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METHODS OF MAKING GIFTS OF LAND FOR
CHARITABLE OR PUBLIC USES

J. W. SIMONTON

In 1869 the then owners of a large acreage of land, granted one acre in the midst thereof to a certain township, "to be exclusively appropriated and used as a site for a schoolhouse and school for said township." In 1923 the land being within proved gas territory, the Board of Education, claiming to be successors in title to the grantee, made an oil and gas lease of the acre, and the assignee of the lessee prepared to drill. The owners of the adjoining lands, who were successors in title of the grantors, sought to enjoin drilling and a temporary injunction was entered below, which on appeal was made permanent.¹

The court decided that the language quoted above, indicated the intent of the grantors to restrict the use of the land, and was not merely a statement of the purposes of the conveyance; that such language amounted to a restrictive covenant limiting the grantee's use of the land which should be enforced as such by injunction. Doubtless a majority of lawyers would agree that the language in question does indicate an intent to restrict the use of the land to school purposes, and if so, then the court's decision that such language, though not expressly stated in the form of a covenant or agreement, may be construed as a restrictive

¹ United Fuel Co. v. Morley Oil & Gas Co., 93 W. Va. 78, 185 S. E. 899 (1936).
covenant, is supported by the authorities. When such a restrictive covenant benefits the adjoining lands owned by the grantors at the time of the conveyance it may be enforced by the successors in title. Clearly the bulk of the gas obtainable through a well drilled on the acre in question would be drained from the adjoining lands, even though the usual offset wells were drilled, and furthermore the drilling of several offset wells would be necessary to give the partial protection possible against this one well. Consequently the result of the decision is one with which one may well feel satisfied.

The language of the granting portion of the deed does not appear in the opinion, but one would infer that the conveyance was of the acre in fee simple, followed by the language quoted above, thus giving the grantee a fee with a restriction which enables the grantors and their successors in title to enforce the limited use in accordance with familiar equitable principles applicable to such restrictions. While the court of equity always exercises a certain discretion in the enforcement of equitable servitudes, there is no reason to suppose it would not enforce the present one so long as the land is used by the grantee and assigns for school purposes. But the school authorities may decide at some time in the future, that the public interest requires the abandonment of the use of this acre for school purposes. The court will not at the request of the adjoining owners, compel the continued maintenance of the use by the school authorities, when such use is contrary to public interest. In such case what would be done with the acre of land? Presumably, it would belong to the township in fee, and the township could then treat it as any other tract of land owned by it in fee. It could probably convey an indefeasible title. In other words, while the restrictive cove-

2 Peck v. Conway, 119 Mass. 546 (1876); Parker v. Nightengale, 6 Allen (Mass.) 841 (1863). See Giddings, "Restrictions on the Use of Land," 5 Harv. L. Rev. 174, 177; Clark, "Equitable Servitudes," 16 Mich. L. Rev. 90, 94. Such constructions have usually been made where the conveyance was by way of gift. Whether the conveyance was by way of gift in the principal case does not appear. There was a consideration of ten dollars recited in the deed, but whether it had ever been paid or whether it was an adequate price for the acre of land does not appear.

3 Pomeroy, Equity Jurisprudence, §1295; Clark, "Equitable Servitudes," 16 Mich. L. Rev. 90, 94.

4 If this was a gift to the township for school purposes only, it seems a violation of moral principles for the donee to thus proceed to drain the gas from the adjoining lands which at the time of the gift belonged to the donors.
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nent attached to a grant in fee simple as in this case, gives reasonable protection to the adjoining lands, so long as the use for school purposes is not abandoned this device fails in case of abandonment of use.6

Doubtless in the future, as in the past, there will occasionally be a man desirous of making a gift of land for some public or charitable purpose with some sort of restriction or provision to assure the continued use of the land donated for the specified purpose. Such a would-be donor is apt to be somewhat hazy as to his exact intent, but in many cases, if not in a majority of cases, he would like to make the gift of land in such a way as to insure, so far as legally possible, the use of that particular land for the designated purpose. If such would-be grantor were informed by his lawyer that the designated use might be abandoned at some future time by the grantee he would often desire that in such event the title of the land revest in himself, his heirs or assigns. As every competent lawyer knows, to make a conveyance which will reasonably and satisfactorily effectuate such intent is by no means easy under our law. Let us then assume a would-be donor who desires to make a gift for some public or charitable purpose in such a way as will give the donee the full and effectual use of the land for the designated purposes, but under which the donee can be restricted to an exclusive use while the specified use is continued and if such use should be abandoned, that the title would pass to the grantor, to his heirs or to his assigns as the case may be. To accomplish this some interest must remain in the grantor which he can alienate, and which will so take effect as to draw to it the full ownership of the land on abandonment of the use. What method should be adopted which will best effectuate this intent of the donor?

