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FUTURE INTERESTS-POWER OF TERMINATION-RESTRAINT ON ALIENATION- MERGER OF THE POWER OF TERMINATION WITH THE FEE SIMPLE SUBJECT TO A CONDITION SUBSEQUENT

Neil McKay S.Ed.
University of Michigan Law School

FUTURE INTERESTS—POWER OF TERMINATION—RESTRAINT ON ALIENATION—MERGER OF THE POWER OF TERMINATION WITH THE FEE SIMPLE SUBJECT TO A CONDITION SUBSEQUENT—*A* conveyed two tracts of land to *B*, her daughter, by two deeds, reserving a life estate in each tract and restraining, by condition subsequent, alienation of them in any manner, for five years in one deed, and for twelve years in the second. In less than five years and before the restrictions were violated, *A* died and *B* was adjudged her sole and only heir at law. Thereafter *B* conveyed the land by quit claim deed to the defendant, her husband. *B* died a month later, leaving a will, by which she devised and bequeathed all her property to the defendant. The heirs of *B* were adjudged to be eight aunts and uncles, who are the plaintiffs here, and the defendant. Plaintiffs bring this action against the defendant to quiet title and obtain an accounting for rents and partition of the realty; they ask that each of the plaintiffs be decreed owner of an undivided one-sixteenth of the land and the defendant of an undivided one-half. *Held*, the restraint on alienation imposed by *A* was valid as being reasonably necessary to protect *A*'s life estate; it was a condition subsequent to the grant to *B*, leaving a power of termination in *A*, which on *A*'s death passed to *B* as *A*'s sole heir, and ceased to exist because of the union in *B* of the power to enforce the restraint and the interest so restrained; title was, therefore, quieted in the defendant. *Watson v. Dalton*, (Neb. 1945) 18 N.W. (2d) 658.

It seems clear that the forfeiture restraint on alienation, called valid in the principal case under the Nebraska doctrine upholding such restraints when reasonably necessary to protect the interest of the grantor,[1] would not be allowed in most states since, even though limited in duration, the restraint was complete,[2] and was imposed on a fee simple subject to a life estate which, but for the

[1] Majerus v. Santo, 143 Neb. 774, 10 N.W. (2d) 608 (1943); Peters v. Northwestern Mut. Life Ins. Co., 119 Neb. 161, 227 N.W. 917 (1929); 2 SIMES, FUTURE INTERESTS, § 458 (1936). For the majority view as to the validity of such restraints, see: 4 PROPERTY RESTATEMENT, § 406 (1944); 2 SIMES, FUTURE INTERESTS, § 447 et. seq. (1936); Schnebly, "Restraints upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186, 1380 (1935).

[2] The provisions were as follows: "The grantor .... restricts the grantee for a period of 5 years from this date, from selling or mortgaging said premises or in any manner during said period from placing or causing to place a lien of any kind against said premises." Quoted by the court, principal case at 661.

restraint, would have been indefeasible.[3] However, once it is conceded that the grantor did reserve a valid power of termination, the conclusion of the court that the power of termination was extinguished because of the union in one person of the power to enforce the restraint and the interest so restrained seems to be a desirable one. It should be noticed that both the Nebraska court and the American Law Institute in their *Property Restatement,* on which the decision in the principal case was largely based, in this regard, use the term "ceased to exist" to describe the extinguishment instead of the word "merged." [4] And yet where the particular forfeiture restraint involved is in the form of a condition subsequent, leaving in the grantor a power of termination, it is hard to understand what the theory for such an extinguishment is, unless it is that of merger. Opposing such an application of the doctrine of merger, however, is the familiar holding, which has been recognized in a variety of cases, that a power of termination is really not an interest in land at all, but merely a right in the grantor.[5] Applying this idea, it has been held that where a grantor creates a power of termination, in conveying an estate less than a fee, and retains a reversionary interest, they do not merge,[6] even where it is a reversion in fee.[7] Nevertheless, the result in the principal case would seem to be all supported by analogy to cases where courts have allowed a power of termination to be extinguished by

[3] The generally accepted view in this country is that restraints on vested future interests are governed by the same rules that govern possessory interests. 4 PROPERTY RESTATEMENT, § 411 (1944); 2 SIMES, FUTURE INTERESTS, § 467 (1936); Schnebly, "Restraints upon the Alienation of Legal Interests: II," 44 YALE L. J. 1186 at 1212 (1935); Gray v. Shinn, 293 Ill. 573, 127 N.E. 755 (1920); Lathrop v. Merrill, 207 Mass. 6, 92 N.E. 1019 (1910); Mandlebaum v. McDonell, 29 Mich. 78 (1874).

[4] "It is affrmatively stated in Restatement, Property, sec. 423, p. 4265: 'An otherwise valid restraint on alienation ceases to exist * * * in the case of a promissory restraint in the form of a condition subsequent, upon a union of the power to enforce the restraint and the interest so restrained in the same person; * * *' This statement is on all fours with the case at bar, and governs its decision . . . ." Principal case at 663.

