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Condition Subsequent: Waiver by Inaction

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transferee liability. In a case involving a joint tenancy between husband and wife[18] it was held that such an estate created while the transferor was solvent was valid. Upholding the validity of a joint tenancy the court went on to hold that the right of survivorship passed wholly to the wife and she now held the entirety. Nothing remained to which government tax claims could attach.

Analysis of the above mentioned decisions leaves one substantial inference. Courts will avoid deciding a case on fraudulent conveyance law if there exist sufficient facts and circumstances at make determination of a transferee status immaterial. Motive, though often considered, is not determinate of liability.[19] Solvency of the transferor will be among the first items of consideration. Then it is highly probable in view of the difficulty with the pertinent section of the IRC that state fraudulent conveyance law will eventually determine liability. It is submitted that while the IRC sets out the basic outline relating to transfers of property, the substantive law that actually controls is, in most cases, state law. Thus any transferee to be certain of his obligations should not only check the IRC but also his own state law.

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CONDITION SUBSEQUENT: WAIVER BY INACTION

Conditions subsequent in a grant are not favored in law and no provision will be interpreted to create such a condition if the language will bear any other reasonable construction.[1] When the courts find that there is a condition present, a waiver is readily implied by all the courts from any active conduct on the part of the grantor calculated to induce the grantee to believe that a forfeiture will not be insisted upon.[2] However, the cases are in conflict when the grantor merely stands by and silently acquiesces in the breach or delays in enforcing the condition after the breach.

Several cases express the view that mere silent acquiescence in the breach cannot preclude the grantor from insisting upon a forfeiture.[3] In

18. Irvine v. Helvering, 99 F.2d 265 (8th Cir. 1938).
19. United States v. Cummins Distilleries Corporation, 166 F.2d 17 (6th Cir. 1948); Harwood v. Eaton, 68 F.2d 12 (5th Cir. 1933).

1. J. M. Carey & Brother v. City of Casper, 66 Wyo. 437, 213 P.2d 263 (1950); Godding v. Hall, 56 Colo. 579, 140 Pac. 165 (1914); Chute v. Washburn, 44 Minn. 312, 46 N.W. 555 (1890); Jeffries v. State, 216 Ark. 657, 226 S.W.2d 810 (1950).
2. Nye-Scheinder-Fowler Grain Co. v. Hopkins, 99 Neb. 244, 155 N.W. 1097 (1916), where grantor received benefits with knowledge of the breach; M.R.M. Realty Co. v. Title Guaranty & Turst Co., 270 N.Y. 120, 200 N.E. 666 (1936), where grantor's actions rendered performance of the condition impossible.
3. Ralston v. Hatfield, 81 Ind.App. 641, 143 N.E. 887 (1924); Trustees of Union College v. City of New York, 173 N.Y. 38, 65 N.E. 853 (1903); Gray v. Blanchard, 25 Mass. (8 Pick) 284 (1829); Howe v. Lowell, 171 Mass. 575, 51 N.E. 536 (1894); Hannah v. Culpepper, 213 Ala. 319, 104 So. 751 (1925).

one case[4] the grantor conveyed land to the city with a provision that the portion of the premises not used for a highway would be improved, dedicated and forever used by the city as a common park or boulevard. The deed contained a condition that if the land were used for any other purpose the grantor or his heirs would have a right to re-enter. The city erected a pumping station on the land not used for the highway. The grantor did nothing actively to induce the grantee to breach the condition, but after the station was constructed, he went so far as to deed the adjoining land to the grantee so that he could pump the water from the station on the land. The court said that even though the grantor stood by without making any objection to the breach, his indulgence would not waive the condition, in spite of the fact that the city expended a large sum on construction and improvements. The court reasoned that before the condition can be waived there must be a showing of some affirmative act on the part of the grantor that would induce the grantee to breach the condition.

A few cases take the view that silent acquiescence will constitute a waiver of the breach of the condition when continued for a time longer than the period of the statute of limitations,[5] which was considered a proper measure of a reasonable time in which to assert the breach. Other courts do not follow this doctrine, except for a make-weight in their decisions, because it becomes too inflexible. These cases hold that the grantor will waive his right to declare a forfeiture if he waits for an unreasonable time, but such time may be more or less than that allowed by the local statute of limitations for the recovery of real property.

What is considered to be an unreasonable time varies greatly with the nature of the property in issue. A period of two years was considered an unreasonable time in one type of case even though the grantee did not change his position.[6] Yet in another case[7] a grantor stood by for a period of 15 years without making any objection to the failure of the grantee to comply with the condition and the court held this to be a reasonable time. One court went so far as to say that the failure of the grantor to assert a forfeiture during his lifetime would not necessarily waive the right.[8]

The generally accepted rule that mere silent acquiescence will not waive a condition subsequent is apparently to be accepted with certain reservations. Other than the passage of an unreasonable time, many courts have held that the grantor will waive his right to re-enter if he stands by and watches the grantee spend time and money in reliance on his indul-

4. Howe v. Lowell, supra note 3.
5. Jefferies v. State, 215 Ark. 657, 226 S.W.2d 810 (1950); Bredell v. Kerr, 242 Mo. 317, 147 S.W. 105 (1912); Hannah v. Culpepper, 213 Ala. 319, 104 So. 751 (1925).
6. Kampman v. Kampman, 98 Ark. 328, 135 S.W. 905 (1911).
7. Union College v. City of New York, 173 N.Y. 38, 65 N.E. 853 (1903).
8. Wilkes v. Groover, 138 Ga. 407, 75 S.E. 353 (1912).

gence.[9] This result was reached in the case of *Wisdom v. Minchen*.[10] In this case the lesse breached a condition in his oil lease and the lessor, knowing of the breach, stood by and let the lessee spend additional money in their drilling operations. The court held that if a grantor is entitled to re-enter on breach of a condition he must act promptly. If he fails to re-enter he cannot be permitted to reap the benefit of money subsequently expended or labor bestowed by the lessee in reliance upon the belief that the lessor would not declare a forfeiture of the lease.

