Michigan Law Review

Volume 57 | Issue 8

1959

The Minority Doctrine Concerning Direct Restraints on Alienation

Herbert A. Bernhard
Member, California Bar

THE MINORITY DOCTRINE CONCERNING DIRECT RESTRAINTS ON ALIENATION

*Herbert A. Bernhard**

RESTRAINTS on the legal power of alienation[1] which arise by acts of the parties can be classified into three categories: disabling restraints, forfeiture restraints and promissory restraints.[2] A disabling restraint exists when the property[3] involved[4] is under a direction that it shall not be alienated. A forfeiture restraint exists when the property involved will be forfeited upon alienation of the property by the conveyee. A promissory restraint exists when the conveyee has promised not to alienate the property; it may arise out of a covenant either in the conveyance itself or in a separate contract.

This classification is not a purely formal one. While it is true that in many cases it is unnecessary to categorize the situation according to this particular classification scheme,[5] nevertheless, it is also true that such characterization frequently makes the difference between one result and another.[6] The reason for this last may be found by considering the results of an attempt to alien property which is under each type of restraint. For one thing, property under disabling restraint remains under that restraint until the period of the restraint is over, since any attempt to alien is ineffective.[7] On the other hand, a forfeiture restraint

*Member, California Bar.—Ed.

1 The term "restraint on alienation" is ambiguous, in that it could mean restraint on the legal power of alienation or it could mean hindrance of alienability as a practical matter. As used in this article, the term will refer only to the former. However, since practical salability is one underlying policy basis for the doctrines discussed, the actual inalienability that results from a given restraint cannot be neglected.

2 See 4 PROPERTY RESTATEMENT §404 (1944).

3 Generally no distinction is made between real and personal property. 3 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §1138 (1956) [hereinafter cited SIMES AND SMITH].

4 The definitions sometimes used appear to imply that these restraints arise only when property is transferred. While this is the normal situation, a transfer of property is not necessary. 4 PROPERTY RESTATEMENT §404, comment *b* (1944).

5 See 3 SIMES AND SMITH, §1132.

6 See 6 AMERICAN LAW OF PROPERTY §26.26 (1952); 4 PROPERTY RESTATEMENT §404, comment *c* (1944).

7 However, some courts would hold the grantee who conveys in violation of a restraint to be "estopped" from questioning his conveyance. See Gray v. Gray, 300 Ky. 265, 188 S.W. (2d) 440 (1945).

would cease to exist once the alienation attempt has been made. Further, both the promissory and forfeiture restraints may be eliminated upon agreement of all parties concerned, whereas the disabling restraint cannot. Another distinction arises from the fact that violation of a forfeiture restraint affects title to the property, whereas violation of a promissory restraint gives rise to contract remedies only.

Thus, situations in the three categories can vary considerably in effect, e.g., a disabling restraint has a much greater actual restraining effect on the salability of the property than does a forfeiture type. In view of this, it is not surprising that the courts have made a distinction between types of restraints. Whether such a method of distinction is best, however, is another matter. A primary concern of this article is the question of whether such characterization by types is not better replaced by a simple "reasonable vs. unreasonable" characterization.

Simply stated, the minority doctrine which this article treats holds that restraints on alienation of property are invalid only if unreasonable. This is in contrast to the "majority" concept which takes the view that all restraints on alienation are void, unless they fall into recognized exception categories. Since the minority doctrine is best understood when viewed by contrast to the majority doctrine, the latter is treated first.

I. CHARACTERISTICS OF THE MAJORITY AND MINORITY DOCTRINES

A. *Characteristics of the Majority Doctrine*

Both "doctrines" which we shall discuss are easily enough stated in black-letter type, but, of course, the decisions do not necessarily have the consistency and sharp boundaries implied by the bald statements of the doctrines. All courts would agree on the invalidity of a restraint disabling alienation of a fee estate for all time to all persons. However, as the restraints become less extreme in each of the parameters, e.g., the restraint is merely of forfeiture type or is to last for a limited time, then more and more courts shift over to upholding them by one device or another. Often the rationale of such cases is obscure. No stress will be given in this paper to the minor variations, since there are hundreds of cases and they have been adequately catalogued by the text writers.