[5] Courts have frequently regarded powers of termination as something less than an interest in land. See: Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896); People v. Wainwright, 237 N.Y. 407, 143 N.E. 236 (1924); Parry v. Berkeley Hall School Foundation, 10 Cal. (2d) 422, 74 P. (2d) 738 (1937); Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930); 77 A.L.R. 344 (1932). In South Carolina the statutes of descent are held not to apply to possibilities of reverter because they are not "estates." It has also been held there that a possibility of reverter is not a substantial enough interest to merge. Adams v. Chaplin, 1 Hill (S.C. Eq.) 265 (1833). See also: 4 THOMPSON, REAL PROPERTY, § 2129 (1939); 1 SIMES, FUTURE INTERESTS, § 159 (1936); 1 TIFFANY, REAL PROPERTY, § 209 (1939).

[6] Parry v. Berkeley Hall School Foundation, 10 Cal. (2d) 422, 74 P. (2d) 738 (1937); 114 A.L.R. 566 (1938); 2 PROPERTY RESTATEMENT, § 155, comment c (1936); 1 SIMES, FUTURE INTERESTS, § 165 (1936); 33 AM. JUR., § 208.

[7] Parry v. Berkeley Hall School Foundation, 10 Cal. (2d) 422 at 426, 74 P. (2d) 738 (1937), stated the rule as follows: ". . . The grantor may transfer land to the grantee for life, subject to a condition subsequent restricting its use. In such case the grantor has the reversion in fee and also has a right of reentry (power of termination), and they do not merge."

a release to the person holding the other interests.[8] Surely on the basis of results, at least, it is no more illogical to hold that a power of termination ceases to exist when it passes by descent, than when it passes by release. Moreover, considering the fact that courts have generally held the power of termination to be enough of an interest to descend,[9] it appears that they have accorded to this power many of the characteristics of a property interest. With this in mind, and remembering the well known and long standing prejudice of the courts against forfeitures for breach of conditions subsequent,[10] perhaps most forcefully demonstrated in the cases where it has been held that an attempt to alienate a power of termination is not only ineffective to transfer the power, but destroys it as well; [11] objections to the result reached by the Nebraska court in the principal case would seem more technical than substantial.

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[8] Trustees of Calvary Presbyterian Church v. Putnam, 249 N.Y. 111, 162 N.E. 601 (1928); Huntley v. McBrayer, 172 N.C. 642, 90 S.E. 754 (1916); Arnold v. Scharff, (Tex. Civ. App.) 210 S.W. 326 (1918); Schulman v. Ellenville Elec. Co., 152 Misc. 843, 273 N.Y.S. 530 (1934); Jones v. Williams, 132 Ga. 782, 64 S.E. 1081 (1909). And this same result has been allowed in cases involving possibilities of reverter: Pearse v. Killian, S.C. Eq. (McMullan) 234 (1841); 38 A.L.R. 1111 (1925); Brill v. Lynn, 207 Ky. 757, 270 S.W. 20 (1925); McArdle v. Hurley, 103 Misc. 540, 172 N.Y.S. 57 (1918); Adams v. Chaplin, 1 Hill (S.C. Eq.) 265 (1833); 33 AM. JUR., § 209.

The American Law Institute in their PROPERTY RESTATEMENT state that a power of termination may be transferred by one of the joint holders of the power to another, and may be transferred where the conveyor also has a reversionary interest which is being transferred with the power of termination. 2 PROPERTY RESTATEMENT, § 161 (1936).

[9] North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908); Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930); 77 A.L.R. 344 (1932); 2 PROPERTY RESTATEMENT, §§ 164, 165 (1936); 3 SIMES, FUTURE INTERESTS, § 724 (1936). It has been held in New York that a power of termination passes by representation, rather than by descent; but even there the power can be extinguished by release. Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896); Trustees of Calvary Presbyterian Church v. Putnam, 249 N.Y. 111, 162 N.E. 601 (1928).

[10] Allen v. Trustees of Great Neck Free Church, 240 N.Y. App. Div. 206, 269 N.Y.S. 341 (1934); Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889); Hooper v. Haas, 332 Ill. 561, 164 N.E. 23 (1928); Mead v. Ballard, 7 Wall. (74 U.S.) 290 (1868); Emerson v. Simpson, 43 N.H. 475 (1862); Carter v. Branson, 79 Ind. 14 (1881); 10 R.C.L., § 86 (1915); 1 TIFFANY, REAL PROPERTY, § 193 (1939); 1 SIMES, FUTURE INTERESTS, §§ 168 et seq. (1936).

[11] Rice v. Boston & Worcester Railroad Corp., 94 Mass. (12 Allen) 141 (1866); County of Oakland v. Mack, 243 Mich. 279, 220 N.W. 801 (1928); L.R.A. 1916F 311; 109 A.L.R. 1148 at 1160 (1937); 2 PROPERTY RESTATEMENT, § 160, comment c (1936); 3 SIMES, FUTURE INTERESTS, § 717 (1936).