CONVEYANCE TO MUNICIPALITY FOR PARK PURPOSES HELD FEE SIMPLE ABSOLUTE

PCK Properties, Inc., et al. v. City of Cuyahoga Falls
112 Ohio App. 492 (1960)

The heirs of the grantor of a tract of land brought an action for a judgment declaring them owners in fee simple of land which had been conveyed to the defendant city, and subsequently conveyed by the city to plaintiff, PCK Properties. The pertinent parts of the deed from the grantor to the city read:

> [I] in consideration of one and no/100 dollars ($1.00) . . . hereby grant, bargain, sell, and convey . . . *as long as used as hereinafter set forth*, the following described premises, ...
>
> To have and to hold said premises, with all the rights . . . , *subject however*, . . . to the conditions hereinafter contained.
>
> *The above described land is to be used by said city of Cuyahoga Falls, Ohio, for the purpose of creating and maintaining a park to be known as and called Fields Park.*[1] [court's emphasis]

The Summit County Court of Appeals interpreted the language as a covenant, and held that the city's interest was a fee simple absolute.[2]

The problem presented in this and similar cases is one of construction. If the grant is ambiguous, the court must attempt to determine the intent of the grantor. The construction problem is twofold: (1) Does the language of the conveyance create a covenant or retain a future interest in the grantor, and (2) if it retains a future interest, is the interest conveyed a fee simple determinable or a fee simple with condition subsequent? If the court interprets the phrase as a covenant (assuming it does not accompany either future interest), there is no forfeiture.[3] The remedies available to the grantor for a breach of covenant are an action at law for damages,[4] or an action in equity for either specific performance[5] or an injunction against the violation of the covenant.[6]

If the court interprets the language of the conveyance so that a future interest remains in the grantor, it may be necessary to determine what particular reversionary interest was reserved. Though similar in that the termination of the estate inures to the benefit of the grantor or his successor in interest, the two reversionary interests are distinguishable and have different legal consequences. The fee simple determinable terminates automatically upon the occurrence of the stated event, and the grantor has

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[1] PCK Properties v. City of Cuyahoga Falls, 112 Ohio App. 492 (1960).

[2] *Ibid.*

[3] Miller v. Village of Brookville, 152 Ohio St. 217, 89 N.E.2d 85 (1949).

[4] Huston v. Cincinnati & Z. R.R. Co., 21 Ohio St. 235 (1871).

[5] Tuite v. Miller, 10 Ohio 382 (1841).

[6] Linwood Park v. Rose, 63 Ohio St. 183, 58 N.E. 576 (1900); McGuire v. Caskey, 62 Ohio St. 419, 57 N.E. 53 (1900).

a possibility of reverter.[7] In the fee simple with condition subsequent, a right of re-entry is created in the grantor on the occurrence of the stated event which gives the grantor the power to terminate the estate.[8]

In settling the issues raised by an ambiguous grant, the courts have relied on rules of construction and general policy. As a matter of policy, the courts are adverse to forfeitures.[9] If technical words of limitation are not used, the courts are inclined to construe a provision relating to the prospective use of the property as either a covenant[10] or a mere statement of the motive of the conveyance.[11] The Ohio Supreme Court has held that where a conveyance was to a village "in perpetuity for a park and pleasure ground purposes" a condition would not be raised by implication from a mere declaration that the grant was made for a particular purpose.[12] This view is widely accepted in other jurisdictions[13] and by the text writers.[14]

Similar in result is the rule that a deed must be construed most strongly against the grantor and favorable to the grantee,[15] though this rule is used only as a last resort to resolve an ambiguity.[16] In Ohio, this rule of strict construction is reinforced by a statutory provision[17] declaring that every devise of land shall convey all the estate unless it clearly appears that a lesser estate was intended.[18] Another influencing factor is whether adequate consideration was paid,[19] as the courts are hesitant to declare a forfeiture if the property was purchased for value.

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[7] Schwing v. McClure, 120 Ohio St. 335, 166 N.E.2d 230 (1929); Sperry v. Pond, 5 Ohio 388 (1832); Restatement, Property § 44 (1936).

[8] Restatement, Property § 45 (1936).

[9] Stanley v. Cold, 5 Wall (72 U.S.) 119, 18 L. Ed. 502 (1866); Miller v. Village of Brookville, *supra*, note 1; Matter of Copps Chapel Church, 120 Ohio St. 309, 166 N.E. 218 (1929).

[10] Miller v. Village of Brookville, *supra*, note 1; Cleveland Terminal & Valley R.R. Co. v. State, 85 Ohio St. 251, 97 N.E. 967 (1912); First Presbyterian Church v. Tarr 63 Ohio App. 286 (1939); Larwill v. Farrelly, 8 Ohio App. 356 (1918).

[11] Matter of Copps Chapel Church, *supra*, note 7; City of Cleveland v. Herron, 102 Ohio St. 218, 131 N.E. 348 (1912); Village of Ashland v. Greinier, 58 Ohio St. 67, 50 N.E. 99 (1898); Wayne Lakes Park Inc. v. Warner, 104 Ohio App. 107 (1957).