Within the above limitation, then, the majority doctrine of restraints on alienation can be stated as follows: Except for

certain specific categories of situations, restraints on alienation are void; restraints fitting within the exceptional categories are valid.[8] In a few instances the doctrine has been codified,[9] but in most instances it has been judicially created and sustained. The recognized exceptions vary from court to court, but nevertheless there is substantial agreement on many. These include:

1. The spendthrift trust and similar trust devices.[10]
2. Restraints on the power to partition (if not to last for too long a time).[11]
3. Restraints (particularly forfeiture) on alienation to a small group of persons,[12] where the group classification is not defined by race or other social characteristic.
4. Forfeiture restraints on a life or lesser estate.[13]
5. Promissory (and sometimes forfeiture) restraints in the form of a right of pre-emption.[14]
6. Restraints for protection of the vendor in a land-sale contract.[15]
7. Reasonable provisions in the articles of a business organization prohibiting transfer of shares.[16]
8. Restraints applied to gifts to charity.[17]

It should be noted that some of these exceptions—most notably 2 and 7—incorporate what amounts to a reasonableness requirement. Generally, however, the majority doctrine is marked by the class-by-class approach rather than by a case-by-case approach. The law is fixed for type situations. When a case falls within or without such a type the law is stringently applied without regard to the specific circumstances in which the case arises.

8 See Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 at 375 (1935).

9 E.g., Cal. Civ. Code (Deering, 1949) §711: "Conditions restraining alienation, when repugnant to the interest created, are void." This provision receives interpretation in 5 HASTINGS L.J. 92 (1953); Fraser and Sammis, "The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities," 4 HASTINGS L.J. 101 at 103 (1953).

10 See, generally, GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed. (1947); 51 DICK. L. REV. 109 (1947).

11 See, generally, 132 A.L.R. 666 (1941); 85 A.L.R. 1321 (1933).

12 See, generally, 36 A.L.R. (2d) 1437 (1954).

13 See, generally, 160 A.L.R. 639 (1946).

14 See, generally, 162 A.L.R. 581 (1946).

15 See, generally, Goddard, "Non-assignment Provisions in Land Contracts," 31 MICH. L. REV. 1 (1932).

16 See, generally, 61 A.L.R. (2d) 1318 (1958).

17 See, generally, 3 SIMES AND SMITH, §1170.

In addition to the eight exception categories listed above, others have been given some recognition in a few courts. Thus, restraints on the alienation of separate estates of married women,[18] restraints limited as to time,[19] restraints on the alienation of future interests,[20] restraints prohibiting the assignment of a contract,[21] restraints on garnishment of a legacy by the legatee's creditors while the property is in the hands of the deceased's executor,[22] restraints calling for the forfeiture of one piece of property if another piece is alienated[23] have all received some support. One may anticipate that new exceptions will be announced as worthwhile purposes of restraints arise.

B. *Characteristics of the Minority Doctrine*

The "minority" doctrine, as commonly phrased, states that a restraint on alienation, if reasonable, is valid. The minority referred to is a very limited one: it consists of at most one state—Kentucky. For a long time it was thought that Nebraska might also have accepted the doctrine, but this contention was set to rest, at least as to property held in fee simple, in the case of *Andrews v. Hall.*[24] A recent decision handed down by the Court of Appeals for the Eighth Circuit[25] holds that the doctrine may be in effect in Arkansas, but the authority cited by the court does not seem to justify its position. Occasionally, other courts have used broad "reasonableness" language in recent years,[26] but in these cases either a recognized exception category was involved or the statements were dicta. With the possible exception of a few states where decisions have been so few and/or so cloudy as to leave unclear why certain restraints were upheld or overturned,[27]

18 See, generally, Rappeport, "The Equitable Separate Estate and Restraints on Anticipation: Its Modern Significance," 11 MIAMI L.Q. 85 (1956).

