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Property--Restraint on Alienation

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A contrary result may be reached where the elements of an estoppel are present. *Simmons v. Simmons,* 203 Ark. 566, 158 S.W.2d 42 (1942); *Huffman v. Hatcher,* 178 Ky. 8, 198 S.W. 236 (1917).

The cases involving a change which increases the amount of property conveyed present few problems, and, as evidenced by the principal case, can be decided correctly without even considering other fact situations. However, a statement purporting to give the law concerning the effect of a change by the parties should be applicable to changes that propose to decrease as well as to those that increase the grantee's estate. In considering situations in which the parties to an excuted deed have changed its terms upon agreement, the following rule controls: The delivery of what is in effect a new deed can not reduce the size of a grant already completed.

Robert Willis Walker

Property—Restraint on Alienation

A conveyed property to *C*, a corporation, for the use and benefit as it might deem proper, for the treatment and care of sick or crippled children and for general hospital purposes for such children. The deed provided that in the event *C* or its assigns should fail to use the property for the named purposes for three years, it would revest in *A* or his heirs. The deed further provided that in the event *C* should attempt to alienate the land within twenty-one years after *A's* death, the land should revert to *A* or his heirs. Subsequently, *C* conveyed to *H*, a successor corporation, and *A* joined in the deed to indicate his approval of the transfer. One year after *A's* death, *H* conveyed to another corporation, *M*. One month later, *M* conveyed to *T*, a municipality. Two years from that date, the heirs of *A* executed a quit claim deed to *T*. Certain interested parties sought a declaratory judgment on the effect of the various conveyances. The trial court held the first conveyance had created a benevolent trust, and the conveyance from *H* to *M* was void because of an error in naming the grantors. The title was still in *H*, and *T* had no interest of any kind in the property. *Held,* reversed. The error in the deed was a simple and obvious one, which could and should have been corrected by the trial court. When *H* conveyed to *M*, without *A's* heirs joining in the same instrument, the title immediately vested in *A's* heirs, because of the clause for-

bidding alienation. The court concluded that it was not necessary to examine whether the property had been subject to a trust, because the trust, if any had existed, terminated when the property reverted to the heirs. Thereafter, when the heirs executed a quit claim deed to *T*, the result was a fee simple absolute in *T*, free of any restrictions. *Myers v. Town of Milton,* 137 S.E2d 441 (W. Va. 1964).

The principal case presents an interesting question in that the court did not explain why the clause forbidding alienation was not an illegal restraint. With certain exceptions, any provision in a conveyance of an estate in fee simple which limits, prohibits, or discourages the free alienation of the estate by the grantee, is void as contrary to public policy. *White v. White,* 108 W. Va. 128, 150 S.E. 531 (1929); GRAY, RESTRAINTS ON ALIENATION § 13 (2d ed. 1895).

Because of the court's failure to discuss restraints, it is difficult to determine upon what grounds the court apparently treated this as a valid restraint. This comment will explore three possible rationale for the court's decision.

First, the court may have proceeded upon the assumption that because of the form of conveyance used, an illegal restraint was not created. The grant in the principal case was in fee simple, but it was subject to termination upon either of two occurrences: (1) failure to use the property for its intended purpose, or (2) an attempt by *C*, the grantee, to alienate the property within twenty-one years after *A's* death. Upon either occurrence, the land was to revert to *A* or his heirs. Assuming the limitations were valid, the state of the title after the first conveyance was: fee simple determinable in *C*, with a possibility of reverter in *A* or his heirs. Therefore, *A* had not conveyed away his complete interest in the property, but had retained a vested interest which might or might not ripen into a fee simple absolute, in *A*. But the question is, were these limitations valid? As to the first limitation, *i.e.*, a possibility of reverter upon failure to use the property as directed, the answer is, probably, yes. Although restrictions on the use of property can seriously impair its marketability, the courts generally permit such restraints, when they are "reasonable," will accomplish a beneficial result, and are not otherwise opposed to public policy. *White v. White, supra.* As to the validity of the second limitation, *i.e.*, that

