1894

Conditions and Limitations in Deeds and Wills

Harlow H. Loomis
Cornell Law School

T H E S I S

C O N D I T I O N S A N D L I M I T A T I O N S

I N D E E D S A N D W I L L S.

Presented for the Degree

of

Bachelor of Laws

by

Harlow H. Loomis A. B.

Cornell University

1894.

C O N T E N T S

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CONDITIONS AND LIMITATIONS IN DEEDS AND WILLS.

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The history of estates upon condition goes back to the Norman Conquest. Estates upon condition grew out of the feudal system. The fief was granted by the Lord to the tenant with certain conditions annexed. If these conditions were broken, the lord might take back his fief.

Conditions and limitations in deeds and wills do not materially differ, except that a more strict construction is placed upon the former than the latter. The same general rule applies to conditions and limitations in construing the meaning of an instrument that is applied to all subjects:-- viz, that in a doubtful case in a deed the construction will be against the grantor, and in a will, in favor of the testator.

For the purpose of a correct treatment and understanding of this subject it is essential at the outset that the distinctions between limitations and conditions be sharply drawn and also that the functions of each be clearly shown. The layman is continually mistaking the one for the other and thwarting his own wishes in making

deeds and wills because of misignorance. The instances are innumerable where men have made what, to them, was a safe and satisfactory disposition of their property and subsequently it has turned out that their whole scheme miscarried, ruinous litigation ensued, because a limitation had been confused with a condition or neither should have been used. The lawyer in the press of business often shows himself to be but little better informed than his client and the reports show that even the courts are many times at sea in this matter. Conditions and limitations are continually assuming so many new forms and unusual disguises that one has to be on his alert to avoid confusion and be sure of applying the propert tests.

Tiedeman's definition of estates upon condition, limitation and conditional limitati-n are:--

"An estate upon condition is one which is made to be enlarged or defeated upon the happening or not happening of some event"

"An estate upon limitation is one which is made to determine absolutely upon the happening of some future event."

"A conditional limitation is an estate limited, to take effect upon the happening of the contingency and

and which takes the place of the estate which is determined by such contingency".

The great distinction between estates upon condition and estates upon limitation is that when a condition is broken, in order that the estate shall be divested, an entry must be made; while an estate upon limitation defeats itself upon the happening of the contingency. Other distinctions will be discussed later in specific cases.

Conditions are divided into two great classes, conditions precedent and conditions subsequent. In classifying these two kinds of conditions, we meet with great confusion and many arbitrary distinctions. The courts have almost exhausted their ingenuity and in many instances have damaged their reputation in trying to clothe a condition subsequent with the garments of a condition precedent or vice versa. Perhaps as good a distinction as any may be found in 20 Barbour 456, Underhill v. Saratoga and Wash. Ry Co. "If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act tobe performed and the

time required for its performance it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the consideration is subsequent.

Having defined and given some general tests of classification, let us turn our attention to some particular instances where it is necessary to apply them. The following are some of the pitfalls into which the unwary fa fall in pursuing the labyrinths of conditions and limitations:--

Conditional limitations, conditions in restraint of alienation; conditions that suspend the absolute power of alienation; conditions and covenants; conditions, limitations and trusts in tying up prpperty; conditions in restraint of marriage.

A conditional limitation is a combination of a condition and a limitation, it is a limitation annexed to a condition. Sometimes conditions and limitations would be valueless and not serve the purpose of the grantor or testator at all while by the use of a conditional limitation that purpose is fully carried out. A grants an estate to B upon the condition that B pay yearly a certain sum to C. B does not pay and the estate is divested

re-entry of theproper person. C is deprived of the yearly allowance which allowance mayhave been the motive of A. in making the devise. Suppose A. devises the same estate to B. until B. shall cease topay C. the yearly allowance. The same difficulty is encountered. The estate divests itself, C. has now allowance and the will of the testator is thwarted the same as before. If A. grants an estate to B. upon condition that B. pay a certain sum yearly to C., but if the condition be broken the estate shall pass to C. or a third person who shall perform the same conditi n as was imposed upon B., the devise will fully accomplish the wish of the testator. Again, as we shall see later, conditions subsequent annexed to personalty without a gift-over are"in terrorem" and void.