19 See, generally, 42 A.L.R. (2d) 1243 (1955).

20 See, generally, 3 SIMES AND SMITH, §1159.

21 See, generally, 3 SIMES AND SMITH, §1165.

22 See 40 MICH. L. REV. 97 (1941).

23 See, generally, 3 SIMES AND SMITH, §1167.

24 156 Neb. 817, 58 N.W. (2d) 201 (1953), noted in 52 MICH. L. REV. 616 (1954).

25 Roemhild v. Jones, (8th Cir. 1957) 239 F. (2d) 492.

26 See Kershner v. Hurlbut, (Mo. 1955) 277 S.W. (2d) 619, noted in 54 MICH. L. REV. 1006 (1956); Keeling v. Keeling, 185 Tenn. 134, 203 S.W. (2d) 601 (1947); In re Murphy's Estate, 191 Wash. 180, 71 P. (2d) 6 (1937), revd. on other grounds upon rehearing, 193 Wash. 400, 75 P. (2d) 916 (1938), second rehearing denied, 195 Wash. 695, 81 P. (2d) 779 (1938).

27 E.g., Mississippi [see Russell v. Federal Land Bank, 180 Miss. 55, 176 S. 737 (1937)];

it would seem that Kentucky can look to no sister state for support.[28]

The writer used the term "at most one state—Kentucky" advisedly. A "rule of reason" may take several forms. One extreme is a "per se" approach, in which the court decides along sharply-defined lines that certain conduct is or is not reasonable and does not look to the circumstances of the conduct. The opposite extreme is the flexible approach of looking at each case in the light of its circumstances, with each decision resulting from a weighing of the policies involved. A "per se" approach in restraint questions would really not deviate substantially from the majority doctrine discussed previously—the difference between the two would merely be one of degree. The minority doctrine, as the writer views it, embodies the flexible approach. That is, a restraint on alienation, if reasonable under the circumstances, is valid. A restraint is reasonable under the circumstances if the particular purpose behind its imposition outweighs its effect in terms of the actual hindering of alienability of the particular property involved.

Does the Kentucky doctrine follow this flexible version? Initially one must note the marked tendency of the Kentucky court to imply a condition subsequent and thus to convert disabling restraints into forfeiture restraints, regardless of the actual form of the language used.[29] Such an attitude is certainly not necessary to the reasonableness doctrine. However, as mentioned previously, the forfeiture restraint is generally of much less lasting significance in terms of hindering alienation as a practical matter than a corresponding disabling restraint, and therefore the effect of such an attitude is to make a finding of reasonableness much more likely.

Aside from this conversion of disabling into forfeiture restraints, the writer believes that the doctrine as practiced in Kentucky comes close to the flexible version explained above. It does seem clear that the doctrine there does mean reasonable-

Indiana [see 42 A.L.R. (2d) 1243 at 1311 (1955); Guipe v. Miller, 94 Ind. App. 314, 180 N.E. 760 (1932)].

[28] However, the *Restatement* accepts reasonableness as a factor in certain situations. See 4 PROPERTY RESTATEMENT §406 et seq. (1944); 2 PROPERTY RESTATEMENT §173 (1936).

[29] E.g., Cooper v. Knuckles, 212 Ky. 608, 279 S.W. 1084 (1926), where forfeiture in favor of the testator's heirs was allowed even though the restraint was purely disabling in form. Apparently the first case to set up this practice was Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916). Thus, see Pond Creek Coal Co. v. Runyon, 161 Ky. 64. 170 S.W. 501 (1914), where a disabling restraint was upheld as such.

ness under the circumstances of the particular case. Thus, in *Hutchinson v. Loomis,*[30] the court said:

> "In this jurisdiction the rule is that a restraint upon the alienation of land held in fee is not void if the restraint is for a reasonable period. As to what is a reasonable period, no invariable test has been prescribed and each case must be determined upon the facts and circumstances it presents."