A conveyance in fee as in the principal case with a re-

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6 Unless the court should construe the language quoted as constituting a condition as well as a covenant, the title of the township would become absolute on proper abandonment of the use for school purposes. It seems doubtful whether the court could construe this language both as a covenant and as a condition. See 18 C. J. 871.

6 Usually at the time of the gift the donor is interested in having the school or park or other institution maintained at that particular location, and expects it to be established and to continue at least for a very long period. Unless suggested to him he is not likely to consider that the authorities may be able to abandon the use of the premises, and consequently his interest in providing a way, by which the land may be recovered by himself, his heirs or assigns will be aroused only on making this possibility clear to him.
strictive covenant, limiting the use by the grantee to the particular purpose designated is effective so long as the grantee continues to use the premises for the designated purpose, but it does not cover the case of abandonment of the use. Hence the method used in the principal case will not be discussed as one of the possible methods, but in some of the situations the restrictive covenant may advantageously be used in connection with or as an addition to some other device.

The following methods of effectuating the donor's intent may be mentioned: (1) A determinable fee; (2) a terminable trust; (3) a conditional fee; (4) the grant of the exclusive privilege of use for the designated purposes,—i.e., an easement in gross; (5) a lease. A brief discussion of the advantages and disadvantages of each of the above methods follows. In this discussion it is assumed the donor desires the donee to have the full and complete use of the premises for the specified purposes and that the donor desires to retain some alienable interest in the premises by which he, his heirs or his assigns may regain ownership if the specified use be abandoned by the donee.

(1) The Determinable Fee. The example of determinable fee given by Gray is an estate to A and his heirs until they cease to be tenants of the Manor of Dale, or one might substitute “so long as they continue to be tenants of the Manor of Dale”? The language in which the terminating event is expressed is not material if the meaning is clear, but the estate must be granted with the language expressing the termination a part of the grant, instead of being expressed as a condition following the granting language. In the principal case if this method were adopted the grant should be made to the grantee and assigns until they cease to use said land exclusively for school purposes, or so long as they continue to use said land exclusively for school purposes.

Gray insists that the determinable fee could not be created after the passage of the Statute of Quia Emptores.\(^7\)

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\(^7\) Gray, Rule Against Perpetuities, §13.

\(^8\) Gray, Rule Against Perpetuities, §§81, 774-788; Kales, Future Interests, §§300-302.
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Other writers have disagreed with his conclusion, and in some jurisdictions in this country the courts have upheld estates which if not determinable fees are indistinguishable from them, usually in cases where the grant has been for some public or quasi public purpose. Since there seems to be no decision upholding such an estate in West Virginia, there is doubt whether the use of this method would do more than give to the grantee an absolute fee in the land.

Assuming a determinable fee valid in this state what would be the result? After the conveyance the grantee would have an estate which will terminate *ipso facto*, if the exclusive use for school purposes ceases, and the grantor would have a possibility of reverter. The estate of the grantee, if made to terminate when the exclusive use for school purposes ceased, would be disadvantageous because any partial use for other than such purposes might be held to terminate the estate and, of course drilling for oil and gas should terminate it. If the word "exclusive" were omitted from the grant then it is probable the estate would terminate only on complete abandonment of the specified use and presumably the grantee could mine minerals on the land so long as the use for school purposes continued.

This undesirable feature, so far as the grantee's estate is concerned, could be corrected by a grant "until the grantee and its assigns cease to use for school purposes" followed by a covenant restricting the use of the land to school purposes exclusively. Then if the grantee should attempt to open mines it could be restrained by the enforcement of the covenant, but its estate would terminate only on complete abandonment of the specified use. If the grantee's estate were made to terminate when it ceases to be used.