which directly forbids alienation, upon penalty of forfeiture, the answer is, probably, no. By the weight of authority, any clause in a conveyance of an estate in fee simple which forfeits or terminates that estate upon an attempt at alienation, is void. *Andrews v. Hall,* 156 Neb. 817, 58 N.W.2d 201 (1953); *Cobb v. Moore,* 90 W. Va. 63, 110 S.E. 468 (1922). However, most jurisdictions do recognize various exceptions to this general rule. The distinction which exists between a restraint on use and a restraint on alienation is recognized and discussed in *White v. White, supra.*

In *Cobb v. Moore, supra,* the West Virginia court considered a devise in fee to *F,* which provided that if *F* should attempt to convey the property, the will was to become null and void. The state of the title in that case would be (again assuming the clause forbidding alienation was valid): fee simple determinable in *F,* with a possibility of reverter in the testator's estate. This would make the situation identical with that in the principal case, except that in the *Cobb* case there was no time limitation on the restraint. The court held the clause forbidding alienation void because repugnant to the estate created, and contrary to public policy.

Secondly, the court in the instant case may have proceeded upon the basis that the restraint was valid because it was to expire twenty-one years after *A's* death. Some courts recognize a restraint on alienation for a "reasonable" time as valid. *Wright v. Wright,* 124 Kan. 604, 261 Pac. 840 (1927); *Gray v. Gray,* 188 S.W.2d 440 (Ky. 1945). West Virginia, however, is in accord with the majority view that any absolute restraint on alienation for any period of time on an estate in fee simple is repugnant to the estate granted, and is void as contrary to public policy. *White v. White, supra.*

Third, the court may have assumed that such restraints are valid when contained in a conveyance to a corporation for charitable purposes or to a charitable trust. A majority of American jurisdictions hold these types of restraints valid. *Henshaw v. Flenniken,* 183 Tenn. 232, 191 S.W.2d 541 (1945). The court in the principal case did not appear to rest its decision upon this exception. The court stated that it made no difference whether the deed imposed a charitable trust, or merely granted a determinable fee. Even if the court had attempted to justify its decision on this basis, it would have encountered some difficulty because of prior West Virginia case law. In a case involving a grant in fee to trustees

of a church, in trust to be used for church purposes, the deed provided that the property should not be conveyed to a private individual. The court held the clause invalid, because repugnant to the estate created. *Deepwater Ry. v. Honaker,* 66 W. Va. 136, 66 S.E. 104 (1909).

Although three possible rationale have been presented for the court's position in the principal case, it is difficult to escape the conclusion that the court for some reason failed to consider the possible illegality of the restraint on alienation. There were other issues in the case which could have diverted the court's attention to the exclusion of the question of an illegal restraint on alienation. Even if the restraint had been held invalid, it would not have changed the results of the case as far as the ownership of the property is concerned. The property would still have been owned in fee simple by *T,* but had the court found the restraint on alienation void, the court then might have found that the property was the subject of a still valid trust. However, the question of the continuance of the trust is beyond the scope of this comment. Assume that the heirs of *A* had not executed the quit claim deed to *T,* the municipality, and that they made a direct attack on the title of *T,* claiming the property was their's because of *H's* alienation to *M. T* would then be forced to defend its title on the ground that the clause forbidding alienation was illegal and void. The court in such a case would be forced to face the issue squarely, without other issues to divert its attention from the possible illegality of the restraint on alienation. If and when such a case is properly presented, the court will of necessity either explain, qualify, or overrule the principal case. Meanwhile, it is difficult to forecast what impact the principal case will have as precedent on future cases involving restraints on alienation.

Charles Edward Barnett

Torts—Statute and Ordinance Obligations as Evidence of Landlord's Duty to Trespassers

The *Ds* leased an apartment to *X. P,* a small child, and his mother moved in with *X* contrary to a provision in *X's* lease. *X's* uncontradicted testimony showed that there was a defective screen in a window in the apartment and that the *Ds* had been notified