Of course, one can expect stereotyped situations to arise. Once the court decides that a certain specific restraint is reasonable in the absence of any special circumstances at all, it is difficult to conceive of special circumstances arising in a future case that could make it unreasonable for that case. Similarly, one can expect stereotyped situations in the opposite direction—where a restraint goes so far that it is considered unreasonable whenever it appears without special favoring circumstances. Nonetheless, this does not mean that the restraint has become per se unreasonable.

It is not hard to find language in the Kentucky decisions which might be interpreted as implying that certain restraints are per se unreasonable. Thus, in *Gray v. Gray,*[31] we find: ". . . we recognize as valid a partial restraint, or one for a reasonable period, but not beyond the life of the grantee or devisee."[32] It is the writer's viewpoint, however, that any such implication is unintended by the court[33]—that is, that a restraint beyond the life of the grantee is void *where there are no special circumstances to make it reasonable,* and the Kentucky court would not preclude a party from showing that such a restraint is reasonable in the particular premises. Obviously, for certain types of restraints—e.g., a disabling restraint, on a fee, lasting forever—it may be next to impossible to prove reasonableness. Nevertheless, the doctrinal theory would seem to require that the proponent of the restraint be allowed the opportunity to show its reasonableness under the circumstances, and the writer does not read the Kentucky cases as precluding this possibility.

In trying to understand why the Kentucky court ever adopted the reasonableness doctrine, it may be well to note that the spendthrift trust is apparently not recognized in Kentucky.[34] Thus,

30 244 S.W. (2d) 751 at 752 (1951).
31 300 Ky. 265 at 270, 188 S.W. (2d) 440 (1945).
32 Cf. Howell v. Weisemiller, (Ky. 1957) 299 S.W. (2d) 118.
33 Cf. 3 SIMES AND SMITH §1150; 6 AMERICAN LAW OF PROPERTY §26.22 (1952).
34 40 KY. L.J. 337 at 340 (1952); 20 NOTRE DAME LAWYER 66 at 68 (1944).

the conveyor whose motives in restraining are to assure the continued comfort of a loved one is deprived of a method for accomplishing this which is generally recognized. It may well be that the social pressure for such a method in one form or another led to the early acceptance of what developed into the reasonableness doctrine. The case which originated the doctrine, *Stewart v. Brady*,[35] involved a devise to a daughter, with alienation restricted until the daughter attained thirty-five. The court therein applauded the wisdom of the testatrix "in securing from waste as safe and growing an investment as probably could be made for her young daughter."

II. RATIONALE OF THE RULES AGAINST RESTRAINTS UPON ALIENATION

The reasons given by the early writers[36] for the rules against direct restraints, e.g., repugnancy of such restraint to the estate granted, have very little meaning today,[37] even though they are often still mentioned by the courts.[38] What then is the basis for the majority doctrine?

Professor Schnebly states: "Restraints which make it impossible for the owner of property to transfer his interest have grave social and economic consequences."[39] Let us look at the most frequently stated of these consequences. First, there is the fact that such restraints tend to take the property out of commerce.[40] The undesirable effects on society potentially resulting from this include: (1) the unnatural increase in the market value of property which might result if restraints were widely employed in a particular locale; (2) the discouragement of improvements to the property, since it may be unprofitable to the owner to make such improvements while threatened with such restraint; (3) the hampering of the most effective use of property, if a prospective

35 66 Ky. (3 Bush) 623 at 625 (1868).

36 Co. LITT. 233a; SHEPPERD, TOUCHSTONE, 6th ed., 126 at 130 (1785). See also 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 85 (1923).

37 See Williams, "The Doctrine of Repugnancy—I: Conditions in Gifts," 59 L.Q. REV. 343 (1943). Cf. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 43 (1954).

38 E.g., see In re Jeromos' Will, 9 Misc. (2d) 294, 166 N.Y.S. (2d) 959 (1957); Johnson v. Flanders, 92 Ga. App. 697, 89 S.E. (2d) 829 (1955); Andrews v. Hall, 156 Neb. 817 at 819, 58 N.W. (2d) 201 (1953); Braun v. Klug, 335 Mich. 691 at 695, 57 N.W. (2d) 299 (1953). In the case of disabling restraints, courts often dwell on the fact that there is no one to enforce the restraint. See Mandlebaum v. McDonell, 29 Mich. 78 (1874).