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9 The whole controversy is set out in Gray, Rule Against Perpetuities, §§774-788. There are dicta to the effect there may be a possibility of reverter in Carney v. Kain, 40 W. Va. 758, 812, 816, 23 S. E. 650 (1895), and in Bolling v. Petersburg, 8 Leigh (Va.) 224, 224 (1837).

10 In some states there are statutes providing for the dedication of land to the public and under these statutes a fee simple passes to the municipality or other public body, yet admittedly some sort of an interest remains in the dedicator. Kales prefers to treat this interest as being similar to a right of entry for condition broken, because of doubt as to the validity of the possibility of reverter. See Kales, Future Interests, §§234-235. A gift of land to a municipality for a charitable purpose bears an analogy to such a dedication. Under some dedication statutes the dedication may be made for school purposes. See 18 C. J. 49. But in many cases a possibility of reverter has been enforced. See 18 C. J. 301-302, 370-372.

11 According to Gray's argument an attempt to create a determinable fee would result in the creation of an absolute fee in the grantee. Gray, Rule Against Perpetuities, §81.
exclusively for school purposes, then a restrictive covenant would seem useless for the event which would violate the covenant, would also terminate the estate.

After the conveyance the grantor would have a possibility of reverter,—an interest which at common law is not obnoxious to the rule against perpetuities,\textsuperscript{12} which is inheritable\textsuperscript{13} but inalienable\textsuperscript{14} so that if the grantor aliened all his near-by lands, and after a long period the use were abandoned the title would then be in the heirs of the grantor whoever they might be. The possibility of reverter could easily be held alienable as an “interest” in land under statutes of this state.\textsuperscript{15}

The determinable fee would not be an advantageous method to use for, if its validity were not questionable though it could be so combined with a restrictive covenant as to be entirely fair and satisfactory from the grantee’s side, the interest of the grantor would probably be inalienable and we have assumed the grantor desires to retain an alienable interest.

(2) Terminable Charitable Trust. Suppose the land were conveyed to trustees in trust for use for school purposes by a certain township or district exclusively, then in case the use were abandoned the interest of the cestui would terminate. In such a case the authorities hold there is a resulting trust in favor of the grantor and his heirs or devisees—an interest which is regarded as vested and therefore not within the rule against perpetuities.\textsuperscript{16} Having a vested interest in the land subject to the trust, the grantor may alienate his estate freely. The cestui would get the use of the property and if that use were violated by mining for minerals, equity, at the request of the one owning the grantor’s interest, would enforce the limitations of the trust. A restrictive covenant added here would be needless, so far as the grantor is concerned, for the remedy for enforcing the trust would be as effective as that on the

\textsuperscript{12} Gray, Rule Against Perpetuities, §§40, 41d.
\textsuperscript{13} Tiffany, Real Property 474; Kales, Future Interests, §600.
\textsuperscript{14} Gray, Rule Against Perpetuities, §14; Tiffany, Real Property 474, and Col. L. Rev. 84.
\textsuperscript{15} "Any interest in or claim to real estate may be disposed of by deed or will." W. Va. Code, ch. 71, §5. For a dictum to the effect a possibility of reverter is not alienable see Woodall v. Bruc, 76 W. Va. 196, 196, 85 S. E. 170 (1916).
\textsuperscript{16} See cases collected in Gray, Rule Against Perpetuities, §6031; 11 C. J. 972.
restrictive covenant, in so far as the grantor is concerned. Nevertheless such covenant might be of benefit to others. For example, if part of the adjoining lands owned by the grantor at the time of the creation of the trust were subsequently alienated by him, the owners of such lands probably could enforce a restrictive covenant made for the benefit of their lands, in case of a violation of the trust provided the owner of the land subject to the trust should refuse to enforce the trust.

