitted that she was not entitled to either, and that though the decision is correct, it is no authority for saying that the condition did not bind the land in the hands of the son's widow and his heirs.

9. Remedies For Breach Of Condition.

Because of the consequences of a breach, the courts are reluctant to find that the condition has been broken, and a substantial performance of a condition is sufficient.¹¹⁵ If the condition involves the doing of some act by the grantee and no time limit is set, the grantee should have "his whole lifetime for performance, except when a prompt performance is necessary to give to the grantor or other beneficiary the whole benefit contemplated to be secured to him, or where its immediate fruition formed his motive"¹¹⁶ for the conveyance, in which case only a reasonable time is allowed.¹¹⁷ If the condition is that rent be paid to the grantor by the grantee, the former must make demand in order to enforce a forfeiture for a breach. The common law requires such a demand to be made according to the strictest rules—on the day the rent falls due, at a convenient hour, at a notorious place on the premises and for the exact sum due.¹¹⁸ It seems that this demand must still be made to end a term for years, apart from statutory procedure.¹¹⁹

115. *Morrill v. Wabash Ry.* (1888) 96 Mo. 174. See Reeves, *Real Property*, § 718. Cf. *Smith v. Eagle Coal & Mercantile Co.* (1913) 170 Mo. App. 27.

116. *Tiffany*, *Real Property*, § 71.

117. *Ellis v. Kyger* (1886) 90 Mo. 600. In *Butler v. Manny* (1873) 52 Mo. 497, it was held that no time being fixed for the payment of taxes to which the lessee was bound by covenant, they should be paid as they became due. See also *Metropolitan Land Co. v. Manning* (1902) 98 Mo. App. 248.

118. *McGlynn v. Moore* (1864) 25 Cal. 384. *Tiffany*, *Real Property*, § 71; *Kales*, *Future Interests in Illinois*, § 31. In *Illingworth v. Miltenberger* (1847) 11 Mo. 80, it was held that a tender before the rent was due would not prevent a forfeiture.

119. *Metropolitan Land Co. v. Manning* (1902) 98 Mo. App. 248; *Taylor, Landlord and Tenant* (9th ed.) § 493. The statutes have abolished the technical requirements of the common law as to demand, Revised Statutes 1909, § 7908, and conferred on the landlord a right to dispossess any tenant for non-payment of rent. Revised Statutes 1909, § 7903.

It is one of the essential differences between a limitation and a condition annexed to an estate of freehold that the happening or breach of the condition does not *ipso facto* determine the estate granted. The grantor must signify his intention to insist upon the condition by some unmistakable act, whereas "a limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate."¹²⁰ It was suggested in *Adams v. Lindell*¹²¹ that a condition might be so worded that a breach would *ipso facto* determine the estate; but as to freeholds this cannot be true.¹²² At common law the grantor's election must be made "by entry or some act equivalent to it."¹²³ As stated in *Adams v. Lindell*,¹²¹ "the entry was necessary to defeat the livery made on the creation of the original estate," and only entry was of equal solemnity with livery. It followed that terms for years, since they did not have their origin in livery of seisin but could be created by parol agreement plus entry at common law, could be ended without ceremony, a "claim" being sufficient.¹²⁴ Entry by the grantor or lessor must be with the intent to enforce a forfeiture.¹²⁵ No previous notice need be given to the grantee or lessee.¹²⁶ If the grantee has never taken possession, no entry by the grantor is necessary. In *O'Brien v. Wagner*,¹²⁷ the grantor possessed at the time of the breach, and it was held that the estate reverted at once. But the presumption to that effect is rebuttable.

120. 2 Devlin, Deeds (2d ed.) § 974, quoted in *Hoselton v. Hoselton* (1901) 166 Mo. 182.

121. (1878) 5 Mo. App. 197, 72 Mo. 198.

122. See Kales, Future Interests in Illinois, §§ 30, 62.

123. *Ellis v. Kyger* (1886) 90 Mo. 600.

124. In *Illingworth v. Miltenberger* (1847) 11 Mo. 80, the forfeiture was declared by indorsement on the lease. It is competent for the parties to stipulate the manner in which a lessor must indicate his intention to enforce a forfeiture. *Graham v. Carondelet* (1862) 33 Mo. 262.

