1940

Fees Simple Defeasible: The Purpose they Serve with an Appraisal of Their Utility

M. E. Brake

University of Detroit

Follow this and additional works at: https://.uknowledge.uky.edu/klj

Part of the Property Law and Real Estate Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation


Available at: https://uknowledge.uky.edu/klj/vol28/iss4/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
FEES SIMPLE DEFEASIBLE.\textsuperscript{1}
THE PURPOSES THEY SERVE WITH AN APPRAISAL OF THEIR UTILITY.\textsuperscript{2}

By M. E. Brake\textsuperscript{*}

A conveyor of a fee simple estate in either real or personal property may desire, through the medium of such conveyance, to accomplish some purpose in addition to the mere transfer of the ownership of the conveyed property. Especially is this true where the conveyance lacks the usual consideration. He may wish to secure some benefit personal to himself, or another, through the performance of some service by the conveyee, or his successors in interest; or to coerce the conveyee in the matter of such conveyee's conduct; or to direct the course of ownership of the conveyed property by imposing restraints upon its later alienation; or to continue some direction over the manner in which the conveyed property may, or shall, be used; etc. Within very broad limits, the law indulges him in his desires, and furnishes him with a choice of means for accomplishing his purpose. Each of these varying available means has its own peculiar advantages and disadvantages, and may, or may not, be the one best adapted to a particular situation. Designing a conveying instrument suitable for effectuating a conveyor's intention in these respects requires a familiarity with the various legal tools the law affords for accomplishing these purposes; an ability to select the one best adapted to the end desired; and the requisite skill in legal draftsmanship to incorporate such intention into the conveying instrument so emphatically that doubt can not arise as to its true nature.

The purposes served by annexing conditions subsequent, special limitations or executory limitations to fee simple estates in either real or personal property, thus converting such estates

---

\textsuperscript{1}Possessory fees simple defeasible are alone considered herein.

\textsuperscript{2}This article is a condensation of one chapter from a treatise in the course of preparation by the writer.

\textsuperscript{*}Prof. of Law, Univ. of Detroit, School of Law, Graduate, Western State Teachers College, Kalamazoo 1916; Ph.B. 1919; J.D. 1921; Graduate Student Political Science 1923-25, Univ. of Chicago. Admitted to practice in Illinois in 1922. Prof. of Law, Univ. of Detroit, since 1925.
into fees simple defeasible, are, in the main, similar. Nevertheless, in any given situation, a condition may be preferable to a limitation, a condition subsequent to one precedent, etc. Other available legal means for accomplishing these purposes, with varying degrees of effectiveness, include trusts, covenants, restrictions, liens, mortgages, disabling restraints, etc. A general knowledge of the outstanding legal characteristics of these various mechanisms furnishes the more significant clues for selecting the best available means in any given case.

Where a condition subsequent is annexed to a fee simple estate, title to the property passes immediately and the conveyance becomes effective, subject to being revested, after a breach of the condition, in the conveyor, or his successor in interest, at their option. Once a breach occurs, revesting title is normally a comparatively simple procedure, though, in any given case, a possessory action may be necessary for regaining possession of the property. This power to terminate the estate of the one required to perform, or to abstain from, specified acts furnishes a very formidable weapon for compelling such performance or abstinence; and the ease and speed with which a forfeiture may be perfected after a breach of the condition adds to the desirability of such conditions. The person entitled to forfeit is permitted, at his election, to waive continuing or successive breaches of the condition, and to continue the estate conveyed as though no breach had occurred, and this adds another substantial advantage to conditions subsequent. A condition subsequent is not limited in its duration by the rule against perpetuities, and consequently the use of such condition is an effective means for requiring or prohibiting acts over an extended or indefinite period of time.

However, conditions subsequent are not without their disadvantages. They are loathed by the law, are anathema to equity, and can expect no favors. Courts are apt to be generous to a fault in finding that no breach has occurred, and equity may often intervene to obstruct a forfeiture. Where the person to benefit from the observance of a condition subsequent is one other than the owner of the power of termination, such person is powerless to compel observance of the condition if the owner

---

9 On the nature of fees simple defeasible, see Restatement, Property, (1936) secs. 16, 23, 24 and 25.
of the power is disinclined to act. Where the value of the property subject to forfeiture falls below the value of the observance of the condition, a forfeiture may be desired by the owner of the property. As forfeiture is the only remedy for the breach of a condition subsequent, its effectiveness as a threat will then disappear, and the owner of the power of termination must be satisfied with regaining his property.

Much of what has been said in the preceding paragraphs anent conditions subsequent might be reiterated for special limitations. There is, however, one essential difference between the two which might prove to be either an advantage or a disadvantage in any given case. Special limitations operate automatically to revest title upon the happening of the specified event. Consequently, it would seem that the doctrine of waiver could not in strictness well be applied to them. In many cases a conveyor might prefer to ignore lapses in performance on the part of the conveyee, but if the law of special limitations be strictly applied, title reverts when the defeasing event occurs, and this might occur without the knowledge and against the wishes of both parties. Fixing the exact moment when title re-vested for the consequent fixing of dower, creditors’ rights, etc. might become of concern in any given case. In practice, special limitations are confined largely to continuing some direction over the uses to which the conveyed property might be subjected.

