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Real Property: Estates on Conditions Subsequent--Extension of the Judicial Bias against Forfeiture

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for all practical purposes they would have none under the common law. The rule of public policy would seem to be, and rightly so, that between innocent third parties and parents of a minor child causing damage through wilful misconduct, the latter should bear the burden of responsibility. That the Legislature recognized the inherent danger in this type of legislation is apparent from the strict limitations included in the statute, both as to the amount of liability, and the wilful nature of the act. Thus the wording of the statute gives a strong indication that the Legislature intended it to be strictly construed so as not to further increase the heavy burden placed upon parents by its operation. To allow the insurer here to throw up the statute as a defense would be to deprive the parent of the only protection he now has in such cases. Such an application of the statute to a standard exclusion clause of insurance contracts would indeed have far-reaching and serious consequences. Imputation of wilful misconduct to an insured would prevent his indemnification under state law,[19] which would naturally lead to uncertainty and confusion of policyholders concerning the extent of their protection under insurance contracts now in force. This result is most certainly not in harmony with legislative intent.

Thus the problem, reduced to its basic components, provides its own answer. The statute imposes a strictly limited liability on one class of persons for the benefit of another class, also strictly limited by necessity of the first. The insurer, excluded from the protected class, should not be allowed to reap the benefits of the statute through subordination of public policy.

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REAL PROPERTY: ESTATES ON CONDITIONS SUBSEQUENT—EXTENSION OF THE JUDICIAL BIAS AGAINST FORFEITURE.—The general economic boom in the United States accompanying the second World War sent land values skyrocketing to unheard-of heights with the result that many routine grants of property, of previously little commercial value, for municipal and charitable uses have become the source of much strongly contested litigation. The majority of cases seem to indicate that the careful thought and business-like planning that accompanies the preparation of deeds to property of great commercial value is often neglected when a grantor, with some degree of donative intent, transfers property of small worth for civic or philanthropic purposes.

This leaves for the adjudication of the courts many cases which could have been avoided by a competent draftsman.

Faust v. Little Rock School District,[1] decided in March, 1955, is worthy of note as representative of such cases. In this case, land of relatively little value was granted in 1843 to the mayor and alderman of the city of Little Rock in their corporate capacities. The grantor, an attorney of some renown, in a lengthy and detailed writing, provided that the grant was:

> ". . . subject also to the restrictions and conditions hereinafter made . . . and for the special purpose of being appropriated and used by [the city] for the erection thereon of a city hospital, workhouse or other public building as may to them seem most conductive to the public good and the same shall not be sold or disposed of, nor shall the title vest in the city except on the conditions aforesaid."[2]

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[19] CALIF. INS. CODE § 533 (1935).

[1] —— Ark. ——, 276 S.W.2d 59 (1955).

[2] *Id.* at ——, 276 S.W.2d at 60.

The habendum of the deed repeated the grantor's terms that the conveyance was:

". . . upon the several conditions and for the special purposes herein set forth and specified and none other whatsoever."[3]

The plaintiff appellee school district acquired title by warranty deed from the city of Little Rock in 1870 and brought this action to quiet title against the heirs of the original grantor. Since the time of the original grant to the city, the property had increased in value by nearly $350,000 and the defendant appellants sought to maintain an alleged right of entry for condition broken in this action.

The Supreme Court of Arkansas, quieting title in the school district, affirmed the decree of the lower court. In an indecisive opinion, it was held that the original grant to the city did not create an estate on condition subsequent and further that conditions, if any, had become inoperative by the grantor's heirs remaining silent for seventy years after the conveyance by the city to the school district.

In this case, then, all of the qualifications put in the deed by the draftsman under the label of condition had no legal effect and the grantor, for all practical purposes, would have been as well off had he simply saved his many words and granted to the city in fee simple absolute.

What, then, in terms of this decision, is required to effectively create an estate on condition subsequent? Would the answer have been different in 1843 when the deed in question was drawn?

California courts have continued to recite the deed requirements for the creation of an estate on condition subsequent that were present in early English law[4] and have continued to verbalize the time-honored rules applicable to interpreting deeds that require judicial construction,[5] but a strengthening of the judicial bias against conditions, resulting in forfeiture, is to be found in the decisions.

The Arkansas Chief Justice, in the case under note, pointed out that the early common law did not favor conditions subsequent but said that: "Today's authorities are more restrictive than the judgments and decrees of a century ago."[6]

The existence of this more restrictive judicial prejudice against forfeiture has had a pronounced effect on the requisites necessary to be included in the conveyance of an estate on condition subsequent. The scope of these changes may be demonstrated by a review of the California cases in point since 1900.

In 1901, the California Supreme Court, in the case of *Papst v. Hamilton*,[7] declared a forfeiture for breach of condition subsequent, holding that:

"A deed conveying to grantees . . . upon conditions that the premises should be used solely for erecting, furnishing, keeping and maintaining thereon an academic or collegiate school, etc., and for no other purposes whatever, creates a conditional estate in the grantees. . . . The language used both in its technical and popular sense *ex proprio vigore* imports a condition, or the intent of the grantor to make a conditional estate and where this is the case a clause of re-entry is unnecessary."[8]

The language used by the grantor in this case, held to be sufficient to create an estate on condition subsequent by the California court 54 years ago is almost identical to the language of the grantor in the *Faust* case where the Arkansas court held the language insufficient to create such an estate in 1955.

