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Abstracts of Recent Cases

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heirs of their mother, if the testator's intent had been carried out. The tract, less *D's* share, could have been sold to satisfy the interests of the other cotenants. If, however, the portion claimed by *D* exceeds the testator's one-half undivided interest in the whole property, the entire tract would have to be sold to protect the interests of all parties.

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ABSTRACTS

Corporations—Restraint on Stock Transfers

P and *D* entered into a stock option agreement whereby it was agreed that in the event of the death of *D*, or in the event of his offering his stock for sale during his life, he would sell and *P* would buy all of *D's* stock in *X* corporation at one dollar per share. If the option were not exercised then *D* had the right to sell without restriction. They owned all the stock in *X* corporation. Upon *D's* death *P* tendered one dollar per share to the executors of *D's* estate, but the executor refused to sell. The actual value per share was $1,060. The Orphan's Court of Chester County, Pennsylvania ordered specific performance. *Held*, affirmed. The restriction of sale was not absolute or unreasonable. It was made between mature members of a close family without over-reaching, fraud or deceit. The discrepancy between the sale price and the actual value did not invalidate the agreement. *In re Mather's Estate*, 410 Pa. 373, 189 A.2d 586 (1963).

In the principal case the dissent argued that the agreement created an absolute restraint against tranfers because the first refusal price was nominal in relation to the value of the shares at the time the arrangement was made. The AMERICAN LAW OF PROPERTY supports the dissent, stating that the effect of a preemption as a restraint on alienation hinges upon the matter of price. If the property is required to be offered at a sacrifice price this is a restraint on alienation because the owner will keep it rather than sell. 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952).

The problem of restraining alienation of stock, whether by price or other means, is one of conflict of basic ideas. On the one hand is the general principle that provisions which restrict a stockholder's right to sell or transfer his stock are regarded with disfavor and are strictly construed. Annot., 2 A.L.R.2d 747 (1949). On the other hand is the general principle that stock in a close corporation is not merely property; it creates a personal relationship analogous otherwise to a partnership, and an appropriate restriction helps protect good management. *Mason v. Mallard Tel. Co.*, 213 Iowa 1076, 240 N.W. 671 (1932).

The courts seem to favor the second idea. They have held valid stock restrictions involving first option prices based on: current value, market value, book value, par value, and value stated by appraisers. *Model Clothing House v. Dickinson*, 646 Minn. 367, 178 N.W. 957 (1920); *Nicholson v. Franklin Brewery*, 82 Ohio 94, 91 N.E. 991 (1910); *Doss v. Yingling*, 95 Ind. App. 494, 172 N.E. 801 (1930); *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa. Super. 78 (1909); *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N.E. 432 (1894), respectively. No court has said that a nominal option price is not a restraint on alienation. The principal case did say that the restraint was not absolute because after refusal to buy the owner was free to sell at any price. At this point the court seems to strain to allow a restriction that was serving a useful purpose.

The principle that courts do not favor restraints on alienation must always be kept in mind. At some point the inadequacy of option price might become unreasonable in light of the circumstances. *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 141 N.E.2d 812 (1957), said that when any restriction reaches this point it is void.

Since courts look upon restrictions with disfavor another court might consider a nominal option price as the one in the principal case a restraint on alienation. This court has gone further than any other court, and it might be, as the dissent suggests, they have gone too far.

Estate Taxation—Qualification of Dower Interest Commuted to Cash for Marital Deduction

W renounced the will of her husband, and as a result became entitled to dower in one-third of the real estate of her husband. In lieu of dower being assigned, *W* had her interest commuted to cash. *P*, executor of the estate of *W's* husband, brought an action against the government to determine whether the estate was entitled to a marital deduction. *Held*, judgment for P. *W* never had dower assigned. She did not have dower but only the right to it. When her interest was commuted to cash it became a nonterminable interest, and it was deductible from the adjusted gross value of the estate. *First Nat'l Exch. Bank of Roanoke v. United States*, 217 F. Supp. 604 (W.D. Va. 1963).

INT. REV. CODE of 1954, § 2056(a), provides that "the value of a taxable estate shall be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." "Where, on the lapse of time, on the occurrance of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed." INT. REV. CODE of 1954, § 2056(b).

The problem presented by the principal case in light of the statute is the determination of what is a terminable interest. If the interest is terminable there is no deduction. If the interest is nonterminable there is a deduction. Thus, if an interest that passes is a vested dower interest there is no deduction.

Huddleston v. Miller, 81 W. Va. 357, 94 S.E. 538 (1917), in answer to the question of when a dower interest passes held that until the assignment of dower the widow has merely a vested right to sue for her dower interest, and it is only upon assignment that she acquires a vested estate.

West Virginia further has a statute similar to the Virginia statute in the principal case which provides that dower does not have to be assigned. A payment of cash in lieu of dower can be given where the real estate involved will be enhanced or preserved by not assigning dower in kind, and where the surviving spouse may be fully compensated for such dower and her interest will not be adversely affected. W. VA. CODE ch. 43, art. 1, § 20 (Michie 1961).

Considering that a vested dower interest does not pass until assigned, and that there can be payments of cash in lieu of dower being assigned, it is possible that a dower interest might never vest under West Virginia law. Therefore, it would seem to follow that where the right to dower is commuted to cash under West Virginia law, the only interest that would pass would be a cash interest which is non-terminable and allowable as a marital deduction.