Executory limitations in the form of conditions subsequent partake largely of the advantages and disadvantages of conditions subsequent and special limitations. Operating automatically, as do special limitations, the doctrine of waiver can not in strictness be applied to them. Where the one to benefit from their observance is one other than the owner of the shifting interest, they suffer from the same short-comings as do conditions subsequent in affording him protection. Executory limitations in the form of conditions precedent differ essentially in that title does not vest in the conveyee until performance of the required acts or the happening of the specified events. This presents disadvantages in cases where a conveyee might be unwilling to perform over a protracted period before receiving title. Executory limitations are governed in their duration by the permissible period of the rule against perpetuities, consequently they are unavailable when it
is desired that their observance should continue for some period not sanctioned by the rule. They are confined largely to directing the course of property ownership, but are also employed as coercive devices. Because executory limitations operate to transfer title to one other than the conveyor upon the happening of the defeasing event they are employed much more extensively in wills than in deeds.

I. As Security Devices, for Securing the Payment of Money or the Performance of Services.

A. The Payment of Annuities to a Grantor.

Where a grantor of a fee simple estate in land desires to secure to himself the payment of an annuity by the grantee, perhaps the best of the accepted methods to accomplish such purpose is to make such payment a condition subsequent to the title conveyed. A condition subsequent will normally prove highly effective, either as a threat to compel payment, or as a means of securing a return of the land upon a failure to make the payments. Such a condition should not prove seriously objectionable to the grantee, especially where such annuity is all, or a substantial portion, of the consideration he pays for the land, and where the possession he enjoys is in value the equivalent of, or greater than, the annuity payments. Forfeiture is not a harsh remedy in these cases. The grantee need not breach the condition, and even though his estate be forfeited, if the use of the land be equal to or greater in value than the payments he has made he has lost only his anticipation of ownership. Where the annuity payments exceed the rental value of the land, a grantee risks an actual loss if the condition be breached, and he may be more loathe to accept the conveyance.

A grantor might employ a special limitation here, conveying the land to the grantee in fee simple so long as the

annuity payments are promptly met. However, special limitations would have no advantage over conditions subsequent, and they would be open to the additional objection that they operate automatically. If strictly enforced a delinquency in any one payment for however short a time would revest title in the grantor, probably often contrary to his intentions. In these cases, the grantee is normally some person close to the grantor, and the grantor might well prefer to waive excusable delinquencies in the payments. Moreover, a grantor and grantee, uninformed in the law, might well assume that the grantor has the legal power to waive delinquencies, and discover, too late perhaps, that title had shifted to the grantor, contrary to the expectations of both parties.

Payment of the annuity may be made a lien or charge upon the land, rather than a condition subsequent to the title. However, this may often prove less effective than a condition subsequent as a threat to compel payment, and may be more cumbersome to enforce in case of a failure to meet payments. To the extent that equity may be more generous in the case of a lien or charge in permitting the grantee to remedy a default in payment, to that extent he may be more inclined to grow careless in making payment promptly. Perfecting a forfeiture for the breach of a condition subsequent annexed to a fee simple estate in land is a comparatively simple procedure. In the case of a lien or charge the legal procedure for enforcing such a right may be more expensive, complicated and dilatory than the perfection of a forfeiture. Furthermore, there is a likelihood that equity might be more loathe to interfere with the perfection of a forfeiture, than with the enforcement of a lien or charge, by permitting past breaches to be absolved by delinquent payments. A lien or charge may have an advantage over a condition subsequent in that it may be so created as to impose a personal obligation upon the original grantee. This, however, would be apt to become of importance only when, because of the shrinkage in the value of the land, the grantor would prefer the annuity payment to a return of the land.

While a condition precedent might well be employed to

---

6 As illustrative cases, see: Gallagher v. Herbert, 117 Ill. 160, 7 N. E. 511 (1886); Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736 (1895).
secure annuity payments to a grantor, this might prove so objectionable to the prospective grantee, at least if possession, as well as ownership, be denied to him until performance has been completed, that he might refuse to accept the conveyance, not wishing to risk a loss of past performances, by virtue of an inability to continue future payments. Furthermore, a grantor in cases of this character, usually wishes to relieve himself of the control and management of the land, as well as to secure the benefit of an annuity to himself, and this he accomplishes only as he relinquishes the possession and enjoyment of the land to the grantee. Furthermore, a grantee might be more inclined to make improvements upon land to which he has present title, though such title might be later divested, than he would upon land the title to which was still in abeyance.

A grantor may be satisfied with a mere personal covenant on the part of the grantee to make the annual payments. However, this permits the grantee to transfer the land free from any liability for the payments. If the grantee then becomes financially irresponsible, the grantor has no means of enforcing payment. A well conceived intention on the part of the grantee to perform faithfully may also be frustrated by his death.

Where an owner of land desires all, or substantially all, of the income from the land, and at the same time to relieve himself of the burden of its control and management, he may prefer to place such land in trust with himself as the beneficiary. But usually where an annuity is desired, the owner wishes an immediate conveyance to the grantee, and the interposition of a trustee might prove objectionable to him. A present outright conveyance may be due to a desire to presently benefit the grantee as well as to relinquish the control and management of the land.

Where personal property is involved, the considerations are substantially similar. However, due to the nature of personal property, since it requires greater care for its preservation, and affords greater opportunity for its dissipation, a trust may be preferable here.

B. The Payment of Annuities to One Other Than the Conveyor.

Here the use of a condition subsequent has one distinct disadvantage. It may lose much of its effectiveness in this
situation, since the one entitled to perfect the forfeiture may be disinclined to act, and the law provides no compulsion for him. Here a lien or charge may be preferable, or by the use of an executory limitation, title to the land may be made to shift either to the annuitant, or another, upon a delinquency in payment. In other respects the considerations of the preceding section will have a substantial application here.