CONDITIONS AND COVENANTS.

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It often occurs that parties wish to convey property with certain conditions attached. So important is the performance of these conditions that under no circumstances would they part with the property unless there was reserved to them the rightof reentry upon the condition

being broken. The question of damages never enters their minds during the transaction yet the instrument is so carelessly drawn that the courts are compelled to call what was meant for a condition a covenant, and the only redress is damages for breach of the covenant. A covenant of itself gives no right of reentry and the courts will always, in case of doubt, construe an agreement to be a covenant rather than a limitation or condition.

"Provisions in a deed that it is upon condition that the grantee or his assigns shall not erect or permit a nuisance on the land, is a covenant running with the land and does not create a defect in the title". The above is quoted from Post v/ Weil, 115 N. Y. 361, and is a good illustration ofhow easy it is to confuse covenants with conditions and limitations. The use of the word condition of itself signifies nothing, and there is no condition except a rightof reentry be reserved. It is opportune at this point to state that the right of reentry is not assignable and unless it is expressly reserved in the instrument for the heirs and devisees it perishes with the grantor. This rightof reentry was restricted by the statute, (32 Hen. VIII., Ch. 34) to freehold estates. See also Nicoll v. Ry/ Co.(12 N. Y. 121).

CONDITIONS THAT SUSPEND THE ABSOLUTE POWER OFF ALIENATION

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Much care must be exercised in imposing conditions upon estates that the power of alienation be not suspended beyond the statutory limit. In England this was a favorite way of tying up estates for longperiods and gave rise to such abuses that finally the matter was regulated by statute. The same is true of mostof the states. In New York the suspension of the power of alienation, by statute, is limited in one case to two lives in being and twenty one years; in all others the limit is two lives in being. The statute defines the suspension of the power of alienation as follows:-- "Such power of alienationis suspended when there are no persons inbeing, by whom an absolute fee in possession can be conveyed". How long the limitation or condition annexed may last is of no consequence if the power of alienation is not suspended. The time of the limitation or condition is quite likely to be mistaken for the suspension of the power of alienation. To illustrate, A. grants B. and his heirs and devisees an estate upon condition that B. keep in good re

pair a certain bridge, the estate to revert if B. does not perform the condition; or A. grants B. and his heirs and devisees an estate which is tolast until the town build a bridge in a certain place. The condition and limitation are indefinite in extent of time yet the power of alienation is not suspended. All the parties having any interest are ascertained and can join in a conveyance. When it is the person who is uncertain upon whom the condition or limitation dependsinstead of an uncertain event, the power of alienation is suspended. The following is an example:-- A. grants the use of a lot to a manufacturing company, a corporation, (as an inducement tolocate) until it ceases tobe a corporation; in which event the property is to pass to whoever may be the pastor of the Second Presbyterian Churchin that place. Who the pastor of this Presbyterian Church willbe when the corporation ceases to be a corporation is uncertain. All the persons who have interestsin the property can not be ascertained to unite in a conveyance. The power of alienation is suspended for more than two lives in being.

CONDITIONS IN RESTRAINT OF ALIENATION

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Conditions in restraint of alienation must be attached with caution or the intent of the grantor or testator will surely be defeated. An estate has certain charecteristics, a certain dignity and reputation as it were, which it is bound to maintain. Conditions cannot be imposed which are repugnant andif so imposed are void. Alienation is essential to the verynature of a freehold estate. "A little knowledge is a dangerous thing" applies withpeculiar force to the unfortunate layman who tries to sail his own bark amidst the dangerous shoals of the legal requirements necessary to make a valid deed or will. Persons of cautious, seclusive and suspicious temperaments, relying upon their own superficial knowledge of law are very liable to shun the lawyer's office and endeavor to carry out their plans alone. A father wishes a child to have an estate but love of control to the very last, fear the estate may be wasted make him wish to tie it up, and instead of forming a trust he imposes the condition of absolute restraint of alienation. The restraint is void and what could have been readily accomplished by a trust falls through.