125. 2 Washburn, Real Property (6th ed.) § 958.

126. *Geer v. Zinc Co.* (1907) 126 Mo. App. 173.

127. (1837) 94 Mo. 93. In *Moore v. Wingate* (1873) 53 Mo. 398, the statement that "the fee remained in the grantor" as a result of his continued possession, can only be correct if the condition was precedent. Of course, if the grantor by his possession causes a breach, he can take no advantage of it.

The effect of entry is to *defeat* the grant and the grantor is thereafter "in as of his original estate as if he had never parted with it,"¹²⁸ and he may convey an indefeasible title.¹²⁹ An entry on part of the land is sufficient to enforce a forfeiture of the whole. In *Ruddick v. St. Louis, etc. Ry. Co.*,¹³⁰ the court said, "if several parcels of land are conveyed upon condition by the same deed, or are embraced in the same mortgage and are all situate in the same county, an entry upon one in the name of the whole will be sufficient to enforce the condition as to all of the parcels." After entry by the grantor, the widow has dower.¹³¹ Since the condition binds the estate in the hands of any assignee, the entry by the grantor will defeat any incumbrance which the grantee may have put on the land. While a right of re-entry need not be expressly reserved,¹³² numerous cases have drawn a distinction where it was so reserved, in the grantor's enforcement of his remedy. In *Avery v. K. C. & Southern R. R. Co.*,¹³³ the early railroad cases denying the grantor a right to insist on a forfeiture were distinguished on the ground that no provision for forfeiture was expressed, though the conveyances were admitted to be on condition. In *Baker v. C. R. I. & P. R. R.*,¹³⁴ the road was built under a license which was given on condition,¹³⁵ and the court refused to permit the grantor to eject the company after breach. In *Hubbard v. K. C., etc. R. R.*,¹³⁶ the action was for damages, but the court said ejectment

128. Tiffany, Real Property, § 76.

129. *Moore v. Wingate* (1873) 53 Mo. 398. But to maintain trespass, the grantor must not only have entered but also have acquired a possession. *Metropolitan Land Co. v. Manning* (1902) 98 Mo. App. 248.

130. (1893) 116 Mo. 25. It would seem that the several parcels need not be located in the same county.

131. *Ellis v. Kyger* (1886) 90 Mo. 600.

132. *Ruddick v. St. Louis etc. Ry. Co.* (1893) 116 Mo. 25. See *ante*, p. 6.

133. (1892) 113 Mo. 561.

134. (1874) 57 Mo. 265.

135. The deed of relinquishment was handed to the grantee's agent in escrow. It was treated as no delivery by the court, but it would seem that a delivery in escrow can no more be made to an agent of the grantee than to the grantee himself. 3 Washburn, Real Property (6th ed.) § 2176; *Hubbard v. Greeley* (1892) 84 Me. 340. It is not clear whether the court's decision is based on the grant or on a previous license.

136. (1876) 63 Mo. 68.

would not lie for breach of condition subsequent. In *McClellan v. St. Louis & Hannibal R. R.*,¹³⁷ the grantor's assignee sought to enforce a condition subsequent by ejectment, there being no express reservation of a right of re-entry. The court denied the relief without a consideration of an assignee's rights, and said that the grantor himself "could not have maintained ejectment with or without a decree setting aside this deed."¹³⁸ This dictum is repeated in unintelligible form in *Ruddick v. St. Louis, etc. Ry. Co.*¹³⁹ But after the decision in *Avery v. K. C. & Southern R. R. Co.*,¹³³ it seems clear that the grantor may always have ejectment after breach,¹⁴⁰ and unless a special rule is to be adopted for railroad cases, the inclusion of a provision for re-entry is not essential.¹⁴¹

Entry need not precede the grantor's suit in ejectment. Whether this is based on the confession of entry involved in the action, or on the fact that livery of seisin being practically obsolete, the solemnity of entry is unnecessary, the Missouri courts have not worked out.¹⁴² In cases of leases for years, the forfeiture may be enforced by an action of unlawful detainer.¹⁴³

137. (1890) 103 Mo. 295.