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[3] *Ibid.*
[4] Behlow v. Southern Pac. Ry., 130 Cal. 16, 62 Pac. 295 (1900); 13 Ops. Atty. Gen. 142 (1949).
[5] CALIF. CIV. CODE §§ 1069, 1443.
[6] See note 1 *supra*, 276 S.W.2d at 63.
[7] 133 Cal. 631, 66 Pac. 10 (1901).
[8] *Id.* at 633, 66 Pac. at 10.

A California appellate court decision, *Martin v. City of Stockton*,[9] in 1919 followed the *Papst* case holding that an estate on condition subsequent had been created where the grant read:

> "Providing, however, and this conveyance is made and accepted upon the express condition, limitation and restriction that said party of the second part and its successors forever shall use said premises for excavating and as a waterway and drain only and no other purpose whatsoever."[10]

This decision did not involve a forfeiture, it being an action to gain title by adverse possession which was defeated, and is, therefore, of questionable weight in determining what the courts require to limit an estate by way of condition subsequent so as to impose a forfeiture for breach. This case and the *Papst* case, however, are the last California appellate decisions in the official reports that held a condition subsequent had been created where the intention of the grantor was manifest by nothing more than the use of the words, "on condition."

The *Papst* case, decided in 1901, represents the last declaration of a forfeiture for condition broken where the conveyance did not specifically state that upon breach of the conditions a forfeiture was to result, or the grantor was to have the right of re-entry, or the property was to revert.

In *Behlow v. Southern Pacific Railroad Company*[11] the court decided that an estate on condition subsequent had been created by a deed that contained no words of condition but provided:

> "The conveyance of these lands is made for railroad purposes only and if not so used then it is to revert to the parties of the first part."[12]

In *Reclamation District No. 55 v. Van Loben Sels*,[13] a similar deed provided:

> ". . . for the purpose of reclamation only and if said lands shall cease to be used for such purposes, the same shall thereon revert to the said party of the first part. . . ."[14]

In neither of the above cases were the words, "on condition," used but the court held the intention to create a conditional estate sufficiently expressed by the inclusion of the reverter clause.

Then, in 1926, when the *Hasman v. Elk Grove Union High School*[15] case was decided, the appellate court exercised the judicial bias against forfeiture to new limits. The facts were similar to our principal case, the grantee high school having used the land for a school for 29 years before moving it to a location that would better serve their needs. The deed to the school under which the plaintiff sought to quiet his title read:

> ". . . [T]o have and to hold . . . provided the same shall be used for the purpose of maintaining thereon a high school, otherwise the above described property shall revert to and become the property of the party of the first part, his heirs and assigns."[16]

In interpreting the grant, the court said:

> "Had it been the intention . . . that the property should revert upon the discontinuance of its use for high school purposes it would have been so easy to have so stated in plain and simple language that it must be inferred from the terms actually employed that such was not his intention."[17]

[9] 39 Cal.App. 552, 179 Pac. 894 (1919).
[10] *Id.* at 555, 179 Pac. at 896.
[11] 130 Cal. 16, 62 Pac. 295 (1900).
[12] *Id.* at 18, 62 Pac. at 295.
[13] 145 Cal. 181, 78 Pac. 638 (1904).
[14] *Id.* at 183, 78 Pac. at 639.
[15] 76 Cal.App. 629, 245 Pac. 464 (1926).
[16] *Id.* at 631, 245 Pac. at 465.
[17] *Id.* at 634, 245 Pac. at 466.

Putting the deeds in the *Papst, Behlow* and *Reclamation District* cases, where the language was held to create a condition subsequent, alongside the words here interpreted, it would seem certain that the conveyance in the *Hasman* case was definite in spelling out the grant of an estate on condition subsequent since here, unlike the *Papst* case, the grantor included a provision for forfeiture in the event of a breach. The court, however, distinguished *Papst v. Hamilton* by saying:

> ". . . the language used in the instrument there considered was so plain and certain as to require no interpretation."[18]

The court, in quieting title in the grantee, reasoned that the deed did not provide for a reversion upon the *discontinuance* of the use as a school but upon failure to so use it. Black's Law Dictionary[19] describes the word "failure" as "abandonment," "defeat," or "*discontinuance*" (emphasis added). In terms of this, the court's interpretation amounts to unpredictable hair-splitting. No logical explanation can be given for such conclusions except that the courts have become more determined to avert the forfeiture of estates.