C. The Payment of Legacies by a Devisee.

The methods normally employed in a will to secure the payment of legacies by a devisee are either to make payment a condition precedent, or a condition subsequent to the vesting of title, or to impose a lien or charge upon the devise for securing payment. A lien or charge is normally the more effective means of fulfilling the testator's intention in this respect. The devisee becomes the immediate owner of the land upon the death of the testator, and the legatee is normally sufficiently protected to assure receipt of the legacy, the two things the testator desires. Though the devisee refuses to accept the devise, the legacy remains as a charge against the land. If the devisee lacks sufficient cash to make a prompt payment of the legacy, he, in all probabilities, will be able to borrow upon the security of the land.

To make the payment of the legacy a condition precedent to the vesting of title in the devisee may often prove most unsatisfactory. It is true that the condition furnishes a strong incentive for payment, as the devisee receives no title to the land until the condition is performed. However, if the devisee lacks sufficient cash to pay the legacy promptly, he may experience difficulty in borrowing upon the security of land to which he has, as yet, no title. Also, the devisee may, for one reason or another, prefer to forego the devise, rather than to pay the

---

6As illustrative cases, see: Nevius v. Gorley, 95 Ill. 206 (1880); Fairview Lodge v. Gaddis, 296 Ill. 570, 130 N. E. 315 (1921); Stearns v. Godfrey, 16 Me. 153 (1839).

7As illustrative cases, see: Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264 (1817); Nowak v. Dombrowski, 267 Ill. 103, 107 N. E. 807 (1915); Scholl v. Muscovitz, 170 Wis. 97, 174 N. E. 463 (1919).

8As illustrative cases, see: Ditchey v. Lee, 167 Ind. 267, 78 N. E. 972 (1906); Low v. Ramsey, 135 Ky. 333, 122 S. W. 167 (1909); Cunningham v. Parker, 146 N. Y. 29, 40 N. E. 635 (1895); Beck v. Bailey, 32 Ohio App. 423, 168 N. E. 220 (1929).
legacy even though he is able to do so. The testator’s intention is then completely thwarted, as both devisee and legatee receive nothing under this provision of the will.

Similarly, making payment of the legacy a condition subsequent to the title of the devisee, so that upon a failure in payment the devisee’s title may be divested, may often prove ineffective to accomplish the testator’s purpose. While such condition subsequent may furnish a strong incentive for performance, if the devisee does refuse, or is unable to pay the legacy, the heirs of the testator may forfeit the devisee’s estate and entitle themselves to the land, in which case neither the devisee or the legatee receive anything under this provision of the will. On the other hand, the heirs may refuse to perfect a forfeiture of the land for a failure on the part of the devisee to pay the legacy, and thus the devisee retains the land without paying the legacy, and the legatee receives nothing, neither of which the testator would have desired. The testator might obviate the possibility of refusal to forfeit upon the part of his heirs by using an executory limitation and thus shift title from the devisee automatically upon his failure to pay the legacy within a prescribed time.

D. Compelling the Grantee to Support the Grantor.

Where it is desired that the grantee of land furnish support to the grantor, this purpose is normally accomplished by conveying the land in fee simple subject to a condition subsequent, or to make the vesting of the title in the grantee subject to a condition precedent, or to accept a personal covenant from the grantee that he will furnish the support, or to

---


As illustrative cases, see: Culy v. Upham, 135 Mich. 131, 97 N. W. 405 (1903); Brennan v. Brennan, 185 Mass. 560, 71 N. E. 80 (1904); Fisher v. Fisher, 80 Neb. 145, 113 N. W. 1005 (1907); In re Sicourmat’s Est., 161 Wash. 406, 296 Pac. 1047 (1931).

As illustrative cases, see: Brand v. Power, 110 Ga. 522, 36 S. E. 53 (1900); O’Neill v. Caples, 257 Ill. 526, 101 N. E. 50 (1913); Kohnke
make the furnishing of support a lien or charge against the land. A grantor in stipulating for support and maintenance for himself usually prefers compliance by the grantee personally. Normally, the grantee is a member of the grantor's immediate family in whom the grantor reposes confidence, and upon whose natural affection he relies for fitting and proper care and support. Further, the grantor in such cases, because of advancing years, wishes, besides providing for his future support, to be relieved from the active management of the conveyed property.

A power in the grantor to forfeit the grantee's estate in the conveyed property upon a failure on the part of the grantee to perform his agreement is most apt to accomplish the grantor's purpose. The fear of losing the land conveyed furnishes the grantee with sufficient incentive to perform properly. Even though a forfeiture be perfected for non-performance this normally works no undue hardship upon the grantee. Though he has complied with the terms of the condition for a considerable period of time, and even through no fault of his own he is prevented from continuing, the loss of the conveyed property usually deprives him of nothing more than his anticipations. More often than not the grantee has paid no consideration for the property other than the agreement to furnish support, or if consideration be paid, it is adjusted accordingly. Though the grantee may lose the value of the support he has contributed, nevertheless he has had the enjoyment of the property while furnishing such support, which enjoyment is normally of greater value than the support furnished.