138. Citing *Baker v. C. R. I. & P. R. R. Co.* (1874) 57 Mo. 265; *Bradley v. Mo. Pac. Ry. Co.* (1886) 91 Mo. 493; *Provolt v. C. R. I. & P. R. R. Co.* (1874) 57 Mo. 256. The two latter cases are no authority for the proposition.

139. (1893) 116 Mo. 25. See also *Helton v. St. Louis etc. Ry. Co.* (1887) 25 Mo. App. 322.

140. It would seem that the mere filing of an ejectment suit should be sufficient expression of the grantor's intention and should revest the estate in him if there has been a breach. It was held in *Jones v. Carter* (1846) 15 M. & W. 718, that a term was ended where the ejectment suit had proceeded to the consent rule. In *Avery v. K. C. & So. R. R. Co.* (1892) 113 Mo. 561, the court said "the commencement of the suit was all that the law required." But in *Nagel v. League* (1897) 70 Mo. App. 487, it was held that after filing a suit to enforce a forfeiture, the landlord's second suit under the landlord's summons act in which the defendant was recognized as tenant, waived the breach and the previous declaration of forfeiture. It is difficult to support this case, if the filing of the first suit ended the term.

141. *Kirk v. Mattier* (1897) 140 Mo. 23; *Brooks v. Gaffin* (1905) 192 Mo. 228, 196 Mo. 357.

142. It may be due to the statute, Revised Statutes 1909, § 2382, as suggested in *Ellis v. Kyger* (1886) 90 Mo. 600. See Tiffany, Real Property, § 74.

143. Revised Statutes 1909, §§ 7657, 7689; *Walker v. Engler* (1860) 30 Mo. 130; *Farwell v. Easton* (1876) 63 Mo. 446; *Baxter v.*

The statutory action of unlawful detainer may, apparently, be availed of where the grant is of a freehold estate,¹⁴⁴ but advantage has rarely, if ever, been taken of it in such cases.

After breach of condition, the grantor is not entitled to equity's aid to enforce a forfeiture, nor can he have the deed cancelled or set aside. The deed was an effectual instrument to pass a title and since the grantor has adequate remedies at law there is no reason for equity's taking jurisdiction. In *Messersmith v. Messersmith*,¹⁴⁵ the court refused to cancel the deed on the ground that "equity never lends its aid to enforce a forfeiture." *Reynolds v. Reynolds*,¹⁴⁶ involved a conveyance by parents by warranty deed to their son who immediately reconveyed by deed of trust conditioned on his support of the parents during their lives. The son failed to support the parents who remained in possession of the farm conveyed. In a suit to set aside the warranty deed, the court held it to be a conveyance on condition subsequent, and decreed a cancellation of the warranty deed. But it is submitted that if the parents' conveyance is to be taken to have been on condition subsequent, the breach operated to revest their title, they being already in possession, and that the only relief in equity was for a removal of the cloud which the outstanding deed created. It seems proper that the grantor may after entry maintain a bill to remove a cloud on his title,¹⁴⁷ if the forfeiture is effected by entry and the outstanding deed is made the basis of the assertion of a

Heimann (1908) 134 Mo. App. 260. The statute has been interpreted not to require demand where the possession began rightfully. *Anderson v. McClure* (1894) 57 Mo. App. 93. In *Powers Shoe Co. v. Odd Fellows Hall Co.* (1908) 133 Mo. App. 229, the court enjoined the prosecution of the unlawful detainer suit.

144. Revised Statutes 1909, § 7658.

145. (1856) 22 Mo. 369. In *Anderson v. Gaines* (1900) 156 Mo. 664, the court refused to set aside the deed, but it does not clearly appear that the conveyance was on condition. In *Smith v. Eagle Coal & Mercantile Co.* (1913) 170 Mo. App. 27, the action to have a lease adjudged forfeited failed because there had been no breach. Cf. *Lackland v. Walker* (Mo., 1914) 169 S. W. 275.

146. (1910) 234 Mo. 144.

