Michigan Law Review

Volume 32 | Issue 3

1934

FUTURE INTERESTS -TRANSFERABILITY OF RIGHT OF ENTRY FOR BREACH OF CONDITION

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Estates and Trusts Commons, and the Property Law and Real Estate Commons

Recommended Citation
FUTURE INTERESTS -TRANSFERABILITY OF RIGHT OF ENTRY FOR BREACH OF CONDITION, 32 MICH. L. REV. 415 (1934).
Available at: https://repository.law.umich.edu/mlr/vol32/iss3/20

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FUTURE INTERESTS — TRANSFERABILITY OF RIGHT OF ENTRY FOR BREACH OF CONDITION — Plaintiff's ancestor conveyed land to the city, on the express condition that the city should construct and forever maintain a "speedway" on the premises conveyed, reserving to himself, his heirs and assigns a right of entry for breach of the condition. Subsequently, before the condition was broken, he conveyed to a third party all his remaining land adjoining the Speedway, "together with all the right, title and interest of the party of the first part, in said Speedway." The breach of the condition having since admittedly occurred, the plaintiff, the heir of the original grantor, sought to assert the right of entry. *Held*, that the original grantor, by his ineffectual attempt to convey to the third party his right of entry, had extinguished the right, and full title was in the city. *O'Connor v. City of Saratoga Springs*, (App. Div. 1933) 262 N. Y. S. 809.

Rights of entry for condition broken have almost uniformly been held to be non-transferable before the condition is broken. This was the rule at common law, and aside from statutes in a few States the rule generally remains unchanged today.[1] Recognizing this rule, it seems rather startling that an attempt to

[1] For a comprehensive discussion of the rule of non-transferability of powers of termination of estates, and a collection of the cases and statutes bearing on the subject, see AMERICAN LAW INSTITUTE, RESTATEMENT OF PROPERTY, Tentative Draft No. 4, pp. 20-24, 112-114 (1933).

transfer such a power of termination should act to extinguish totally the power in the grantor, and in his successors. If the conveyance is considered as entirely ineffectual to transfer the power to another, how can it act, directly in opposition to the intent of the parties, to put an end to the reserved interest? The anomaly of this position has been recognized and the results of its application have been disapproved, but the American courts that have passed on the question have, practically without exception, so held.[2] The American Law Institute, however, recognizes the more logical position that such an attempted transfer, if void for its intended purpose, should be void for all purposes.[3] The only argument which

[2] A complete collection of the American decisions is found in L. R. A. 1916F 303 *et seq.*, with a comment discussing the various features of the rule, and expressing strong disapproval of its results. The leading cases in several States are: Hooper v. Cummings, 45 Me. 359 (1858); Rice v. Boston & Worcester R. R., 12 Allen (94 Mass.) 141 (1866); Halpin v. Rural Agricultural School District No. 9, 224 Mich. 308, 194 N. W. 1005 (1923); Wagner v. Wallowa County, 76 Or. 453, 148 Pac. 1140, L. R. A. 1916F 303 (1915). See also Editorial, 85 N. Y. L. J., Apr. 17, 1931, p. 332; 1 TIFFANY, REAL PROPERTY, 2d ed., 316 (1920); 2 WASHBURNE, REAL PROPERTY, 6th ed., sec. 952 (1902).

In the Halpin case, supra, although the point was not there in issue, as the rights of the heirs of the grantor were not presented, the court approved the rule. Bird, J., who wrote the opinion, stated his personal disapproval, but he felt that the law was settled. In two later Michigan decisions, County of Oakland v. Mack, 243 Mich. 279, 220 N. W. 801 (1928), and Fractional School District v. Beardslee, 248 Mich. 112, 226 N. W. 867 (1929), in which the question was in issue, the court considered the dictum of the Halpin case binding upon them.

The doctrine of the Wallowa case, supra, is rather weakened by the recent case of Magness v. Kerr, 121 Or. 373, 254 Pac. 1012 (1927), which refuses to extend the "harsh" rule of the earlier case. The court, however, distinguishes the cases by saying that in the Magness case the reserved interest was a possibility of reverter, while in the other it was a "bare right of entry for breach of condition subsequent," which would seem rather a distinction without a difference, on the facts of those two cases.

New York has two decisions which seem rather contrary to the rule of the principal case. One of these, Southwick v. New York Christian Missionary Society, 151 App. Div. 116, 135 N. Y. S. 392 (1912), aff'd without opinion 211 N. Y. 515, 105 N. E. 204 (1914), reargument denied 212 N. Y. 564, 106 N. E. 1043 (1914), is distinguished in the opinion in the principal case. In that case the power of termination descended to several heirs, one of whom attempted by transfer to acquire the interests of all the others. The court held that the entire interest was in the transferee, by virtue, however, of his original share in the inheritance, and not by the transfers from the other heirs, the interest being indivisible. The other case, People v. Wainwright, 237 N. Y. 407, 143 N. E. 236 (1924), was not considered in the principal case. In that case, the court allowed the State to assert a power of termination reserved in a grant, despite a prior transfer by statute of "such right, title and interest as the State of New York may have in and to the land," as to which the power of termination had been reserved. The court said that no prior attempt to transfer the power had been made, construing the above words only to refer to such interest as the State might have after breach of the condition. This case is therefore on its language not opposed to the rule, but the construction policy there employed would, it seems, have produced different results in nearly all of the other cases.

[3] AMERICAN LAW INSTITUTE, RESTATEMENT OF PROPERTY, Tentative Draft No. 4, sec. 201c (1933): "An attempt to make such a transfer of the power of termination as is forbidden by the principal stated in this Section, does not destroy the power of

is today advanced in support of the rule is that it tends to remove encumbrances, and thus promotes the free alienability of property. Opposed to this argument of policy is the modern tendency in the law of property to recognize such powers of termination as transferable interests,[4] and thus to preserve them by making them freely alienable to those who are in a position to enforce them. The rule of the principal case, in effect, not only says that the conveyance is absolutely void as an attempt to transfer the power, but also places a penalty of extinguishment upon such an attempt. The New York court has followed the clear weight of authority, but, it seems, at the expense of taking a backward step from the continued trend toward a liberalization of property law.

S. G. W.

termination." In the comment on this section no authority is cited in support of this position, but it is admitted to be opposed by the decisions of four States, and dicta in a fifth (N. Y.). With the decision of the principal case the rule is plainly stated for New York, so now five States, by its own computation, are opposed to the rule of the Restatement.

[4] 1 TIFFANY, REAL PROPERTY, 2d ed., 315 (1920); Roberts, "Transfer of Future Interests," 30 MICH. L. REV. 349 at 368 (1932).