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TRUSTS-LANGUAGE OF CONDITION IN INTER VIVOS CONVEYANCE CONSTRUED AS A TRUST

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TRUSTS—LANGUAGE OF CONDITION IN INTER VIVOS CONVEYANCE CONSTRUED AS A TRUST—Grantor conveyed certain real property to plaintiff by deed "subject to the following conditions: That upon my death, the Grantee must pay to my Grand Children out of my estate, the sums of money indicated after each name," the amount to be paid totaling $5,000. By this deed grantor transferred practically all of the property of which she was possessed, so that upon her death she left an estate of but $100. Without having paid any part of the amount stipulated in the deed, grantee commenced suit to quiet title as against the named grandchildren, who in turn counterclaimed. In awarding judgment for defendants, the court construed the transaction as a contract for the benefit of third parties—the named grandchildren. On appeal, *held*, the transaction should be construed as a trust for the benefit of the named grandchildren. The "estate" out of which the grantee was to pay the money could mean only the property conveyed, and the transaction therefore satisfied the essential elements of a trust. *Sutherland v. Pierner*, 249 Wis. 462, 24 N.W. (2d) 883 (1946).

It is well established that a transfer of property "on condition" does not necessarily create a condition.[1] The proper construction depends upon the intention of the transferor, analysis of the entire clause or instrument, and the most effective method of carrying out the purpose of the transaction.[2] Language of condition may be construed, depending upon the individual case, as a trust, an equitable charge upon the land, a third party beneficiary contract, a covenant, a condition precedent, or a condition subsequent. Since the law is favorable to the vesting of estates, and adverse to their destruction, a stipulation in a conveyance or a devise will not be construed as a condition if another construction is possible.[3] Where the transferor has manifested an intention to benefit a third person, a condition is not a very effective method of accomplishing this purpose, since only the transferor or his heirs can take advantage of a condition through the remedy of forfeiture for breach of condition.[4] Where there are express words of forfeiture or reverter for breach of condition, however, it is difficult to construe the transfer as other than upon condition.[5] In the absence of such words, in a case

[1] Stanley v. Colt, 5 Wall. (72 U.S.) 119 (1866); MacKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 652, 61 A. 1027 (1905), 3 L.R.A. (NS) 227 (1906); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 282, note 2 (1915); 1 SCOTT, TRUSTS, § 11 (1939).

[2] MacKenzie v. Trustees of Presbytery of Jersey City, ibid; Stanley v. Colt, 5 Wall. (72 U.S.) 119 (1866); 1 SCOTT, TRUSTS, § 11 (1939); TRUSTS RESTATEMENT, §§ 10, 11 (1935).

[3] Shields v. Harris, 190 N.C. 520, 130 S.E. 189 (1925); Taft v. Morse, 45 Mass. (4 Metc.) 523 (1842); Simms v. Folts Mission Institute, 154 Misc. 384, 276 N.Y.S. 145 (1934); 1 TIFFANY, REAL PROPERTY, § 192 (1939).

[4] This is especially true where a devise is made by a testator to his heir on condition that the heir pay a third person, since if the devise is construed as a true condition, only the heir can take advantage of the breach and the party intended to be benefited is remediless. See TRUSTS RESTATEMENT, § 11, comment d (1935); 1 SCOTT, TRUSTS, § 11 (1939).

[5] Plummer v. Worthington, 321 Ill. 450, 152 N.E. 133 (1926), conveyance to *A* provided *A* pay specified sums, and if not paid by *A*, "then everything herein shall be null and void." Northwestern University v. Wesley Memorial Hospital, 290 Ill. 205, 125 N.E. 13 (1919), conveyance upon express condition and "on failure . . .

where the grantee is required to pay a certain sum of money to a third party, the transaction is usually held to create either a trust or an equitable charge. If it can fairly be said that the intention of the transferor is to impose a duty upon the transferee to deal with the particular property transferred for the benefit of a third person, a trust will result. Thus, where the transfer is made on the condition that the transferee pay a certain sum to a third person "out of" the property or its proceeds, as in the principal case, or "from" the property or its proceeds, the transferor manifests the intention to impose a duty upon the transferee to deal with the property for the benefit of the third person.[6] On the other hand, if property is transferred "upon condition" that the transferee pay a certain sum to a third person; or "subject to the payment of" a certain sum; or with the transferee "paying" the sum to a third person, and there is no indication that the sum is to be paid from the property, ordinarily an equitable charge is created.[7] It has also been held that a third party beneficiary contract may be created by such words concurrently with an equitable charge.[8] If the transferor's intention appears to be that the transferee take the property free of any encumbrance, and that the third person is to have only a personal claim against the transferee, a contract for the benefit of a third person is created.[9] A similar problem of construction is presented where property is transferred "on condition" that it be put to a certain use, or dealt with in a certain way, or where the conveyance states the purpose for which it is made. The "condition" may be construed as a covenant if it is intended that the transferee take both the title and the beneficial interest in the property. On the other hand, where the transfer is to a charitable or religious institution, it is frequently held that the property is taken in trust rather than on condition or with a covenant.[10]

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to carry out these conditions the title shall revert. . . ." In both cases the grant was held to be on condition subsequent.

[6] In Trustees of Iowa College v. Bailie, 236 Iowa 235, 17 N.W. (2d) 143 (1945), conveyance was made under a written agreement providing that the purchase price was $330,000, to be paid out of the income from the property by paying grantors $1,000 per month for life and specified sums to others if there was sufficient income, and any further income to be used in designated ways. Held, a trust, even though grantors retained a vendors' lien as security for the payments. And see TRUSTS RESTATEMENT, § 10, comment f (1935).

In some of the older cases, however, where a devise of lands was made, with devisee paying "out of the estate," or "yielding and paying out of" the land, it was held the testator's intention was to create a charge on the estate and not a trust. Hoover v. Hoover, 5 Pa. St. 351 (1847); Taft v. Morse, 45 Mass. (4 Metc.) 523 (1842).

[7] The most frequently occurring case is a devise of property "subject to the payment of" debts or legacies, and the cases generally hold an equitable charge is created. In re Hammond's Estate, 197 Pa. St. 119, 46 A. 935 (1900); Pendleton v. Meade, 163 Va. 727, 177 S.E. 198 (1934). Cases are collected in 62 A.L.R. 589 (1929).

[8] Logan v. Glass, 136 Pa. Super. 221, 7 A. (2d) 116 (1939), where conveyance was made subject to payment of a sum to *L* on grantor's death, and grantor's attempt to extinguish this incumbrance by another deed was held ineffective because *L*'s rights vested immediately on acceptance of the deed.

[9] Cable's Appeal, 91 Pa. St. 327 (1879).

[10] MacKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 652, 61 A. 1027 (1905), 3 L.R.A. (n.s.) 227 (1906) (conveyance to church on condition that