147. *Moore v. Wingate* (1873) 53 Mo. 398; *Birmingham v. Lesan* (1885) 77 Me. 494. In *Moberly v. Trenton* (1904) 181 Mo. 637, the petition seems to have been improperly framed for the removal of the cloud. Cf. *Smith v. Eagle Coal & Mercantile Co.* (1913) 170 Mo. App. 27.

hostile interest. The grantor should not be entitled to a reconveyance, and the stipulation for it in *Adams v. Lindell*¹⁴⁸ was merely nugatory unless it could be treated as a covenant by the grantee. The existence of a right of re-entry does not deprive equity of its jurisdiction to restrain a breach of covenant.¹⁴⁹

Since the condition in itself involves no contractual obligation,¹⁵⁰ the grantor should not be allowed to maintain an action for damages for breach.¹⁵¹

The grantor's right to enforce a forfeiture for condition broken may be barred by the statute of limitations,¹⁵² and it is conceivable that he may be estopped from enforcing a forfeiture, though most of the cases of so-called estoppel are really cases of waiver.¹⁵³

10. *Waiver And License.*

Any act by the grantor, subsequent to a breach and done with a knowledge of the breach, which affirms the continued existence of the estate in the grantee, is a waiver of the breach.¹⁵⁴ Because of the law's aversion to the forfeiture, it is liberal in finding a waiver and "slight acts are deemed sufficient for this purpose."¹⁵⁵ The acceptance of rent, any portion of which became due after the breach, amounts to a waiver, if the breach was known to have occurred,¹⁵⁶ and a protest that the accept-

148. (1880) 5 Mo. App. 197, 72 Mo. 198.

149. *Godfrey v. Black* (1888) 39 Kan. 193. In *Baker v. St. Louis* (1879) 7 Mo. App. 429, 75 Mo. 671, the covenant for a reconveyance was specifically enforced, entry being unnecessary. Cf. *Sease v. Cleveland Foundry Co.* (1897) 141 Mo. 488.

150. *Vide ante*, p. 12.

151. *Ruddick v. St. Louis etc. Ry. Co.* (1893) 116 Mo. 33. But cf. *Hubbard v. K. C. etc. R. R. Co.* (1876) 63 Mo. 68.

152. *Hoke v. Central Township Farmers' Club* (1905) 194 Mo. 576; *Pierce v. Lee* (1906) 197 Mo. 480.

153. *Garnhart v. Finney* (1867) 40 Mo. 449; *Bredell v. Westminster College* (1912) 242 Mo. 317.

154. *Garnhart v. Finney* (1867) 40 Mo. 449.

155. After entry or effectual declaration of a forfeiture, it would seem that a waiver by the grantor cannot revest the estate in the grantee. But see *Nagel v. League* (1897) 70 Mo. App. 487.

156. *Walker v. Engler* (1860) 30 Mo. 130; *Trauerman v. Lippincott* (1889) 39 Mo. App. 478.

ance is not a waiver is unavailing.¹⁵⁷ But the waiver extends only to past breaches—it is the breach, and not the condition which is waived, though there may be no difference where the condition is such that a single breach will exhaust it. A waiver of a continuous breach during its continuance does not prevent a forfeiture; thus, in *Farwell v. Easton*,¹⁵⁸ it was held that the “forbidden use was a continuing cause of forfeiture” of which the lessor might avail himself after receipt of rent with knowledge of the user. In *Tower v. Compton Hill Improvement Co.*,¹⁵⁹ the grant was on condition and the grantor imposed servitudes on adjacent premises which he owned. After breach of the condition, the grantee sought to restrain the grantor’s violation of the restrictions placed on the adjacent premises, but failed because of his own wrong. Later, more than ten years after the breach, the executors (also devisees) of the grantor sought to enter for condition broken, but the court thought the provisions of the deed abrogated and the action barred by the statute.¹⁶⁰ But it is difficult to see how the waiver of the past breaches destroyed the condition.

It would seem that mere non-action by a grantor or lessor cannot amount to a waiver, though if continued for the statutory period the right of entry may be barred by the statute of limitations.¹⁶¹ But if this non-action is under the circumstances calculated to induce the grantee or lessee to expend money on the premises in the reasonable belief that the grantor or lessor does not intend to take advantage of the condition, and if the grantee or lessee does actually spend such money and this fact is known to the grantor or lessor who still fails to act, then the grantor or lessor may be taken to have waived his right to a forfeiture.¹⁶²

157. *Davenport v. The Queen* (1877) 3 App. Cases 115.