The decision in the *Hasman* case can't be rationalized by thinking of it as an "outlaw case." Six years later, in 1932, the appellate court decided *Booth v. County of Los Angeles*[20] where the grant, similar to the one in the *Hasman* case, read:

> "This conveyance is made for the purpose of a road or highway, to revert to said J. J. Harshman, his heirs and assigns if not so used."[21]

The court refused to find that a condition subsequent existed in spite of the fact that the words were exactly the same as those which the Supreme Court had found sufficient to create such an estate in 1904 in *Behlow v. Southern Pacific Railroad Company*, cited above. The opinion of the court repeated the words of the *Hasman* case that:

> "Had it been the intention of the grantor herein that the property should revert upon the discontinuance of its use for road purposes, it would have been so easy to have so stated in plain and simple language that it must be inferred from the terms actually employed that such was not the intention of the grantor."[22]

When *Rosecrans v. Pacific Electric Railroad*[23] was decided in 1943 by the Supreme Court, sitting in bank, Justice Carter, in a well-reasoned opinion, said of the *Hasman* case: "That reasoning is rendered doubtful by the decision of this court in *Romero v. Department of Public Works.*"[24]

As late as 1949, however, the Attorney General cited the *Hasman* case in addressing the District Attorney of Colusa County as to whether an estate on condition subsequent had been granted by a deed to the Bridgeport School District.[25] The opinion of the Attorney General concluded that:

> "The absence of a reversionary clause in the deed in question prevents the creation of a condition subsequent. The reasoning of the cases in those instances where no words of reversion are found is that if the grantor had intended a forfeiture he most certainly would have indicated said intention by the inclusion in his deed of words of reverter. The court in the *Hasman* case ruled that no condition subsequent had been created by this particular clause."[26]

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[18] *Ibid.*
[19] 4th Ed. 711 (1951).
[20] 124 Cal.App. 259, 12 P.2d 72 (1932).
[21] *Id.* at 260, 12 P.2d at 72.
[22] *Id.* at 262, 12 P.2d at 73.
[23] 21 Cal.2d 602, 134 P.2d 245.
[24] *Id.* at 608, 134 P.2d at 248.
[25] 13 Ops. Atty. Gen. 142 (1949).
[26] *Id.* at 143.

In 1935, in *Gramer v. The City of Sacramento*,[27] the Supreme Court adopted the words of the appellate court in the *Hasman* case to hold that no condition subsequent had been created by a deed that made certain provisions, using the word, "condition," but contained no right of re-entry clause. The court ruled:

> ". . . the deed contained no words of reverter or forfeiture. It would have been a simple thing had the grantor contemplated such a possibility for him to have inserted appropriate language making provision for a forfeiture. . . . No condition in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. . . ."[28]

To appreciate the change in attitude reflected by the above excerpts, compare the words to the opinion of the same court considering the same problem in *Victoria Hospital Association v. All Persons*[29] in 1915 where the court said:

> "It is true that the words 'on condition that' are apt and appropriate words, both in their technical and popular sense, to create a condition, and it appears to be the generally accepted doctrine that, as the words 'on condition' are the precise and technical terms by which an estate on condition is created, such a phrase is sufficient to create a conditional estate, unless there is something else in the deed indicating the contrary.
>
> "This is the accepted doctrine in this court and such words *ex proprio vigore* import such condition in the absence of other language inconsistent therewith."[30]

Whereas the content of the two excerpts above is not necessarily contradictory, when viewing the two opinions together, it is an unmistakable conclusion that the recognized bias of the courts against forfeiture had gained strength in the 25 years that separated the opinions.

In the early 1900's, we saw the Supreme Court hold that an estate on condition subsequent had been created[31] and that there should be a forfeiture[32] where the only language relied on by the court to manifest the grantor's intention to create such an estate amounted to the words, "on condition." In other cases, where the grantor had substituted a declaration of purpose as to the use of the property in place of the words, "on condition," but had included a reverter clause, we saw the court hold that an estate on condition subsequent had been granted.[33] Then after 1926, we saw a change of tenor in the opinions, accompanied by more restrictive decisions ruling that such language was insufficient to show the intent of the grantor to create an estate on condition subsequent.[34]

Upon this authority, the statement, in the decision of the Arkansas Court, that today's authorities are more restrictive than the judgments and decrees of a century ago is certainly applicable to the California courts, and this fact should pervade the thought of every draftsman attempting to limit an estate by way of condition subsequent.

The old rules, still being cited by the courts, that:

> ". . . While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or clear implication,"[35] and,

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[27] 2 Cal.2d 432, 41 P.2d 543 (1935).
[28] *Id.* at 439, 41 P.2d at 546.
[29] 169 Cal. 455, 147 Pac. 124 (1915).
[30] *Id.* at 460, 147 Pac. at 126.
[31] Martin v. City of Stockton, 39 Cal.App. 552, 179 Pac. 894 (1919).
[32] Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10 (1901).
[33] Reclamation Dist. v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638 (1904); Behlow v. Southern Pac. Ry., 130 Cal. 16, 62 Pac. 295 (1900).
[34] Gramer v. Sacramento, 2 Cal.2d 432, 41 P.2d 543 (1935); Booth v. County of Los Angeles, 124 Cal.App. 259, 12 P.2d 72 (1932); Hasman v. Elk Grove Union High School, 76 Cal.App. 629, 245 Pac. 464 (1926).
[35] Hawlew v. Kafitz, 148 Cal. 393, 83 Pac. 248 (1905).