The objection to the terminable trust is that while the authorities seem to support it so far as they go, the number of cases is small and for that reason the court in this state might possibly not feel bound to follow them.\footnote{Seemingly the court in Virginia has declared there is no such thing as a resulting trust with respect to a charitable gift. See Clark v. Oliver, 91 Va. 421, 22 S. E. 175 (1895). No decisions have been found in this state but there is a dictum to the effect that on total failure of the charitable purpose the property reverts to the donor and his heirs. See Venable v. Coffman, 2 W. Va. 310 (1887). Where the \textit{cy pres} doctrine may be applied there could be no such result but it is assumed this doctrine would not apply in the situations under discussion.} But if there were complete abandonment of the use, a total failure of the purpose, it is difficult to see how the \textit{cy pres} doctrine could apply, and if so, certainly the property ought to revert to the donor and his heirs. Aside from this possible objection this method is certainly an advantageous one. If the trust were for school purposes with a covenant restricting the use solely to such purposes, then the cestui would get the full and complete use of the premises for such purposes. If such uses were abandoned the full interest would go to the grantor or his heirs or his assigns, as the case may be, by virtue of the resulting trust. Whoever owns this interest can compel the cestui to respect the limitations of the trust and in case of a violation by mining on the land, may have an effective remedy in equity. The remedy on the restrictive covenant should be available to owners of adjoining lands who hold under the grantor, if made for the benefit of such lands, and they should be able to enforce such covenant in case the owner of the land subject to the trust refused to do so. On the whole, this would be one of the very best methods our law offers to accomplish the grantor’s intent, provided the court would recognize and enforce the resulting trust. Probably the court under the circumstances would enforce the trust. It is at least
as certain of enforcement as the other methods herein discussed.

(3) Conditional Fee Simple.\textsuperscript{18} So far as the authorities go there is no doubt as to the validity of a condition subsequent attached to a fee.\textsuperscript{19} Consequently an estate may be granted in fee on condition that if the grantee or its assigns cease to use the land exclusively for school purposes, the estate shall thereupon be forfeited and the grantor or his heir may enter. The exact language is not material so long as the condition plainly appears, but the usual grant is made "on condition that" or "provided that" followed by the words expressing the nature of the condition.\textsuperscript{20} So far as the usual and ordinary meaning of the language used is concerned, the intent of the grantor in the determinable fee and in the conditional fee seems the same, the distinction between the two being merely the technical one of the form in which the event on which the estate is to end is expressed. Thus a grant to the "township in fee so long as used for school purposes" creates a determinable fee while a grant "to the township and its assigns for school purposes provided that if the use for school purposes ceases the estate of the grantee shall terminate" creates a conditional fee. The legal effect of the two is very different. After granting the conditional fee there is in the grantee a fee simple estate subject to the condition. If the condition is violated the estate does not terminate \textit{ipso facto} as in case of the determinable fee, but remains until the person having the right of entry for condition broken declares a forfeiture.\textsuperscript{21} If no forfeiture is declared the estate remains in the grantee in fee. The interest which remains in the grantor is a right of entry for condition broken which interest is not obnoxious to the rule against perpetuities. Like the possibility of reverter at common law the right of entry is heritable but

\textsuperscript{18} This term is used in this article to denote a fee simple estate on condition subsequent and is not intended to refer to the fee simple conditional as it existed before the Statute of \textit{De Domis}.

\textsuperscript{19} See Tiffany, \textit{Real Property} 258; 18 C. J. 370-1; Kales, \textit{Future Interests}, §216.

\textsuperscript{20} Kales, \textit{Future Interests}, §240.

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inalienable, and it has even been held that an attempt to alienate the right of entry destroys the condition leaving an absolute fee in the grantee. On breach the grantor must declare a forfeiture and he may by his acts and his laches quite easily waive his right to forfeit for a breach of the condition so that he cannot thereafter exercise it.

It has been held that a condition attached to a fee may be construed as a restrictive covenant and enforced as such. Query whether the same language may be enforced as a restrictive covenant and later, on a new breach be enforced as a condition as well. Probably if the estate were conditioned on the exclusive use for school purposes a court would refuse to enforce a forfeiture where the use was still continued and an additional unauthorized use such as opening a mine was made by the grantee. Courts have always shown great reluctance to aid in the enforcement of a forfeiture of a fee. Yet if the use for school purposes were abandoned there seems no reason why the court would not enforce the forfeiture in such a case. If so, the best way to word the conveyance would be to make the grant on condition the grantee continue to use the land for school purposes, with a restrictive covenant that the grantee use exclusively for such purposes. This would permit the grantor or those who have taken any lands through him which are benefitted by the covenant to enforce such covenant if there were an unauthorized use, while in case of total abandonment of the use the grantor would take advantage of his condition and declare the estate forfeited.