In making a choice between a condition subsequent and a condition precedent, the former is the better selection under ordinary circumstances. Giving the grantee a present estate in the land relieves the grantor from the responsibility of the management of the property, and enables the grantee to better control and protect it. It provides the grantee with a greater

\(^{12}\) As illustrative cases, see: Van Horne v. Mercer, 29 Ind. App. 277, 64 N. E. 531 (1902); Fitzpatrick v. Fitzpatrick, 91 Mich. 394, 51 N. W. 1058 (1892); Childs v. Rue, 84 Minn. 323, 87 N. W. 918 (1901); Helms v. Helms, 135 N. C. 164, 47 S. E. 415 (1904); Carney v. Carney, 138 Tenn. 87, 200 S. W. 517 (1918); Pownal v. Taylor, 37 Va. 172, 54 Am. Dec. 725 (1839).
incentive for accepting the property and furnishing the support. It seems manifestly unjust to ask a grantee to furnish support over a protracted period of time without the benefit of enjoying the land, and without acquiring a substantial property interest therein.

A lien here is subject to the same objection that beset it as a security device for forcing payment of annuities and legacies. It may prove more cumbersome of enforcement than a condition subsequent, and may be subject to equitable relief to a greater extent than a condition subsequent. It has the further disadvantage that it may not secure personal performance from the grantee, but merely the value of the support.

A personal covenant for support on the part of the grantee may provide insufficient protection for the grantor. While the grantee still owns the land a court may set aside the deed on one or another of various equitable grounds, but if the grantee transfers the land, the grantor is left unprotected if the grantee becomes financially irresponsible. In the exceptional case, where the land through depreciation becomes of less value than the support to be furnished, a covenant may be more effective than a condition subsequent, i.e., a personal judgment for damages may in a given case be more valuable to the grantor than a return of the land.

While a special limitation might be used, it is normally undesirable, especially where the grantee is closely related to the grantor, as the grantor may wish to waive occasional lapses in performance. An executory limitation is subject to the same objection, and with the additional disadvantage, that though it might be a sufficient threat, if a breach occurs title shifts from the grantee thus punishing him but provides no means for enforcing the support unless some arrangement be continued with reference to the executory interests.

**E. Compelling Support of One Other Than a Grantor.**

Where a conveyor wishes a conveyee of land to furnish support to one other than the conveyor, the same means as he might employ for compelling support to himself, the condition
subsequent, the condition precedent, the lien, or the covenant are available to him. Where a grantor wishes to use a conveyance as a means of compelling support to be furnished to one other than himself, the use of a condition subsequent presents some advantages and some disadvantages in addition to those mentioned in the preceding section. The grantor has the additional advantage that if for any reason he desires the support to cease, he may waive any breach, or possibly release the grantee from the condition. To this extent the use of a condition subsequent is a distinct disadvantage to the beneficiary of the support. A disadvantage from the standpoint of the grantor is the fact that, if he should die before performance be completed, his heirs or devisees may refuse to enforce the condition, leaving the beneficiary helpless. A lien might in some cases be more acceptable here.

Where support is sought to be secured through a devise, a condition subsequent has additional disadvantages. The heir may not care to forfeit the devise if support fails, and if he does forfeit this does not carry out the testator's primary intention of securing support. While the devisee may thus be deprived of the property, the beneficiary is helpless to compel support. A condition precedent in these situations may be so objectionable to the devisee, especially if the value of the property be small, and prospects for a continuance of the support over a long period of time are imminent, that he will refuse the devise, thus depriving the beneficiary of the support. Furthermore, the one entitled to the support may refuse to receive it, thus depriving the devisee of his devise through impossibility of performing the condition precedent. Perhaps here in the ordinary case, a lien or charge will be a more substantial means of carrying out the testator's intention, or the testator may prefer to employ an executory limitation shifting title to a number of persons successively, if any one prior in turn fails to furnish the support.


As an illustrative case, see: In re Dempsey, 55 N. Y. S. 427 (1898).

As an illustrative case, see: Outland v. Outland, 118 N. C. 138, 23 S. E. 972 (1896).

As an illustrative case, see: Campau v. Chene, 1 Mich. 400 (1850).
F. Securing Care for a Grave.

Annexing a condition subsequent in a conveyance of property is an effective means of securing care for a grave, but it is subject to the disadvantage that those succeeding to the conveyor's power of termination may be disinclined to act, or the lapse of time may make it difficult to determine who is entitled to act. Since conditions subsequent are not within the rule against perpetuities, their duration may be continued indefinitely. A condition precedent is not a very satisfactory method of securing a succession of acts over a protracted period of time, and might well be so objectionable to a conveyee that he would refuse the conveyance. A condition precedent to be valid must be limited in its duration to the permissible period of the rule against perpetuities. An executory limitation might well divest the first conveyee of his property thus providing an incentive for him to perform, but upon such divestment the necessity for performance will cease, unless provision be made for successive divestments and alternative gifts upon each conveyee's failure to perform. The duration of an executory limitation must be confined to the permissible period of the rule against perpetuities. Today in most American jurisdictions, by statute where necessary, private trusts for the care of graves are exempted from the rule against perpetuities, and the use of a trust, normally with a corporate trustee, is now the generally accepted means for securing the care and maintenance of a grave, some provision being necessary for securing performance of the trust.

II. As Coercive Devices for Controlling Conduct.

A. Restraining Marriage.

As a matter of public policy, the law prescribes certain limits beyond which a conveyor of property may not proceed, through the instrumentality of such property, in restraining the marriage of the conveyee. Thus, a total, or a substantially total, restraint upon marriage is forbidden, while certain partial restraints, or general restraints upon remarriage, are permissible. Within these permissible limits, it is obvious that in subjecting the property conveyed in fee simple to defeasance upon a prohibited marriage, a very effective means of in-
fluencing conveyees in this respect is afforded. Consequently, it is very common to find conveyors availing themselves of such legal mechanisms as special limitations, conditions subsequent, and executory limitations in seeking to restrain marriages deemed objectionable by them. In these cases there is not a great deal of choice between the methods generally employed. There may be one objection to a condition subsequent in that the successor in interest to the conveyor may in a given case refuse to exercise his power of termination. In general, a special limitation if the grantor desire the property to revest in himself or his heirs, or an executory limitation if it is desired that title vest in another, in case the conveyee marry contrary to the terms of the conveyance, are the preferable means.

