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## Future Interests - Restraints on Alienation - Same Rules Applicable to Restraints on Future and Possessory Interests

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FUTURE INTERESTS—RESTRAINTS ON ALIENATION—SAME RULES APPLICABLE TO RESTRAINTS ON FUTURE AND POSSESSORY INTERESTS—Testator devised real estate to his wife for life, remainder to his children, “with the following understanding,” that should any child attempt to dispose of his interest before the death of the testator’s wife, that child would forfeit his share and it would go to the remaining children. After the death of the testator, but before the death of his widow, one son conveyed away his interest in the property. In a suit for the partition of the real estate devised by the testator, *held*, on appeal, restraints on the alienation of vested estates in fee simple are against public policy and are therefore void. The conveyance by the son was effective. *Andrews v. Hall*, 156 Neb. 817, 58 N.W. (2d) 201 (1953).

Throughout most of its history our legal system has looked with disfavor

upon restraints on the alienation of vested legal interests in real property.<sup>1</sup> One of the soundest reasons for the rejection of such restraints today is that they conflict with the social and economic policy directed toward making possible the fullest economic utilization of land.<sup>2</sup> Restraints are of two basic types,<sup>3</sup> disabling restraints<sup>4</sup> and forfeiture restraints.<sup>5</sup> An absolute and unqualified restraint of either type is void when imposed upon an otherwise absolute legal interest.<sup>6</sup> By the great weight of authority, disabling restraints qualified as to time on a fee are also void,<sup>7</sup> and forfeiture restraints qualified as to time on a fee are generally void.<sup>8</sup> A small though indefinite number of states,<sup>9</sup> the most notable among them being Kentucky,<sup>10</sup> have departed from the general rule by holding that forfeiture restraints limited in time on a fee are valid if they are "reasonable." Nebraska has been in this latter group for some time, and the principal case is significant in that it explicitly repudiates the position previously taken by the Nebraska Supreme Court<sup>11</sup> and places Nebraska in the group of states following the more general rule. Furthermore, the restraint in the principal case was on a future interest, a vested remainder in fee, and this raises the seldom litigated question of whether rules applying to restraints

<sup>1</sup> On the general subject see Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961, 1186, 1380 (1935), a slightly altered, expanded and more current version of which is found in 6 *AMERICAN LAW OF PROPERTY*, part 26 (1952); 2 *SIMES, FUTURE INTERESTS*, c. 29 (1936); 4 *PROPERTY RESTATEMENT*, part II (1944). See also Fratcher, "Restraints on Alienation of Legal Interests in Michigan Property," 50 *MICH. L. REV.* 675, 793, 1017 (1952).

<sup>2</sup> 2 *SIMES, FUTURE INTERESTS* §§442, 444 (1936).

<sup>3</sup> A third type of restraint, the promissory restraint, is not discussed in this note. See 4 *PROPERTY RESTATEMENT* §404, comment g (1944).

<sup>4</sup> Such a restraint withholds from the conveyee the power to make a transfer, voluntary or involuntary, and any attempted transfer is void. The term "disabling" seems to have originated in Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961 at 963 (1935). Disabling restraints are generally less favored than forfeiture restraints. 4 *PROPERTY RESTATEMENT* §405, comment a (1944).

<sup>5</sup> Such a restraint either extinguishes the interest of the conveyee on his transfer in violation of the restraint, his interest then going either to the creator of the restraint or to a third person, or else makes his interest subject to destruction at the will of the creator of the restraint or his heirs.

<sup>6</sup> Many cases are collected in 6 *AMERICAN LAW OF PROPERTY* §26.15 (1952). *Accord*, 4 *PROPERTY RESTATEMENT* §§405, 406 (1944). A well-recognized exception to this rule is a restraint on alienation by a trustee. 6 *AMERICAN LAW OF PROPERTY* §26.13 (1952).

<sup>7</sup> See the cases collected in 6 *AMERICAN LAW OF PROPERTY* §§26.16 to 26.17 (1952), and 2 *SIMES, FUTURE INTERESTS* §451 (1936).

<sup>8</sup> See the cases collected in 6 *AMERICAN LAW OF PROPERTY* §§26.19 to 26.21 (1952), and 2 *SIMES, FUTURE INTERESTS* §457 (1936). *Accord*, 4 *PROPERTY RESTATEMENT* §406, comment e (1944).

<sup>9</sup> See *Fleming v. Blount*, 202 Ark. 507, 151 S.W. (2d) 88 (1941); *Matlock v. Lock*, 38 Ind. App. 281, 73 N.E. 171 (1905); *Hinshaw v. Wright*, 124 Kan. 792, 262 P. 601 (1928); *Furst v. Lacher*, 149 Minn. 53, 182 N.W. 720 (1921); *Lynch v. Lynch*, 161 S.C. 170, 159 S.E. 26 (1931).