158. (1876) 63 Mo. 446.

159. (1905) 192 Mo. 379.

160. It should be noticed that the plaintiffs had no right to enter because they did not sue as heirs.

161. *Hoke v. Central Township Farmers' Club* (1905) 194 Mo. 576. In this case the court quoted with apparent approval a statement of the Kentucky court in *Kenner v. American Contract Co.* (1872) 9 Bush 210, that “the waiver of a forfeiture may be inferred by reason of the failure of the party entitled to the estate to re-enter or assert some claim in a reasonable time.”

162. *Powers Shoe Co. v. Odd Fellows Hall Co.* (1908) 133 Mo. App. 229; *Bredell v. Westminster College* (1912) 242 Mo. 317.

This latter waiver is really an estoppel. In *Johnson v. Douglass*,¹⁶³ a lessor was entitled to exact a forfeiture for non-payment of rent, and when he demanded the payment the tenant said he would credit the amount of the rent on the lessor's note which he held; to which the lessor made no objection. The court held this amounted to a waiver by the lessor—it could not have been an estoppel for it does not appear that the tenant had changed his position; but in a true case of waiver, this is unnecessary.

Where a lease is on condition that the lessee and his assigns shall not assign without license, it was early held in *Dumpor's Case*,¹⁶⁴ that an assignment with license destroyed the condition.¹⁶⁵ This rule has been much criticised,¹⁶⁶ but its authority is generally recognized.¹⁶⁷ In *Tennessee Marine & Insurance Co. v. Scott*,¹⁶⁸ the court said that "*Dumpor's Case*, though much criticised by eminent judges, is still adhered to as law," but it was held that it did not apply to a condition in an insurance contract. *Dougherty v. Matthews*,¹⁶⁹ was a suit by a lessor against his lessee's assignee for rent. The lease was conditioned on non-assignment by the lessee without license, but it is not shown that the condition forbade assignment by the lessee's assigns. The lessee assigned to the defendant, apparently without license, and the defendant procured the plaintiff's consent to a second assignment upon his undertaking responsibility for the rent. It was held that the defendant's undertaking was a mere *nudum pactum*, but the court did not decide that the condition was destroyed by

163. (1880) 73 Mo. 168.

164. (1603) 4 Co. 119b.

165. But an action may still be maintained on the covenant if there is one. Cf. *Gannett v. Aldree* (1869) 103 Mass. 372; *Dakin v. Williams* (1839) 22 Wend. (N. Y.) 201.

166. See 7 American Law Review 616; 1 Smith, Leading Cases (9th ed.) 135.

167. *Brummell v. Macpherson* (1807) 14 Ves. 173. See 23 Harvard Law Review 630. In *Reid v. Brewing Co.* (1898) 88 Md. 234, the doctrine was extended to covenants. But see 12 Harvard Law Review 272.

168. (1851) 14 Mo. 46. In 7 American Law Review 635, it is said that the Missouri court repeated the dictum of *Tennessee Marine & Fire Insurance Co. v. Scott* in *McGlynn v. Moore* for which the citation is given as 25 Mo. 384. But there is no such case in the Missouri reports and the reference must be to *McGlynn v. Moore* (1864) 25 Cal. 384.

169. (1865) 35 Mo. 520.

the first assignment to which, being without license, *Dumpor's Case* did not apply.¹⁷⁰ In *Farwell v. Easton*,¹⁷¹ it was in effect held that a tolerance of past breaches of a condition against certain use of the premises was not a license and did not destroy the condition. In *Crouch v. Wabash, etc. Ry. Co.*,¹⁷² there may have been one license to assign, but it was unnecessary to decide whether the condition survived it, for if it did, the breach had been waived. These cases leave in doubt the authority of *Dumpor's Case* in Missouri. If it is law, it probably does not apply unless the condition is against assignment¹⁷³ by the lessee and *his assigns* after *Dougherty v. Matthews*, and it applies only to conditions against assignment. The rule of *Dumpor's Case* should be avoided by an insertion in a lease of a provision that a license is not to have the effect of destroying the condition, or by a stipulation to this effect in the license actually given.¹⁷⁴

