Michigan Law Review

Volume 54 | Issue 7

1956

Future Interests - Restraints on Alienation - Validity of Pre-Emptive Provision

Julian Linde
University of Michigan Law School

FUTURE INTERESTS—RESTRAINTS ON ALIENATION—VALIDITY OF PRE-EMPTIVE PROVISION—Defendant purchased a strip of land lying between his residence and the plaintiff's for $2,550. Immediately thereafter and pursuant to a prior understanding, he conveyed the west half to plaintiff for one half the price he paid for the entire tract. As a part of this transaction it was agreed that should either party desire to sell his portion of the lot at any time in the future, he would first offer it to the other at its original cost plus any amounts expended for improvements. When defendant was offered $3,500 for his half seven years later, he disregarded this agreement and accepted the offer. Plaintiff's action for specific performance of the contract was dismissed. On appeal, *held,* affirmed. Although the arrangement does not violate the rule against perpetuities, it is nevertheless void as a direct restraint on alienation. *Kershner v. Hurlburt,* (Mo. 1955) 277 S.W. (2d) 619.

Pre-emptions, or "first refusals," differ from ordinary options because they are not exercisable until the owner of the property decides to sell it.[1] Upon the happening of this event the holder has a reasonable time in which to decide whether or not he wants to purchase.[2] Basically, there are two kinds of pre-emptions.[3] In one type the holder is preferred if he matches a third party's bona fide offer which is acceptable to the owner; in the other, as typified by the principal case, the pre-emption price is fixed at the time the agreement is entered into.[4] Since the price-matching variety does little more than add a potential buyer, its restraint on alienation is negligible and seemingly should be permitted.[5] However, because a pre-emption involves a contingent future interest as well as a possible direct restraint on alienation, there are decisions in which the rule against perpetuities has been applied to these pre-emptions[6] and viola-

[1] Something less than actual sale to another person will establish the requisite state of mind. Hathaway v. Nevitt, 358 Mo. 202, 213 S.W. (2d) 938 (1948).

[2] 5 CORBIN, CONTRACTS §1197 (1951).

[3] See 4 PROPERTY RESTATEMENT §413, comment *a,* illus. 1, 2 (1944).

[4] Interesting variations on these types are presented in Concannon v. Haile, 81 Pa. D & C. 480 (1952) and Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926).

[5] See Weber v. Texas Co., (5th Cir. 1936) 83 F. (2d) 807, cert. den. 299 U.S. 561, 57 S.Ct. 23 (1936); 6 AMERICAN LAW OF PROPERTY §26.65 (1952).

[6] The use of this rule as the criterion of validity seems unsound because the duration of a pre-emption bears no necessary relation to the extent of the burden it imposes on

tions of it found.[7] Where the pre-emption is at a fixed price, the degree of restraint imposed in a particular situation will be determined by the extent to which realizable value exceeds pre-emption price.[8] In the interests of certainty it has been suggested that the mere insertion of a fixed price should render a pre-emptive provision void.[9] Under this approach the provision is viewed solely as a direct restraint and thus its duration is immaterial. Only a few of the cases handle the problem in this simple manner.[10] In the others enforceability depends wholly or in part upon whether or not the pre-emption involved is construed so as to violate the rule against perpetuities.[11] Although the court in the principal case follows the practice of applying both rules, the outcome of the dual tests here is apparently unique in the law thus far. The result is a square holding that although the pre-emption does not offend the rule against perpetuities,[12] it must nevertheless be struck down as violative of the rule against restraints.[13] This is a significant step toward recognition that the latter rule should be determinative in the case of pre-emptions. It may be anticipated that it will lead ultimately to the conclusion that the rule against perpetuities has no relaevancy in this area whatever.[14]

There is a dictum in the principal case that the instant provision, and in fact any direct restraint not intended to last longer than the period of the rule against perpetuities, would be permitted if it were reasonable.[15] A reasonable restraint is defined as one which is imposed for a socially or economically desirable purpose. Kentucky is apparently the

alienability and also because the rule itself contemplates non-commercial dispositions of property whereas pre-emptions are commonly found in connection with commercial transactions. Professor Schnebly, writing in 6 AMERICAN LAW OF PROPERTY §26.66 (1952), objects to the practice and makes the persuasive point that the operation of the rule might be overcome in most jurisdictions (assuming the usual case where the right is to be conferred on the grantor of the property) merely by the device of phrasing the pre-emption in forfeiture rather than promissory terms. This is so because the rule in this country, absent statutes to the contrary, is that powers of termination are not subject to the rule. See 3 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §1238 (1956).

7 Saulsberry v. Saulsberry, 290 Ky. 132, 160 S.W. (2d) 654 (1942); Roberts v. Jones, 307 Mass. 504, 30 N.E. (2d) 392 (1940).

8 In a leading English case, In re Rosher, 26 Ch. D. 801 (1884), the ratio was 5:1 and the court held this equivalent to an absolute restraint. Should the value fall below the price of the pre-emption, the latter loses both its power to restrain and its economic value.

9 This is the position taken in 4 PROPERTY RESTATEMENT §413 (1944) and in 6 AMERICAN LAW OF PROPERTY §§26.65, 26.67 (1952).

10 Two which approximate this approach are DePeyster v. Michael, 6 N.Y. 467 (1852) and Maynard v. Polhemus, 74 Cal. 141, 15 P. 451 (1887).

11 See, e.g.: Henderson v. Bell, 103 Kan. 422, 173 P. 1124 (1918); Lewis Oyster Co. v. West, 93 Conn. 518, 107 A. 138 (1919); Maddox v. Keeler, 296 Ky. 440, 177 S.W. (2d) 568 (1944).

12 The covenant was interpreted as intended to be binding only on the immediate parties. Principal case at 623.

13 Principal case at 626.

14 See note 6 supra.

15 The alleged purpose of this restraint, i.e., to prevent the erection of business property on the site, was belied by the express allowance for improvements without any hint that they be restricted to a particular type. Principal case at 626.

only jurisdiction with a doctrine of reasonable restraints presently in force.[16] There the standard professedly applied is one of "reasonable time," but it has been pointed out that the purpose of the restraint often influences the results reached.[17] Although it seems desirable to allow restraints on alienation for some commercial purposes for fairly short periods of time, a doctrine of reasonable restraints does not provide an adequate means for doing this because it is inherently subject to litigation and casts doubt on the status of titles.[18] It appears that such exceptions could best be handled by statutes drawn to cover only specifically defined types of situations.

Julian Linde

[16] The Kentucky cases are discussed in Roberts, "Future Property Interests in Kentucky," 13 KY. L. J. 186 (1925).

[17] Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 at 405 (1935).

[18] See Andrews v. Hall, 156 Neb. 817, 58 N.W. (2d) 201 (1953), the case abrogating Nebraska's then existing reasonable restraints doctrine.