However reasonable restraints of alienation are allowed, viz.:-- conditions not to alienate for a certain but reasonable time; not to alienate to a certain person or class of persons; not to alienate before coming into possession; but a condition not to alienate only to a certain person is invalid.

CONDITIONS? LIMITATIONS AND TRUSTS

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The very interesting question is liable to arise whether a provision in a will is a condition or a trust. The courts, whenever they can at present, construe a devis upon condition as a devise in fee upon trust. For example,-- A. devises a certain farm to B. provided he maintain in comfortable circumstances C. B. is the heir of A. If this devise is called a devise upon condition and B. refuse to perform the condition, there is no one but B. to make a reentry and divest the estate. B. would be placed in the novel position of compelling himself toperform this condition and the result would be that C. would be deprived of support . The courts would construe this devise to be a trust to the extent that B. would have to maintain C. This construction carries out

the intent of the test ator. In the majority of cases it is clear that the testator hed no wish that the estate should ever be divested but did wish that certain provisions in the will should be guaranteed and become a charge upon the estate devised.

It is a matter ofprime importance when persons wish to make wise provisions for their loved ones to know just what steps should be taken. The law relating to trusts isin amny ways intricate and there exists in the minds of many a violentprejudice against this method of tying up property. It is a perfectly natural desire to wish to leave property in the control of a person and not subject them to the humiliation of a species of guardianship which is incident to a trust. How can I leave this estate to my child so that he can control it andkepp his self-respect, and at the same time how can I protect him from is own improvidence or the misfortunes liable to come to all, is a question that many a father asks himself. In themajority of cases he shuns a trust and seeks by conditions and limitations to surround his loved one with safeguards against failure and want, and too often fails utterly in his well meant purpose. The

difficulty generally arises by imposing conditions that are repugnant to the estate. The testator or grantor, in his desire to accomplish his wish, not only imposes conditions repugnant to the estate but also endeavors to restrict and invade the rights of third parties, viz., creditors.

The English law upon this subject is well settled in Brandon v/ Robinson, (18 Vesey 429).

"There is no doubt that property may be given to a man until he shallbecome a bnakrupt. It is equally clear, generally speaking, that if propertyis given to a amn for his life the donor cannot take away the incidents to a life estate; a disposition to a man until he shall become bankrupt and after his bankruptcy over is quite different from an attempt togive tohim for life with a proviso that he shall not sell nor alien it". The law of New York is the same. The following is quoted from Bramhall v. Terris, 14 N.Y. 41:--

"A provision in a will that the interest of a devisee for life in property shall cease on the recovery of a property judgment by creditors to reach itis valid".

The law in New York relative to trusts is that where

a trust is created by a person other than the beneficiary, the beneficiary cannot dispose of it but the creditors can reach so much of it as is not necessary for his support.

Hence in England andin those jurisdictions that follow the English law in this respect, a grantor or testator should be careful to use a limitation and a limitation over or form a trust if he wishes to put the property out of the reach of creditors. The following examples will illustrate:--

A wishes to leave property to B. in such a manner that B. will always receive the benefit and that it will be out of the reach of creditors. Perhaps B. is already deeply in debt or his habits or financial ability is such that A. is fearful that B. will soon come to want if given absolute control of the estate. If the will or deed give theproperty on condition that B. remain solvent or recites that it shall never be sold for debts, the devise or grant is absolute and the estate is alienable andliable for debt. If the devise or grant is made until B. become insolvent, the limitation is good and the estate ceases when B. becomes insolvent. A limitation over should generally be made for the testator or gran-

tor not only desires that the estate should not fall into the hands of creditors but that the devisee or grantee should have the benefit of it. A limitationover to some person who naturally would see to the wants of the devisee or grantee should be made. The same object can as readily be accomplished by a trust, care always being taken that the absolute power of alienation be not suspended. There is always the objection to a trust that it takes the property out of the control of the beneficiary and wounds his pride and in the majorityof cases the testator or grantor dislikes a trust for that reason.