11. *Equitable Relief Against Forfeiture.*

The well-defined jurisdiction of equity to relieve against forfeitures may be exercised in favor of a grantee whose estate is subject to defeasance by the grantor, if a proper case for equitable relief is presented. It was first suggested, by way of *dictum* in *Messersmith v. Messersmith*,¹⁷⁵ where the condition was that the grantee support the grantor, that equity would compel the grantor to accept just compensation in lieu of a forfeiture. The prayer in *Graham v. Carondelet*¹⁷⁶ was for relief against a forfeiture declared, but the court found that the declaration was inoperative and it was therefore unnecessary to give relief. In

170. The first headnote to *Dougherty v. Matthews* is therefore misleading and has probably caused the numerous citations of the case as following *Dumpor's Case*. See Tiffany, Real Property, § 72.

171. (1876) 63 Mo. 446.

172. (1886) 22 Mo. App. 315.

173. It would seem that *Dumpor's Case* is not to be applied to a condition against sub-letting. *Doe d. Boscawen v. Bliss* (1813) 4 Taunt. 735.

174. *Kew v. Trainor* (1894) 150 Ill. 150.

175. (1856) 22 Mo. 369. The court also suggested that the equitable defense might be set up in an action at law for possession. Such a defense seems to have been allowed in *Knight v. Orchard* (1901) 92 Mo. App. 466. Cf. *Tetley v. McElmurry* (1906) 201 Mo. 382.

176. (1862) 33 Mo. 262.

Avery v. K. C. & So. R. R. Co.,¹⁷⁷ the condition was that rent be paid and the *dictum* of the court was that the tenant "might have paid the rent and been relieved from the forfeiture." In *Powers Shoe Co. v. Odd Fellows Hall Co.*,¹⁷⁸ a lessee sought to enjoin the lessor's prosecution of an unlawful detainer suit and to have the lessor's declaration of a forfeiture set aside as a cloud on the leasehold. The court seems to have thought that the lessor was guilty of fraud and laches which deprived him of his right to enforce a forfeiture and the relief was granted. But there is a clear *dictum* that forfeiture occasioned by an assignment without the lessor's consent would not be relieved against. In *Kansas City, etc. Ry. Co. v. Young*,¹⁷⁹ the court restrained a grantor's interference with a right of way, given on condition that a sum of money be paid before actual construction of the railroad should be commenced, though such sum was not paid. But in *Orr v. Zimmerman*,¹⁸⁰ there is a *dictum* that "courts of equity will not interfere where the exaction is made for the protection of the vendor, and under circumstances where a strictly legal right is fairly claimed."

The doctrine of the Missouri cases seems to be that the grantor's enforcement of his legal right to a forfeiture will not be restrained unless he is proceeding unconscionably, or unless the money compensation offered is adequate redress for the breach and the grantor's damage is ascertainable.¹⁸¹

12. Statutory Conditions.

The most important question concerning statutory conditions arises in connection with the statutory dedication of land to public uses. The filing of a plat of a city, town, village or addition is given the effect of vesting "the fee of such parcels of land as are therein named, described or intended for public

177. (1892) 113 Mo. 561.

178. (1908) 133 Mo. App. 229. Cf. *Orr v. Zimmerman* (1876) 63 Mo. 72.

179. (1912) 167 Mo. App. 524. Cf. *Tetley v. McElmurry* (1906) 201 Mo. 382.

180. (1876) 63 Mo. 72.

181. In *Brooks v. Gaffin* (1905) 192 Mo. 228, 255, the damage was not ascertainable, hence the court's *dictum* that the grantee had "no right to ask any court to relieve him of his own breach of his voluntary contract."

uses in such city, town or village in trust and for the uses therein named, expressed or intended, and for no other use or purpose." 182 Does this statute confer an absolute fee on the municipality? 183 Or does some interest or possibility of interest remain in the dedicator? If it were a common law dedication, the public would get but an easement; but this statute purports to pass the *fee*. Suppose the public use is abandoned or becomes impossible—may the dedicator or his heirs re-enter?