In conclusion one might say that a grant on condition the grantee continue to use the land for school purposes with a restrictive covenant that said grantee use exclusively for school purposes would be much better than a determinable fee, because the validity of the conditional fee is established while there is doubt as to validity of the determin-

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22 KALES, FUTURE INTERESTS, §240. Gray, Rule Against Perpetuities, §12; Tiffany, Real Property 318. Some cases hold the interest is devisable and perhaps under modern statutes it may come to be fully alienable. See Tiffany, Real Property 316; 18 C. J. 866. Like the possibility of reverter it could be held to be alienable under the W. Va. Code c. 71, §5.
23 Tiffany, Real Property 815. See cases collected in note 58 A. L. R. 1111.
24 Tiffany, Real Property 305-307.
26 Courts seem quite willing to aid in the enforcement of the forfeiture in such cases as this. See cases cited. N. 46 post.
able fee. Yet the right of entry has not the quality of alienability,27 and for this reason the terminable trust would seem preferable to either the determinable fee or the conditional fee.28

(4) Easement in Gross. There seems no good reason why the grantor instead of granting in fee may not convey to the grantee just what he intends the grantee to have, namely the exclusive privilege of use of the land for school purposes.29 This would amount to the conveyance of the privilege of use in fee simple and would confer on the grantee an interest similar to that which railroads often obtain through eminent domain proceedings or that of the public in roads and streets. The interest of the grantee would be as useful for the purposes expressed as if it were a fee,30 yet the ownership of the land would remain in the grantor subject to the servitude. No question as to the rule against perpetuities could arise here, for the grantor would have a substantial legal estate in the land as freely alienable as other legal estates in land. The grantee would acquire no title whatever to minerals beneath the land, except in so far as they might be necessary for the support of the surface. If the grantee should violate the easement the owner of the land would have such legal and equitable remedies as the law allows for such violation. He could sue at law for damages31 or if the violation or threatened violation were continuous he could secure the aid of the equity court to restrain interference with his property rights.32 A restrictive covenant would be of no value to him since his remedies would already be adequate both at law and in equity.

27 Unless it were held alienable under ch. 71, §5 of the W. V.a. CONV as was suggested supra, n. 22.
28 A gift of land on condition that it be used solely for school purposes may be construed as a trust, and in England is so construed as a general rule, thop doing away with the conditional fee. Gray, Rule Against Perpetuities, §259. In this case if construed as a trust it would create a terminable trust.
29 This has been little used in the case of gifts for public or charitable purposes but there is no good reason why it should not be used. It gives to the grantee a legal estate with exclusive possession of the land, and at the same time leaves the title in the grantor subject to the servitude. Both parties could protect their rights by use of the usual legal and equitable remedies applicable to easements. For cases see Roanoke Investment Co. v. Railroad Co., 103 Mo. 50, 37 S. W. 1000 (1891); Right of Way Oil Co. v. Oil & Gas Co., 101 Tex. 94, 157 S. W. 787 (1913).
30 Neither the railroad nor the municipality is troubled in the use of the right of way because such right of way is legally only a servitude.
31 TIFFANY, REAL PROPERTY 1358.
Suppose the grantee should abandon the use? The interest being merely an easement may be lost by voluntary abandonment so in such case the grantor could safely enter and take possession if the intent to abandon were clear, and the easement would thereby terminate. The easement however, would constitute a cloud on the grantor's title until he filed a bill and had the cloud removed. But this objection is no greater than can be made in case of the terminable trust, the determinable fee or the conditional fee. In each case an action would almost certainly be required either to gain possession of the land or to remove cloud from the title.

An objection to the use of the easement in gross would be the doubt as to the attitude of the court concerning it. Some jurisdictions have held an easement in gross is neither assignable nor inheritable. If this were the law then the grantee's estate might be non-assignable. But in the case of exclusive rights of way courts have protected the interest of the owner of the easement in gross by holding such interest is assignable, and it would seem very improbable that our court would refuse to hold the interest of the grantee assignable where the exclusive use was for public benefit or for a charitable purpose. At all events the objection would not concern the grantor. His interest in the land would be alienable and he would have adequate remedies against the grantee in case his intent was not respected.