It has also become the established law in some states that if circumstances affecting the restrictive use of land have so changed to defeat the purpose of the condition or covenant the courts will not allow a forfeiture for the breach even though the grantor's conduct did not in any way waive the condition.[11] This situation has arisen in cases where the grantor inserts a condition in a deed that liquor shall not be sold on the premises and subsequently the area became frequented with bars and liquor stores, circumventing the grantor's attempt to restrict the liquor traffic in that area.[12]

Another exception to the general doctrine was presented in the case of *Gasaway v. City of Lafayette*.[13] In this case land was granted to the city upon condition that the ground remain open as a public market space. After several years of silent acquiescence while the city allowed a business district to be constructed on this land, the heirs of the grantor brought an action to recover possession of the land for breach of the condition. The court held that such a long delay in bringing suit caused public as well as private rights to intervene to such an extent that it would be inequitable to enforce the forfeiture because it would bring about great hardships and litigation.

The courts also will not allow a forfeiture where compliance with the condition would be illegal even though the grantor does not waive the breach of the condition.[14] This situation has arisen in the case of *Burdell v. Grande*[15] where the grantor inserted a condition in the deed that he would have a right to re-enter if liquor were ever sold on the premises. The effect of the condition was to give the grantor a monopoly on the sale of liquor within the town. The trial judge said that to allow the grantor to create such a situation would be against public policy and the

9. Hedick v. Lone Star Steel Company, 277 S.W.2d 925 (1955); Wisdom v. Minchen, 154 S.W.2d 330 (1941); Benavides v. Hunt, 79 Tex. 383, 15 S.W. 396 (1891); Barrie v. Smith, 47 Mich. 129, 10 N.W. 168 (1881); Bredell v. Kerr, 242 Mo. 317, 147 S.W. 105 (1912).

10. Wisdom v. Minchen, 154 S.W.2d 330 (1941).

11. Wedum-Aldahl Co. v. Miller, 18 Cal.App.2d 745, 64 P.2d 762 (1937); Robinson v. Cannon, 346 Mo. 1126, 145 S.W.2d 146 (1940).

12. Wedum-Aldahl Co. v. Miller, supra note 11.

13. Gasaway v. City of Lafayette, 61 Ind.App. 178, 109 N.S. 789 (1915).

14. Wilshire Oil Co. v. Star Petroleum Co., 93 Cal.App. 437, 269 Pac. 722 (1928); Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 42 N.W. 532 (1889); Burdell v. Grandi, 152 Cal. 376, 92 Pac. 1022 (1907).

15. Burdell v. Grandi, supra note 14.

courts could not allow a forfeiture of the deed because to do so would be to allow the grantor to use the courts to sustain an illegal act.

A comparison of the more recent decisions indicates that the trend of opinion is toward the view that mere inaction by the grantor will waive a condition subsequent when the grantee has changed his position in reliance on the grantor's silence. This is as it should be. The grantor has a duty to speak when he has knowledge that the grantee has breached the condition.[16]

No definite rule as to passage of time and type of change in conditions should be laid down as to whether silence alone by the grantor will waive a condition because it becomes too inflexible. The only rule that should be followed is that the condition will be waived if it is inequitable to enforce a forfeiture. It is a rare case in which a failure to exercise the right of forfeiture would not be accompanied by a change in condition or action on the part of the grantee.

The cases herein discussed clearly indicate judicial recognition of equities created in the grantee because of changed factual conditions or expenditures by the grantee which were deemed sufficient to cause the court to deny enforcement of the grantor's reserved condition although he remained silent. Only when such equities in the grantee are absent can reference be had to a theory dictating that silence by the grantor will not waive a condition subsequent.

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THE APPLICATION OF THE WYOMING REAL ESTATE LAWS TO AN AUCTIONEER

The question of whether an auctioneer selling realty at auction should be required to have a real estate license has been a proverbial football among individuals engaged in the two respective businesses. In general, the auctioneers take the position that they are not required by law to hold a real estate license, while the licensed realtors contend that the auctioneer should be licensed, on the theory that the auctioneers are dealing with realty in the same capacity as does any real estate broker. Auctioneers enjoy a competitive advantage because the auctioneer's fee[1] is much less than the real estate broker's fee.[2] Most real estate associations have set up standards to guide and regulate their fees, but there are no such standards applying to auctioneers, hence each individual auctioneer is free to charge whatever he desires. The problem is that of an unlicensed and unregulated business existing alongside a well regulated business.

16. Migliaccio v. Davis, 120 Utah 1, 232 P.2d 195 (1951); Johnson v. Neil, 123 Colo. 337, 229 P.2d 939 (1951).

1. Auctioneers' usual fee is 2% of the gross sale on general sales and some sell real estate for 1%.
2. Real estate brokers usually charge 5% up to a certain sum, and then 3% thereafter. Of course, this may differ with localities.