While a general restraint upon marriage designed to promote celibacy is normally declared void because opposed to public policy, it is permissible to convey property to one, their estate in such property to terminate upon marriage, where the objective sought is to furnish support until marriage, or to prevent the donor's bounty from being enjoyed by some one

As illustrative cases, see: Bennett v. Packer, 70 Conn. 357, 39 Atl. 739 (1895); Brown v. Harmon, 73 Ind. 412 (1881); Staack v. Detterding, 182 Ia. 532, 161 N. W. 44 (1917); Hinkle v. Hinkle, 163 Ky. 286, 181 S. W. 1116 (1916); Winget v. Gay, 325 Mo. 565, 28 S. W. (2d) 999 (1930); Anderson v. Anderson, 119 Neb. 310, 229 N. W. 124 (1910); In re Kidd's Est., 293 Pa. 21, 141 Atl. 644 (1928); Squier v. Harvey, 16 R. I. 226, 14 Atl. 862 (1888); Haring v. Shelton, 103 Tex. 10, 122 S. W. 13 (1909).

As illustrative cases, see: Glass v. Johnson, 297 Ill. 149, 130 N. E. 473 (1921); Crawford v. Thompson, 91 Ind. 266, 46 Am. Rep. 598 (1883); Randall v. Marble, 69 Mo. 310, 31 Am. Rep. 281 (1879); Turner v. Evane, 134 Md. 239, 16 Atl. 617 (1919); Otis v. Prince, 76 Mass. 581 (1858); Hogan v. Curtin, 88 N. Y. 162, 42 Am. Rep. 244 (1882); Card v. Mason, 169 N. C. 507, 86 S. E. 302 (1915).


As illustrative cases where an executory limitation has been annexed to a determinable fee, see: Shaw v. Shaw, 115 Ia. 133, 88 N. W. 337 (1901); Hinkle v. Hinkle, 163 Ky. 286, 181 S. W. 1116 (1916); Pringle v. Dunkley, 22 Miss. 16 (1850); Winget v. Gay, 325 Mo. 368, 28 S. W. (2d) 999 (1930); Smith v. Creech, 136 N. C. 107, 119 S. E. 3 (1923).
other than the donee. Due to the terminology normally employed in their creation, a condition subsequent seems more readily designed for expressing a purpose of restraining marriage, while a special limitation seems better adapted for expressing an intention to provide a maintenance until marriage. Consequently, it has been frequently asserted that if a provision in a conveyance which unreasonably restrains marriage is construed as a condition subsequent, it is void, while if it is construed as a special limitation, it is valid, and that the courts will attempt so to construe such provisions as to validate them whenever possible. Such a position seems untenable, when it is considered that a special limitation may be employed just as readily for the purpose of discouraging marriage as a condition subsequent. It is perhaps nearer correct to consider that the validity of such provisions is determined by their purpose, rather than by their nature, and that in the absence of any evidence as to their purpose, it will be presumed that a special limitation was employed primarily for furnishing maintenance until marriage, while a condition subsequent was employed primarily to restrain marriage.

In drafting a conveyance transferring property to one until marriage, with the intention of furnishing that person with maintenance during the interim while they remain single, and with no intention of restraining marriage, a special limitation may be safer to employ than a condition subsequent, but the purpose of the conveyance should not be left to a court’s conclusion drawn from the technical nature of the defeasing provision, but such purpose should be set forth clearly and unmistakingly in terminology employed primarily for that purpose. Even though the major purpose of a defeasing provision be to restrain marriage, this purpose may be neatly camouflaged under an expressed intention of furnishing maintenance, and an otherwise invalid purpose thus be effectuated.

It is not uncommon for a testator to desire to reduce the amount of property devised or bequeathed to his wife, if she should remarry. He may be prompted in this by a desire to restrain her remarriage, or by a feeling that her newly acquired husband should be primarily responsible for her support. The law permits a husband to impose such an impediment to his
wife's remarriage regardless of his motive, and to accomplish this purpose an executory limitation is regularly employed in the drafting of the will.

B. **Inducing the Disruption of the Familial Relation.**

Public policy generally opposes the inciting of a spouse to secure a divorce, or to live separate from the other spouse, by offering property as an inducement, but where such inducement is offered, a condition precedent requiring the conveyee to secure a divorce or a separation before title shall vest is the means generally employed. A condition precedent is ordinarily the best available means in these situations, since the conveyor does not desire the title to vest until the divorce or separation has taken place. However, it has some disadvantages unless extreme care is exercised in setting forth the terms of the condition. Where property is conveyed subject to a condition precedent, the title vests as soon as the terms of the condition are satisfied. Where a divorce is demanded by the condition, it is easy to determine when the condition is satisfied. Where a separation is all that is required it is more difficult to determine when title should vest, unless the terms of the condition are explicit in this respect. A more serious drawback in the use of a condition precedent is that once title vests it can not later be divested even though the prohibited acts later occur. To be completely efficacious some provision should be made for divesting title after it has once vested, if the parties should again remarry, or live together, as the case may be. Where it is desired to continue a separation already begun, a condition subsequent may be employed.