(5) The Lease. Though leases in fee simple, as they

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33 TIFFANY, REAL PROPERTY 1377-81; Warren v. Stone, 7 W. Va. 474 (1874); Scott v. Moore, 68 Va. 668, 37 S. E. 342 (1900). Likewise a profit may be lost by abandonment, the doctrine having frequently been applied to oil and gas leases. See Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 665 (1902); Steelsmith v. Cartlin, 45 W. Va. 27, 29 S. E. 978 (1899).

34 The record title would show a defect even if possession could be had without action and a bill to remove a cloud from the title would be necessary. Hall v. Armstrong, 53 Conn. 554, 4 Atl. 113 (1886); Boatman v. Lasley, 28 Oh. St. 614 (1878); TIFFANY, REAL PROPERTY 1226.


36 Whatever may be said in favor of the doctrine that an easement in gross is personal only and not alienable nor inheritable as applied to the usual types of easements, such doctrine ought to have no application to those easements in gross which give to the owner exclusive possession of the surface of the land such as rights of way for railroads, for public roads and streets and burial rights. This would be the character of the easement under discussion. Though it may be termed an easement in gross it is in fact as substantial an interest in the land as is acquired by very many lessees under their leases. The distinction between such an easement and a lease is largely one of legal theory rather than of practical fact.

37 An action at law or remedy in equity by injunction. See TIFFANY, REAL PROPERTY 1370.
are called, are not unknown to our law, yet usually some sort of reversionary interest in the landlord is required in order to have tenure between the parties. But the practical effect desired may be had by making a lease for a very long term such as a thousand years or more. No reservation of rent is essential. The lease may be on condition that if the use for school purposes be abandoned the landlord or his assigns may forfeit the leasehold, or it may be made for so long as the lessee and assigns continue to use the land for school purposes not exceeding a thousand years, thus creating a provision terminating the lease on abandonment of the use. Any experienced lawyer can see how effectively the lessor can proceed by proper covenants and conditions to carry out his intent. The remedies for enforcement of the various restrictive covenants and conditions would be adequate. Furthermore there seems no reason why a restrictive covenant for the benefit of adjoining lands then owned by the lessor might not be inserted in the lease just as well as in a grant in fee simple. There could be no question but that the lessor’s reversion is freely alienable and the assignee could enforce not only the covenants of the lease but also the conditions. If at the same time there were a restrictive covenant limiting the use for the benefit of adjoining lands owned by the lessor, it would seem the various remedies would be more complete and effective than in any of the other methods. But it would be dangerous to make the lease in fee simple even on condition the land was to be used only for school purposes, for the court might well hold no relation of landlord arose but there was granted a conditional fee or a determinable fee as the case might be.

Conclusion. We have seen that a grant in fee simple so long as the land continues to be used for a public or charitable purpose at common law created a determinable

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22 TIFFANY, LANDLORD & TENANT, §11; 35 C. J. 962.
23 There is no common law restriction on the length of the term. It may be for any number of years. See BLACKSTONE COMM. 142; POLLOCK & MAITLAND, HISTORY OF THE ENGLISH LAW 112; Morrison v. Railroad Co., 63 Minn. 76, 65 N. W. 141 (1895).
24 Remedies of a landlord against his tenant would be available.
25 There seems no reason why equity should not enforce a restrictive covenant in a long term lease, if made for the benefit of adjoining lands.
26 W. VA. CODE, ch. 93 §1. This has been quite generally true since the Statute of 82 Hen. VIII (1541).
27 See 28 C. J. 843. Leases in fee reserving ground rent are usually construed as creating conditional fees.
fee; a grant in fee simple on condition the land was to be used only for specified public or charitable purposes with a right of reentry on breach of the condition at common law created a conditional fee; yet the intent of the grantor seems exactly the same in both cases, the distinction being merely in the form of the language used. An examination of the authorities indicates that one or the other of these forms of conveyance are usually used in such cases, probably with little knowledge of the probable consequences. It seems evident that the courts do not understand the distinctions between the two types of estates, and furthermore the courts seem to see no reason why a grantor should not be permitted to make such a conveyance, nor why, on proof of abandonment of the specified use, the grantor or his heirs or his assigns as the case may be, should not be able to get back the property, particularly where the intent that it revert is clearly expressed in the conveyance. The possibility of reverter and the right of entry for condition broken thus are apt to be confused by the courts—but it seems clear that the courts are determined to allow the grantor or his heirs or his assigns to recover the property after abandonment of the use. It is probable that the old common law distinction between the two estates will disappear, and that the interest of the grantor will come to be everywhere alienable as well as inheritable, as has already happened in some jurisdictions.