The United States courts take a radically different position than the courts of England and New York. They hold that the wish of the testator shouldbe respected and that proper security is given to creditors by the records made in this country of wills and deeds. It seems to us that this view is the reasonable one. If the testators intent and wishes canbe clearly shown they should not be thwarted simply because of the technicality that a condition was annexed instead of a limitation. The wishes of testators are carried out in many instances more arbitrary and fifficult. The following quotation from Nichols v. Eaton, (91 U. S. 716) is a very good sum-

mary of the United States doctrine:--

"While the will in question is considered valid in all its parts upon the extremesit doctrines of the English Chancery Courts, this court does not wish it understood that it accepts the limitations which the court has placed upon the powers of testamentary disposition of property by its owner. Nor does it sanction the doctrine that the power of alienation is a necessary incident to a devise's life estate in real property or that rents and profits of real and the income and dividends of personal property cannot be given and granted by a testator to a person free from all liability for the debts of the latter".

CONDITIONS IN RESTRAINT OF MARRIAGE.

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Conditionsin restraint of marriage form an interesting and important part of the subject of conditions and limitations. To understand the law and its application to this matter it is necessary to trace its origin and historical growth. In that way only can be explained some of the apparent anomalies that are found today in the Englishlaw upon marriage. The civil law is the

source of much of our law and in numerous disguises and insiduous ways has become a part of our jurisprudence. Let us take a glance at Roman history and study certain phases of Roman life and society that were causes of the civil law upon marriage. The law respecting the encouragement and restraint of marriage was based upon political expediency and to meet the exigencies of the time rather than upon broad basal principles of marriage as an abstract subject. What was suitable for them and their day is inapplicable to different countries and times.

First; there was an absolute liberty of divorce which fact alone ought to make the Roman law of marriage different from the English law where divorces are rare and and hard to obtain. Again, after the civil war, the country had been depopulated and the habits of celibacy grew apace until of Augustue the Julianlaw not only offered encouragement to marriage but placed many discouragements upon celibacy.

In Stackpole v. Beaumont, (3 Vesey Jr. 89), the court says:--

"The Julian law being established in restraint of celibacy and for the encouragement ofa all persons who

would contract marriage,it necessarily followed that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction that these conditions in restraint of marriage were null."

The probate of wills and administration of estates were at first under the jurisdictionof the ecclesiastical courts. That court was always at variance with and naturally hostile to the common law courts. Being conducted by churchmen it was strongly biased in favor of the civil law and in the matter of marriages as in many other ways it incorporated the civil law as a part of the law of the land simply because it was the civil law. Consequently the Ecclesiastical courts adopted much that was only applicable to a peculiar people, radically different in race, religion and customs, and tried to make it fit into the common law.

"The decision in the Ecclesiastical court is impossible to be accounnteafor but upon this circumstance, that in the unenlightened ages soon after the revival of letters there was a blind superstitious adherence to the text of the Civil law". So much for thehistory of this branch of our subject. We will now briefly treat of the

English and American law as it now exists in reference to conditions in restraint of marriage.

Four classes of conditions must be constantly kept in mind in treating of conditions in restraint of marriage, viz.:-- Conditions precedent and conditions subsequent; conditions annexed to realty and conditions annexed to personalty. If the condition is imposed upon realty the common law is followed. If it is a condition precedent, the condition must be complied with or the estate nefer vests, even if the condition be illegal, impossible or unreasonable. If the condition be a condition subsequent, the estate will be defeated if condition is broken provided the condition be legal and one that can be enforced. No limitation over is necessary nor is there any discussion of that vexed question "a condition in terrorem" which is liable to arise if the estate is personalty.

Says Story:-- "If the condition be subsequent and annexed to real estate, its validity will depend upon its being such as the law will allow to divest an estate". It is many times a close question whether the devise is personal or real in its nature. For not only a devise f

of real estate but a legacy charged upon land follows the common law.

It is pertinent at this point tomention some of the conditions which are legal and by a discussion of them infer what are illegal and invalid. Whenconditions subsequent are annexed to real estate the estate is liable to be defeated when the condition is broken, unless the condition is illegal or impossible. Ifthe estate be personal and the condition precedent, the estate vests whether the condition be performed or not unless the condition be illegal or impossible.