A distinction must be drawn between those conditions annexed to a conveyance of property, the primary purpose of which is to induce a divorce or separation, and which are generally recognized as void, and those provisions the primary purpose of which is not to induce a divorce or separation, but to provide a maintenance for a divorced spouse, or to provide a
gift for one if they are enjoying a single status at the death of the conveyor, and which are generally recognized as valid. Considerable care must be exercised in drafting conditions in these cases, so that the valid purpose will be clearly and explicitly set forth, and not easily confused with an intention to induce a divorce or separation.

C. Prohibiting Will Contests.

Here, the testator invariably desires that the title to the property shall pass to the devisees and legatees at his death, to be divested as to the shares of any who may contest the will. Consequently, a condition subsequent\(^{21}\) or an executory limitation\(^{22}\) is normally employed depending upon whether the testator desires his heirs, or others, to receive the forfeited estate. It is preferable, in any case, to employ an executory limitation and thus make an express gift over. In the absence of an express gift over, the law is not clear whether the testator's heirs, or the residuary devisees and legatees, in case the will contains a residuary clause, are the ones entitled to the forfeited property. If the heirs are found to be entitled, the law is not clear whether their interest is that of a possibility of reverter or a power of termination which requires an act of forfeiture.

D. Influencing Moral Conduct.

One making a conveyance of property may desire to qualify the conveyance in such manner as to influence the conveyee in his moral conduct. If such a conveyee is already possessed of exemplary habits, a condition subsequent,\(^{23}\) or an executory limitation\(^{24}\) annexed to the conveyance may be impressive in

\(^{21}\) As illustrative cases, see: Harber v. Harber, 158 Ga. 274, 123 S. E. 114 (1924); Ayers' Adm'r. v. Ayers, 212 Ky. 400, 279 S. W. 647 (1926); Williams v. Williams, 83 Tenn. 433 (1885); Dutterer v. Logan, 103 W. Va. 216, 137 S. E. 1 (1927).

\(^{22}\) As illustrative cases, see: Donegan v. Wade, 70 Ala. 501 (1881); Moorman v. Louisville Trust Co., 181 Ky. 30, 203 S. W. 856 (1918); Chambers v. Chambers, 322 Mo. 1086, 18 S. W. (2d) 30 (1929); Rouse v. Branch, 91 S. C. 111, 74 S. E. 133 (1912); Tate v. Camp, 147 Tenn. 137, 245 S. W. 339 (1922); Massie v. Massie, 54 Tex. Civ. App. 617, 118 S. W. 219 (1909); Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S. E. 466 (1897).

\(^{23}\) As illustrative cases, see: Sherrard v. Sloan, 117 Neb. 776, 223 N. W. 17 (1929); Stewart v. Workman, 85 W. Va. 695, 102 S. E. 474 (1920).

\(^{24}\) As an illustrative case, see: Forsyth v. Forsyth, 46 N. J. E. 400, 19 Atl. 119 (1890).
influencing him to continue. If it is desired to improve his moral conduct, it is usually preferable to withhold the vesting of title to the property until reformation is completed, and a condition precedent is normally employed. If a condition precedent is employed it should do more than merely require a reformation. It should require leading an exemplary life for a time sufficient to reasonably insure permanence, or a provision should be incorporated for forfeiting title upon a recurrence of the prohibited delinquencies.

E. Insuring Competency in Property Management.

A conveyor of property often desires that the conveyance shall not become completely effective until such time as the conveyee shall attain such matured age as will offer some assurance of competent management of the property. The title to the conveyed property may be made contingent, by means of a condition precedent, upon the conveyee attaining a prescribed age, or title may be made to pass when the conveyance becomes effective with control and possession withheld until a designated age is attained. The choice here centers about the question whether the conveyee shall become the owner of the property only if he attains a given age, or whether he shall become the owner when the conveyance becomes effective, with control and possession postponed until a given age, usually maturity. The determining factor in influencing a choice is the disposition to be made of the property upon the premature death of the conveyee. Extreme caution need be exercised that the conveyor

---

26 As illustrative cases, see: Holmes v. Conn. Trust and Safe Deposit Co., 92 Conn. 507, 103 Atl. 640 (1918); Cassem v. Kennedy, 147 Ill. 660, 35 N. E. 738 (1893); Markham v. Hufford, 123 Mich. 505, 52 N. W. 222 (1900); Kerens v. St. Louis Union Trust Co., 283 Mo. 601, 233 S. W. 645 (1920); Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422 (1890); Campbell v. Clough, 71 N. E. 149, 51 Atl. 668 (1901); In re Steven's Est., 164 Pa. 209, 30 Atl. 243 (1890); Starkes v. Conde, 100 Wis. 633, 76 N. W. 600 (1898).

27 As illustrative cases, see: Hickey v. Costello, 80 Colo. 461, 251 Pac. 595 (1927); Ross v. Ware's Admr., 131 Ky. 528, 116 S. W. 241 (1909); Webb v. Webb, 92 Md. 101, 48 Atl. 95 (1900); In re Grothe's Est., 237 Pa. 262, 85 Atl. 141 (1912).

28 As illustrative cases, see: Brizendine v. American Trust and Savings Bank, 211 Ala. 694, 101 So. 613 (1924); State v. Main, 87 Conn. 175, 87 Atl. 38 (1913); Silvers v. Canary, 114 Ind. 123, 16 N. E. 166 (1888); Hall v. Ayers' Guardian, 105 S. W. 911 (1907); In re Vanderwarker's Est., 81 Minn. 197, 83 N. W. 533 (1900); Cammann v. Bailey, 210 N. Y. 19, 103 N. E. 824 (1913); In re O'Brien's Will, 173 Wis. 41, 180 N. W. 141 (1920).
make a definite choice which is incorporated into the conveying instrument so clearly that doubt will not arise. If it is desired that title be postponed until the specified age is attained, provision should be made for an alternative disposition upon the premature death of the conveyee, and the rule against perpetuities must be satisfied.