But it may be objected that if the possibility of reverter and the right of entry for condition broken be made alienable, then they ought to be held void as being within the rule against perpetuities unless properly limited to comply with said rule. Professor Gray insisted that the latter of these interests ought to be within the rule but admitted

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46 As to conditional fees see Los Angeles etc. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1910); Sherman v. Town of Jefferson, 274 Ill. 294, 113 N. E. 624 (1916); Indianapolis etc. R. R. Co. v. Hood, 66 Ind. 580 (1880); Foy v. Locke, 201 Mass. 387, 87 N. E. 763 (1909); Estes v. Muskegon etc. Ass'n., 181 Mich. 71, 147 N. W. 533 (1914); Oxford Board of Trade v. Steel Co., 61 N. J. L. 694, 80 Atl. 324 (1911); Richardson v. Chafin, 36 Okla. 700, 32 Pac. 722 (1913).


48 See cases n. 44 supra. See also note in 38 A. L. R. 1111 where the right of entry for condition broken is called a possibility of reverter.
that the law was settled otherwise.\textsuperscript{48} Seemingly even where a court has held some such interest alienable the question whether it ought for this reason be within the rule against perpetuities has not been raised. If the question were argued, it is probable the courts would nevertheless hold the interest was not within the rule where the gift was for some public or charitable purpose. In such case the reasons given by Professor Gray why it is reasonable that the rule apply to contingent future interests which are alienable would not seem to apply here since the interest of the grantor would be of little value and the grantee is not supposed to have the power to alienate except for the purpose of carrying out the public or charitable use to which the land is devoted.\textsuperscript{49}

In England the conditional fee has become obsolete because the courts have construed such conveyances as creating trusts\textsuperscript{60} and one would have to go only a little further to put the same construction on the determinable fee. The trust, when the conveyance is so construed, would seem to be a terminable trust of the sort discussed above, and this form of trust forms a very satisfactory method of making a grant such as we are discussing. But the intent of the grantor to create a trust is none too clear, and one could just as easily recognize and enforce the possibility of reverter and the right of entry for condition broken, the only change necessary being to hold both interests alienable, which would be easy under most modern statutes. The long term lease would form a most excellent method of carrying out the desired purpose, but it is unlikely the average lawyer would venture to use it, or that the beneficiaries would be pleased with such an interest, though it could be made just as desirable from the standpoint of the charity as either the determinable fee, the conditional fee or the terminable trust.

While in this state where the courts have seemingly not yet dealt with the determinable fee or the conditional fee, the use of the terminable trust, the long term lease or the easement in gross might be advised as being preferable

\textsuperscript{48} Gray, Rule Against Perpetuities, §§204, 205.
\textsuperscript{49} Gray, Rule Against Perpetuities, §§268.
\textsuperscript{50} Gray, Rule Against Perpetuities, §§299.
from the grantor's standpoint, yet it is more than probable that the two former methods will be used as a matter of course, partly because they seem to express the grantor's intention, even though their legal effect may not be in accordance with such intention. The legal effect must be left to the courts when questions arise, but it must be admitted there is considerable uncertainty as to the outcome, and it must be remembered that if the decision of the court as to either estate is adverse to the grantor he is apt to lose all interest in the land, while if the easement in gross or the lease were used the grantor's interest would be safe enough, and there would be a natural tendency on the part of the courts to uphold a charitable gift in favor of the grantee. An adverse decision in case of the terminable trust might destroy the grantor's interest yet this sort of trust is better established than is the determinable fee and perhaps as well established as the conditional fee.

51 If held defective for any reason the grantor would be benefited though his intent might wholly or partially fail.