A condition in restraint of marriage until the devisee is twenty-one years of age is valid. Itis not an unreasonable request.to ask a person to wait until his majority before assuming the responsibility of the marriage state and the law may well protect the testator in wishing to shield the devisee from the inexperience and rashness of youth. In England and in some of the states the law sustains a condition imposing restraint of marriage during widowhood.

"The law recognizes in the husband such an interest in his wife's widowhood as to make itlawful for him to

restrain her from making a second marriage".

The above is quoted from Loyd v/ Loyd, (2Sim. U. S. 255). This is unfair and is one of the manyarbitrary and unjust distinctions against women and in favor of men in which the common law abounded. The reasons are just as poignant why a wife should wish her husbanato remain unmarried as for the husband to wish the same of the wife. In those jurisdictions where such a condition is not allowed to be imposed, a limitation is perfectly feasible and legal.

A. bequeaths to B., his wife, the use of certain property until she remarries. The courtsinterpret such a limitation to mean that A. has no desire to restrain his wife frommarriage but is simply desirousof providing for her until such an event, assuming that then there will be no need of such support, since her next husband will look out for her needs. The same method can be used in providing for the wants of a child. A. devises an annual income to his daughter until she shall marry. This is called no restriction of marriage but is simply a provision made for her until that event shall accrue, when her husband will support her and the annuity or the

principal from which it is derived then goes where the testator thinks it will be of the most service, at least where he desires it to go.

A condition to ask consent is lawful, as not restraining marriage generally. Where consent is required, a subsequent approval is not good. If several are required to consent, all must consent. Consent, if given cannot be withdrawn unless fraud can be shown in obtaining it of giving it. If consent is arbitrarily withheld, it can be compelled to be given if no course can be shown why it should not be given.

Where the condition is upon marrying into a particular family, the devisee has his whole life time to perform the condition, because he has married contrary to the wishes of the testator does not necessarily preclude him from sometime complying with the requirements made.

Says Proper:-- "Conditions which require or prohibit marriage with particular persons or against marriage to particular families or which prescribe the due ceremonies and the peace of marriage are valid."

Lastly we will treat of conditions in restraint of marriages annexed to personal property. Itis here that are found the peculiarities mentioned at some length in

a previous part of this thesis, taken from the civil law and through the ecclesiastical courts and engrafted upon the law of England. The civil law recognized no difference between conditions precedent and conditions subsequent as to their validity. The ecclesiastical courts did not go quite so far but recognized but recognized some, yet differed from the common law courts. As to conditions precedent, the English courts are in doubt. In Clark v. Parker, (19 Vesy 14), the court says:--

"Whether a condition precedent in restraint of marriage annexed to personallegacies can be considered in terrorem only wehre there is an express limitati n over is a point upon which great diversityof judicial opinion has been declared. Where there is a valid devise over there can be no doubt but what it will take effect if the condition be not complied with." But not even in England (the same case being authority) and certainly not in most of the states, will a condition precedent with no limitation over be regarded as "in terrorem", if the condition be legal and reasonable.

With conditions subsequent the rule isvery clear and all restraints upon marriage are held to bein terrorem" if there is no gift over.

"Where a legacy is given to which a condition subsequent is attached in restraint of marriage the condition is void and merely in terrorem unless there be also a valid devise over of the particular legacy" The above is quoted from 3 Ark. 332 368. See also 88 N. Y. 162. The fact that there is a residuary legatee will not make a legacy a gift over but there must be an express direction that the legacy shall not fall into residue on breach of the condition.

It is important to note here the difference between the validity of "estates over" when they depend upon conditions precedent or subsequent. Conditions annexed to personalty or realty. If the first estate is realty and depends upon a condition precedent which isnot performed, and the first estate does not vest, the estate over will fail. If the condition be subsequent the breach of the condition will defeat the estate over. If the estate be personal, the Englishlaw follows the Civil law, making no distinctions between conditions precedent and conditions subsequent.

As the law exists at present, unless modified by statutes, we find conditions in restraintof marriage fol-

lowing the common law where there is real estate; but if the estate is personal we are yet governed by the rules of the civil law. There has been left our jurisprudence a legacy with curious conditions and limitations annexed, inherited from the ecclesiastical courts.