The question seems to have squarely arisen only in *Gaskins v. Williams*,¹⁸⁴ where the statutory dedication was "for courthouse purposes" and such use having become "practically" impossible, the court held that the title reverted to the dedicator's heirs. The court cited *Campbell v. Kansas City*¹⁸⁵ and *Goode v. St. Louis*,¹⁸⁶ but both of these cases involved common law dedications. If the title reverts, has the dedicator a right of entry for condition broken, or a possibility of reverter? If the first, his right cannot be assigned; 187 if the second, it can be assigned. The court did not attempt to answer the question, if indeed it was considered, in *Gaskins v. Williams*, but said that the municipality does not have "an absolute, unqualified ownership." 188 The possible remoteness of the dedicator's interest is a practical consideration.

Statutory dedication must be considered also in connection with statutory vacation of public lands,¹⁸⁹ the effect of which is that if the land vacated "be a street or alley, . . . all title thereto shall vest in the person owning the property on each side thereof in equal proportions." If this deprives the dedicator

182. Revised Statutes 1835, p. 599. Now Revised Statutes 1909, § 10294.

183. The *dictum* in *Snoddy v. Bolen* (1894) 122 Mo. 479, is that while the statute "vests the fee in the street in the city, town, village or county, still it is held in trust for street purposes and for no other use or purpose. Every other beneficial use is in the lot owners, and this interest of the lot owner will pass by a conveyance of the lot." What other beneficial use is there? If the fee passes, what is the nature of the dedicator's interest?

184. (1911) 235 Mo. 563. Cf. *Robinson v. Korns* (1913) 250 Mo. 663.

185. (1890) 102 Mo. 326.

186. (1892) 113 Mo. 257.

187. *Vide ante*, p. 14.

188. See Kales, *Future Interests In Illinois*, § 2 *et seq.*

189. Revised Statutes 1909, § 9502. Originally enacted in 1877. Laws of 1877, p. 186.

of any interest, it is unconstitutional for no compensation is given. Can it be said that the dedicator's interest passes to his grantees? If so, it is not a right of entry for condition broken. There has been no decision on the effect of this statute,¹⁹⁰ and until the theory of *Gaskins v. Williams* is worked out it will be difficult to defend its constitutionality.¹⁹¹

*Thomas v. Hunt*¹⁹² presented questions under both statutes, but their determination was unnecessary to the decision. The action was for possession of the east half of a street dedicated by plat as the eastern boundary of an addition. The plaintiff claimed as owner of an abutting lot on the east, which the dedicators had owned at the time of the dedication of the street, which had been vacated. The court was of the opinion that the municipality acquired but an easement,¹⁹³ and that the effect of the vacation was to put the fee to the eastern half in the owner of the lot abutting on the east. This latter result seems absurd, except for the fact that the dedicator previously owned the lot abutting on the east.

The other statutory conditions present little difficulty. Every tenant holds subject to a statutory condition that the reserved rent be paid promptly,¹⁹⁴ and tenants for terms not exceeding two years hold subject to conditions against assignment and waste.¹⁹⁵ The enforcement of these conditions is controlled entirely by statute and is beyond the reach of the common law rules.

MANLEY O. HUDSON,¹⁹⁶

190. *Johnson v. Rasmus* (1911) 237 Mo. 586, involved the abandonment of a public road under Revised Statutes 1909, § 10446; the public had but an easement in that case.

191. This subject has been so fully discussed by Professor Kales that it is unnecessary to treat it at greater length in this study. See Kales, *Future Interests in Illinois*, § 3 *et seq.* In so far as it applies to statutory dedications made prior to the enactment of the statute, there can be little doubt as to its unconstitutionality if *Gaskins v. Williams* is to be followed.

192. (1896) 134 Mo. 392.

193. It is possible that although the statute purports to pass a fee, it passes but an easement. This view was taken of the early statutes authorizing railroads to take the fee simple in condemnation proceedings. *Kellogg v. Malin* (1872) 50 Mo. 496; *Chouteau v. Mo. Pac. Ry. Co.* (1894) 122 Mo. 375.

194. Revised Statutes 1909, § 7903.

195. Revised Statutes 1909, § 7880.

196. The writer has been ably assisted by John M. Linger, Esq., in the preparation of this article.