Property—Effect on Dower Interest of Notice of Contract to Convey Real Estate Before Marriage

H and his first wife had entered into a contract prior to their divorce, providing that *H* would will all his property to the *Ps*. *H* made his will in accordance with the contract. Subsequently *H* married *D* who had no knowledge of either the agreement or the will. Upon *H's* death *D* renounced the will and claimed a dower interest in the real estate which *H* had conveyed by will to the *Ps*. *Ps* brought suit for summary judgment to disallow *D* a dower interest in the real estate. The United States District Court for the Southern District of Florida granted *D* her dower interest. *Held*, affirmed. Where there was no notice of the existence of such a contract or a will executed under it, the promisee of the contract, who is the beneficiary of such will, could have his rights restricted where the widow claims her dower right. *Barkley v. Barkley*, 314 F.2d 188 (5th Cir. 1963).

In *Harris v. Harris*, 130 W. Va. 100, 43 S.E.2d 225 (1947), the court reached a result contra to the principal case. The deceased husband entered into a valid agreement with his first wife to will all his property to her and their two children. He subsequently obtained a divorce and married again. The husband died intestate without disposing of his property. The second wife claimed a dower interest in the property held by the husband at the time of his death, but the court held that she was not so entitled. The court denied recovery on the theory that under the contract to convey the property the husband only held the legal title. The woman and children held the equitable title. The husband, in effect, held his property in trust for them, and dower does not spring from a seisin in trust for another because the holder of the legal title had no beneficial interest in himself. This theory is the one followed by the majority of the courts. Annot., 63 A.L.R. 137 (1929), and 51 W. VA. L. REV. 60 (1949).

The court in the principal case allowed the widow to have dower on the theory that it would be inequitable to deny her a right that marriage usually confers when she did not have notice of the contract made by her husband.

In the *Harris* case, *supra,* the contract was recorded and the court stated that in view of this fact the widow's lack of knowledge could not sustain her claim. This statement seems to indicate that the lack of knowledge might be a factor to consider. However, in the next sentence the court further stated that marriage confers rights only in property which a spouse holds beneficially for himself at the time of the marriage ceremony.

It appears that the West Virginia court is saying that notice may or may not be material but, the determining factor is the interest the husband holds at the time of the marriage. A West Virginia court would not, therefore, follow the holding in the principal case.

Taxation—The Right to Collect Post-Bankruptcy Interest

P was adjudicated bankrupt. *D,* the United States, filed a claim for taxes, but its claim was only partially satisfied. *P* was entitled to an income tax refund for later years unless *D* could offset the refund by charging post-bankruptcy interest on the unpaid taxes. *P* filed a claim for refund. The United States District Court of the Southern District of California denied the refund. *Held,* affirmed. Taxes levied on the taxpayer by the United States are not dischargeable in bankruptcy. Bankruptcy did not discharge the principal, and it could not discharge interest. *White v. United States,* 317 F.2d 231 (9th Cir. 1963).

Attempts to collect post-bankruptcy interest should be divided into two areas: the collection from the bankrupt estate, and the collection from the individual.

With regard to the federal government's right to collect interest up to the date of payment from the estate there has been much litigation. A minority and a majority view seem to have emerged. The minority view is that where the government's claim is secured by pre-bankruptcy lien the government can collect post-bankruptcy interest from the estate. The weight of authority appears to deny interest from the estate beyond the date of bankruptcy regardless of a lien. Annot., 77 A.L.R.2d 1119 (1961).

This issue is still open to much question and to determine the rights of the government one must look to the holdings of the individual circuits. In *United States v. Harrington*, 269 F.2d 719 (4th Cir. 1959), the court followed what is stated above as the majority view.

The principal case falls into the second area. Here the government claimed that the interest survived the discharge in bankruptcy on the same basis as a federal tax claim, and might still constitute a valid charge against the bankrupt as an individual. This has nothing to do with an attempt to collect post-bankruptcy interest from the bankrupt estate.

The only other case directly in point is *United States v. Mighell*, 273 F.2d 682 (10th Cir. 1959). In this case the United States contended that post-bankruptcy interest covered by pre-bankruptcy liens survived the bankruptcy. The court allowed interest to the date of bankruptcy but not beyond that point. The court cited *United States v. Harrington, supra,* as their authority for the denial of post-bankruptcy interest.

The court in the principal case admits that they are in conflict with *United States v. Mighell, supra,* but states that they choose to follow their trial court's decision.

With a conflict on the right of the government to collect post-bankruptcy interest from the bankrupt estate, the conflict set up by the principal case on the right of the government to collect post-bankruptcy interest from the individual does not seem so strange. Yet, it is hard to decide what can be used as a guide line to determine what any particular circuit will hold. One might think that courts following the majority view as to bankrupt estates would have a tendency to carry over that view into decisions concerning post-bankruptcy interest against the individual. On the other hand, courts following the minority view should use the minority reasoning in reaching a decision on allowing post-bankruptcy interest against the individual. The principal case shows that no such relationship exists. The court allowed post-bankruptcy interest against the individual while stating that between the tax collector and the bankrupt estate the interest would be suspended at the time of adjudication. The split of authority thus exists in both areas and it is hard to tell which way the different circuits will handle the problem when it confronts them again.

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