<sup>10</sup> See the cases collected in 6 *AMERICAN LAW OF PROPERTY* §26.22 (1952), and 2 *SIMES, FUTURE INTERESTS* §458 (1936).

<sup>11</sup> See *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161, 227 N.W. 917 (1929), declaring valid a disabling restraint operative for ten years on a fee. It is this case that the principal case expressly overruled. But cf. *Moffitt v. Williams*, 116 Neb. 785, 219 N.W. 138 (1928).

on the alienation of possessory interests are applicable equally to restraints on future interests.<sup>12</sup> The few decided cases suggest that the same rules will be applied to a restraint on a future interest as would be applied if the restraint were on a fee in possession. This is true whether the restraint may continue in effect after the future interest has come into actual possession,<sup>13</sup> or whether the restraint may in terms continue operative only so long as the future interest remains non-possessory.<sup>14</sup> It may be argued that instead of the usual flat prohibition of restraints qualified as to time on the voluntary alienation<sup>15</sup> of otherwise absolute legal interests in land, it would be desirable to adopt a qualitative approach toward these restraints.<sup>16</sup> Such an approach might weigh the length of time during which alienation is restrained, the purpose for which the restraint is imposed,<sup>17</sup> and the practical effect that the restraint has on alienation<sup>18</sup> against the public interest in promoting the free alienation of land.<sup>19</sup>

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<sup>12</sup> Since the policy of the law even now does not favor the alienation of contingent future interests to the extent that it does in the case of vested interests, it seems possible that courts might permit express restraints on the alienation of contingent future interests for the period prior to vesting even in those jurisdictions where alienation is permitted. See Sweet, "Restraints on Alienation," 33 L.Q. Rev. 236 at 245 (1917); Gordon v. Tate, 314 Mo. 508, 284 S.W. 497 (1926); *Minter v. People's National Bank*, 95 Ind. App. 204, 182 N.E. 87 (1932).

<sup>13</sup> See *Mandlebaum v. McDonell*, 29 Mich. 78 (1874); *Hause v. O'Leary*, 136 Minn. 126, 161 N.W. 392 (1917); *Johnson v. Gaines*, 230 N.C. 653, 55 S.E. (2d) 191 (1949); *McFadden v. McFadden*, 302 Ill. 504, 135 N.E. 31 (1922); *Wright v. Jenks*, 124 Kan. 604, 261 P. 840 (1927). *Accord*, 4 PROPERTY RESTATEMENT §411 (1944). "No authority has been found which has divided the restraint and upheld it for the period of time during which the future interest may remain non-possessory." 6 AMERICAN LAW OF PROPERTY 492 (1952).

<sup>14</sup> *Voellinger v. Kirchner*, 314 Ill. 398, 145 N.E. 638 (1924); *Lathrop v. Merrill*, 207 Mass. 6, 92 N.E. 1019 (1910); *Watkins v. Minor*, 214 Mich. 380, 183 N.W. 186 (1921). But cf. *In re Goulder*, [1905] 2 Ch. 100; *Barker's Estate*, 159 Pa. 518 at 526, 28 A. 365 (1894). The *Restatement* is in accord with this proposition where the future interest is indefeasibly vested, but expressly takes no position where a forfeiture restraint is to endure only so long as the future interest restrained remains contingent or defeasible. 4 PROPERTY RESTATEMENT §411, caveat and comment *e* (1944).

<sup>15</sup> It should be noted that a restraint upon the involuntary alienation of property leaves the property free from the claims of creditors, a situation which would appear to be intolerable.

<sup>16</sup> The gains from such an approach probably would accrue primarily to those who, through lack of competent legal advice, attempted to accomplish their purpose by the use of a restraint on alienation rather than by the use of an acceptable device, such as a trust.

<sup>17</sup> These cases suggest some legitimate purposes: *In re Congested Districts Bd.*, [1919] 1 Ir. R. 146 (upholding restraint affording security to vendor for payments due); *Earls v. McAlpine*, 27 Grant Ch. 161 (1879), app. dismissed 6 Ont. Rep. 145 (1881) (upholding restraint enforcing support for widow); *Northwest Real Estate Co. v. Serio*, 156 Md. 229, 144 A. 245 (1929) (rejecting restraint facilitating urban development). See Sweet, "Restraints on Alienation," 33 L.Q. Rev. 236 at 246 (1917).

<sup>18</sup> The very act of creating a future interest usually imposes a strong economic restraint on the alienation of either the future or the possessory interest. This has been used as an argument for permitting forfeiture restraints on present legal life estates. See 6 AMERICAN LAW OF PROPERTY §26.48 (1952).

<sup>19</sup> See 6 AMERICAN LAW OF PROPERTY §§26.25 to 26.30 (1952).