[12] Miller v. Village of Brookville, *supra*, note 1.

[13] Hawkins v. Third, 244 Ala. 534, 14 So. 2d 513 (1943); Jones v. Reid, 184 Ga. 764 (1937); Bald v. Nuernberger, 267 Ill. 616, 108 N.E. 724 (1915); Nichols v. Fernald, 82 N.H. 186, 133 A. 836 (1926); Carruthers v. Spaulding, 244 App. Div. 412, 275 N.Y.S. 37 (1934).

[14] Simes & Smith, Future Interests § 248 (1956); Tiffany, Real Property § 124 (1940); Thompson, Real Property §§ 2049, 2050 (1940).

[15] Goebel v. Cincinnati Postal & Realty Co., 120 Ohio St. 19, 165 N.E. 350 (1929).

[16] Metzger v. Joyce, 70 Ohio App. 94, 41 N.E.2d 461 (1941).

[17] Ohio Rev. Code § 2107.51 (1953).

[18] A similar statute, Ohio Rev. Code § 5301.02 is applicable to deeds and mortgages.

[19] Ohio cases in which consideration seems to have been a factor include: Cleveland Terminal and Valley R.R. Co. v. State, *supra*, note 9; Village of Ashland v. Greinier, *supra*, note 8; City of Dayton v. Unknown Heirs of Matlack, 139 N.E.2d 495 (Com. Pleas 1956).

The issue thus becomes which words are necessary to reserve either of the future interests in the grantor. The usual expressions used to create a fee simple determinable are "so long as," "until," "during," or a clause providing that upon the occurrence of the stated event, the land is to revert to the grantor.[20] "Upon the condition that," "but if, provided that," or a provision that if the stated event occurs the grantor may enter and terminate the estate is held to create a fee simple with condition subsequent.[21] However, the Ohio cases in this area of law are not entirely clear, and some are conflicting.

In *Sperry v. Pond*,[22] the phrase "so long as" they kept a saw mill and a grist mill, doing business on the premises, "and no longer" was held to be a valid condition with a forfeiture if the grantee failed to perform the condition. In *Ashland v. Greiner*,[23] the court in construing a *habendum* clause which read ". . . the said grantees . . . shall not at any time use or occupy . . . premises for any other purpose . . . than whereon to erect or build religious houses . . ." held that there were no words of forfeiture or re-entry, and therefore the breach of the covenants restricting the use to which the estate was to be devoted did not operate to forfeit the estate. In the controversial[24] *Matter of Copps Chapel*,[25] a quitclaim deed with an *habendum* clause reading "so long as said lot is held and used for church purposes" was interpreted as a covenant. The majority opinion relied on *Ashland* in that there were no words of forfeiture or re-entry, and distinguished it from *Sperry* on the grounds that the significant "and no longer" was absent and also because the limitation appeared in the *habendum* clause and in the *granting* clause. The result in *Copps Chapel* led one writer to suggest that the fee simple determinable had been abolished in Ohio.[26] However, since this decision three lower courts in Ohio have held that a conveyance created a fee simple determinable.[27]

In the noted case, the court relied strongly on the syllabus in *Miller v. Village of Brookville*.[28] The result reached is consistent with *Miller*, but there is an important distinction. In *Miller* there was no use of the tradi-

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20 Restatement, Property § 45 (1936).

21 *Ibid.*

22 58 Ohio St. 67 (1898).

23 *Supra*, note 8.

24 See, *e.g.*, 9 Buf. L.R. 291 (1929); 3 Cin. L.R. 491 (1929); 15 Iowa L.R. 206 (1930); 14 Minn. L.R. 187 (1930).

25 *Supra*, note 7.

26 3 Cin. L.R. 491 (1929).

27 Schurch v. Harraman, 47 Ohio App. 383 (1933); Board of Education v. Hollingsworth, 56 Ohio App. 95 (1936); Burdette v. Jones, 34 Ohio Ops. 488 (Com. Pleas 1947).

28 *Supra*, note 1. The syllabus read:

> When a conveyance of land owned in fee simple is made to and accepted by a municipality in perpetuity for use as a park, and there is no provision for forfeiture or reversion, the entire estate of the grantor is divested and title to the municipality thereto is not a determinable fee but a fee simple.

tional "so long as," but only a general provision that the land was to be used for a specified purpose. *Copps Chapel* was also distinguishable because in this case the "so long as" was used in the *granting* clause and not in the *habendum* clause.[29] The Ohio Supreme Court had considered this to be one of the decisive factors in distinguishing *Copps Chapel* from *Sperry*. Another factor apparently overlooked by the court was the element of consideration. The city received the land essentially as a gift, as the consideration was only one dollar ($1.00). Thus the court could have distinguished this case from both *Miller* and *Copps Chapel*, and in view of the inadequate consideration, an interpretation declaring that the city had received a fee simple determinable would have produced a more equitable result.

[29] This reasoning was used by the court in Burdette v. Jones, *supra*, note 25.