F. Miscellaneous—Inculcating Thrift—Encouraging Acceptance or Renunciation of a Given Religion—Selecting a Residence—Adopting a Name—Learning a Trade—Etc.

Conveyances of property are often qualified for the purpose of influencing the conveyee in various ways, such as accumulating a designated amount of property by his own efforts;28 accepting or renouncing a given religion;29 living with a designated person,30 or in a given locality;31 changing his name;32 learning a trade;33 etc. Normally, in this class of cases it is desired that the title to the property shall not vest until the purposes of the conveyance are accomplished, and a condition precedent is employed. Such condition should be broad enough in its scope as to clearly indicate the desires of the conveyor, and provision should be made for an alternative disposition of the property if the condition be not fulfilled. The rule against perpetuities must be satisfied.

28 As illustrative cases, see: Horrocks v. Basham, 139 Ark. 216, 213 S. W. 372 (1919); In re Scott's Will, 204 N. Y. S. 473 (1924); Reynolds v. Safe Deposit and Trust Co., 201 N. C. 267, 159 N. E. 416 (1931).

29 As illustrative cases, see: Kenyon v. See, 94 N. Y. 563 (1884); In re Devlin's Trusts, 284 Pa. 11, 130 Atl. 238 (1928); Magee v. O'Neil, 19 S. C. 170, 45 Am. Rep. 765 (1893); Maddox v. Maddox, 53 Va. 804 (1854).

30 As illustrative cases, see: Johnson v. Warren, 74 Mich. 491, 42 N. W. 74 (1889); Gilliland v. Bredin, 63 Pa. St. 398 (1869); Perry v. Brown, 34 R. I. 203, 53 Atl. 8 (1912); In re Hill, 215 Wis. 72, 253 N. W. 787 (1934).

31 As illustrative cases, see: Grindem v. Grindem, 34 Ia. 295, 55 N. W. 505 (1893); Jenkins v. Horwitz, 92 Md. 34, 47 Atl. 1022 (1900); Pitchford v. Limer, 139 N. C. 13, 51 S. E. 789 (1905).

32 As illustrative cases, see: Holmes v. Conn. Trust and Safe Dep. Co., 92 Conn. 507, 103 Atl. 640 (1918); Smith v. Smith, 64 Neb. 563, 90 N. W. 560 (1902); Merrill v. Wisconsin Female College, 74 Wis. 415, 43 N. W. 104 (1889).

33 As illustrative cases, see: Seeley v. Hincks, 65 Conn. 1, 31 Atl. 533 (1894); Colby v. Dean, 70 N. H. 551, 49 Atl. 574 (1901); Webster v. Morris, 66 Wis. 366, 28 N. W. 353 (1886).
III. AS DEVICES FOR REGULATING THE USE OF CONVEYED LAND.

A. REQUIRING A DESIGNATED USER.

Where a grantor of land desires that the conveyed land shall be used for some particular purpose, such as railroad, municipal, canal or irrigation, street or highway, park, burial, educational, religious, charitable or business, a condition subsequent, or a special limitation annexed to the fee simple are the devices regularly employed, and these are the most effective means of securing compliance, the only choice between the two lying between the automatic termination of the special limitation, as opposed to completing a forfeiture in the case of a condition subsequent. While a condition precedent might be employed here, it is subject to certain serious disadvantages. The grantee may refuse to accept such fearing that an inability to complete performance may cost him the performance already completed. He would not be inclined to accept land and place improvements upon it unless given a present ownership. A serious object from the standpoint of the conveyor is that after a sufficient use is once commenced, the condition is satisfied, ownership vests, and a later compliance cannot be enforced. Further, a condition precedent must satisfy the rule against perpetuities. If a gift over, rather than a return of the land, is desired in case the conveyee fails to conform, an executory limitation is employed.

442 KENTUCKY LAW JOURNAL

As illustrative cases, see: Pettit v. Stuttgart Normal Inst., 67 Ark. 430, 55 S. W. 485 (1900); Ocean Beach Realty Co. v. City of Miami Beach, 106 Fla. 392, 143 So. 301 (1932); Griffith v. Owensboro & N. R. Co., 16 Ky. L. Rep. 384, 30 S. W. 206 (1895); Trustees of the General Assembly of the Presbyterian Church v. Alexander, — Ky. —, 46 S. W. 503 (1898); Fayette Co. Bd. of Educ. v. Bryan, 263 Ky. 61, 61 S. W. (2d) 990 (1936); Sargent v. Trustees of Christian Church of Little Cypress, 252 Ky. 57, 66 S. W. (2d) 5 (1933); Clarke v. Inh. of Brookfield, 81 Mo. 503, 51 Am. Rep. 243 (1884); Yazoo & M. V. R. Co. v. Lakeview Traction Co., 100 Miss. 281, 56 So. 393 (1911); Spies v. Avondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464 (1906).

As illustrative cases, see: Carr v. Georgia R. R. Co., 74 Ga. 73 (1884); Kennedy v. Kennedy, 183 Ga. 432, 188 So. 722 (1936); Board of Education v. Littrell, 173 Ky. 78, 190 S. W. 465 (1917); Duncan v. Webster Co. Bd. of Educ., 205 Ky. 86, 265 S. W. 489 (1924); Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930); Sperry's Lessee v. Pond, 5 Ohio 387, 24 Am. Dec. 296 (1832); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S. W. 36 (1925).

As an illustrative case, see: Maguire v. City of Macomb, 293 Ill. 441, 127 N. E. 682 (1920).

As illustrative cases, see: Farnsworth v. Perry, 83 Me. 447, 22 Atl. 373 (1891); In re Jacobs' Will, 280 N. Y. S. 1 (1935); Blue v. City of Wilmington, 186 N. C. 321, 119 S. E. 741 (1923).
A disadvantage is that the duration of the executory limitation must satisfy the permissible period of the rule against perpetuities. While a covenant may be employed in these cases, it may often prove insufficient to insure compliance because of the difficulty in showing damages for a breach or sufficient reason for specific performance. In the case of a conveyance in trust for charitable purposes, unless a condition subsequent or a special limitation is also employed, a grantor may be without remedy to compel the carrying out of the trust purposes, except insofar as he may be a beneficiary.

B. Prohibiting a Particular User.

Where a conveyor of land wishes to prevent certain uses of the land conveyed for some reason personal to himself, a condition subsequent is normally the more effective device. However, where it is desired to impose restraints upon the use of conveyed land in order to maintain the eligible character of adjoining property, a restrictive covenant, or restriction, is often more suitable than a condition subsequent. The remedy of a restrictive covenant, injunction, is often more effective for securing performance than is a threat of forfeiture. A restrictive covenant may be made available to the adjoining land owners, in cases where the parties are all purchasers from the same grantor, such owners often being the ones most concerned in having the covenants performed. A condition subsequent may be taken advantage of only by the creator thereof, or his successor in interest. Consequently, unless the one entitled to forfeit is also an owner of adjoining property he may not be concerned with a failure to comply. Conditions subsequent may be employed to prevent the breach of building restrictions, and there seems no good reason why a provision may not be incorporated into a deed so as


39As illustrative cases, see: Wakefield v. Van Tassel, 202 Ill. 41, 66 N. E. 330 (1903); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1887); Hatcher v. Andrews, 65 Ky. 561 (1869); Sharpe v. N. C. R. Co., 10 N. C. 350, 129 S. E. 826 (1925); Jeffery v. Graham, 61 Tex. 481 (1884).
to serve both as a restrictive covenant for the benefit of such adjoining land owners as may be entitled, and also as a condition subsequent for the benefit of the grantor.

C. Prescribing Designated Acts with Reference to Conveyed Land.

Timber may be conveyed, or excepted from a conveyance, with a provision in the deed that the timber is to be cut and removed from the land within a prescribed period of time. The time specified for removal may be incorporated into the deed in such manner as to operate somewhat in the nature of a condition subsequent,⁴⁰ a condition precedent,⁴¹ or a covenant.⁴² The condition subsequent is normally the best of these three methods. A covenant may not be sufficient protection for the owner of the land, and applying the general principles of the law of covenants in strictness might produce some ludicrous results. The vast majority of the timber cases are glaring examples of a failure on the part of the parties to the conveyance to select a particular legal means for securing the removal of the trees from the land within a prescribed period of time, despite the fact that each available legal device produces its own legal results.

Conditions subsequent are very effective means for compelling a grantee to perform certain acts with reference to the conveyed land, such as building a fence, erecting a dwelling house thereon, or digging for minerals and paying royalties.


IV. As Devices for Directing the Course of Property Ownership.

A. Restraining Alienation.

Since earliest times there has been exhibited an urgent desire on the part of land owners to continue the ownership of their land in their family. By restraining inter vivos alienation and testate succession, such wish might, in a large measure, be gratified. However, public policy is opposed to such restraints, and the law greatly circumscribes the extent to which the alienation of a fee simple estate in land may be restricted. In the main all attempts to impose a perpetual and absolute restraint upon the transfer or incumbrance of a fee simple estate in either real or personal property is void and unenforceable. The same is largely true even though the restraint be qualified as to time or possible aliens, though a few cases have recognized such restraints if reasonable. Wherever restraints are thus permitted the methods employed are disabling restraints, conditions subsequent and executory limitations. The former will more often than not prove ineffectual because of lack of enforcement. The choice between a condition subsequent and an executory limitation will depend upon whom it is desired shall benefit from a breach. There is some slight authority that certain restraints will be upheld when in the form of executory limitations, but not otherwise.

B. Providing Substitutionary Gifts.

By providing in a conveyance for a substituted transferee if the first transferee fails to leave descendants to succeed to the ownership of the property, a transferor is able, to some extent, to continue the ownership of the property in his own family, if he so desires. Providing a gift over if the transferee should die without surviving issue is also a more or less effective means for hampering inter vivos alienation as prospective purchasers or mortgagees will be willing normally to take no more than a gambler's chance on a title that might be defeated at any moment by events entirely out of their control, and usually the terms under which they would be willing to proceed will prove unacceptable to the owner. Providing such substitutionary gifts is the major role played in property law by executory limitations.
C. Thwarting Creditors.

While attempts have often been made to employ conditions subsequent and executory limitations annexed to fee simple estates in real and personal property for the purpose of thwarting a conveyee’s creditors, by preventing them from reaching the conveyed property, such attempts usually arouse strong opposition in the law, and in most American jurisdictions they are of little avail for such purposes. In most jurisdictions, the use of a life estate is more effective here, as the law is more generous in permitting a life estate to be insulated against creditors’ claims than it is a fee simple. A spendthrift trust may prove a suitable means for this purpose.