39 6 AMERICAN LAW OF PROPERTY §26.3 (1952).

40 But see Northwest Real Estate Co. v. Serio, 156 Md. 229, 144 A. 245 (1929).

purchaser would be a more effective user than the present owner; and (4) the removal from trade of an increasing amount of the national capital.

When property is removed from commerce, then coincidentally there tends to be a concentration of wealth. Just as the former has potentially undesirable social effects, so does the latter. When the concentration is large, too much economic power comes into the hands of the holder, and his affairs have substantial effect upon the public. As such, they are a matter of public concern. Such phenomena as great family dynasties or extreme inequality of the distribution of wealth are inconsistent with much present-day socio-political thinking.

A further effect is a sort of "survival of the least fit." That is, the one under restraint is protected by the restraint from his own foolishness, a result which has been the subject of some criticism.

Moreover, one must consider creditors. Extension of credit is often based upon appearances rather than upon realities. It is hard to justify allowing a person the appearance of prosperity that the enjoyment of property enables him to obtain and yet denying his creditors resort to the property so enjoyed for satisfaction of their claims. Indeed, Professor Gray considered the practice of allowing a man to enjoy property without being liable for his debts sufficiently immoral to justify the rule against restraints, even when there was in fact no deception of creditors.[41]

We must also consider the policy against dead hand control. While society recognizes the desire of a property owner to control the distribution of his property after his death, it also recognizes that life is for the living and not for the dead. Thus, the wishes of the passing generation to fetter property must be balanced against the desires of the coming generation to take property without restraint.

Accordingly, we see that the rules against restraints on alienation are designed to prevent at least five social "evils": (a) obstruction of commerce and productivity; (b) concentration of wealth; (c) survival of the least fit; (d) abuse of creditors; and (e) dead hand control. Not all of these are of equally great significance today. Thus undue concentration of wealth is being dealt with

41 GRAY, RESTRAINTS ON ALIENATION OF PROPERTY, 2d ed., §258 (1895).

in other ways—notably by means of the graduated estate and income tax structure. And with respect to survival of the least fit, it is not clear that such protection of the weak—if for a limited time—is as much against public policy as the proponents of the rules against restraints suggest. In any event, (a), (d) and (e) are definitely important today, and they constitute the grounds for the present-day policy against restraints. Indeed, (d) achieves increasing significance as the early American dislike of creditors is more and more dispelled.

Restraints are not wholly undesirable, however. There are undoubtedly situations in which a restraint may secure, rather than deny, desirable social objectives. In recognition of this fundamental fact, states espousing the majority doctrine have carved out whole areas in which restraints are allowed—the eight exceptions listed in part I-A above being a fair sample. Let us view these exceptions and briefly consider the extent to which each counterbalances the actual restraining of alienability involved in each case with some conflicting, but desirable, purpose.

(1) The spendthrift trust has, of course, been carried to an extreme which is hard to justify, and it has been frequently criticized by able writers.[42] However, its original motive was laudatory—the desire of the conveyor to assure a continuing support of the conveyee. Further, it is important from the point of view of this article to note several facts[43] which tend to make the disabling restraint on an equitable interest easier to counterbalance than a similar restraint on a legal interest. First, the fact that a trust device is used is significant because the trust itself hinders alienability as a practical matter anyhow. Secondly, persons dealing with the owner of an equitable interest are perhaps less likely to place reliance on such ownership than if a legal interest were involved. A third reason for treating the spendthrift trust more favorably than the legal restraint arises from the fact that equity's control of the former tends to protect against some of its potential abuses.[44] Lastly, the trustee generally has the power, even if not the right, to alien, so that the property may be transferred absolutely regardless of the trust. Indeed, one writer has

42 E.g., see 6 AMERICAN LAW OF PROPERTY §26.100 (1952).

43 Some of those who criticize spendthrift trusts neglect these facts and rely on "reason and common sense." E.g., see 3 WALSH, REAL PROPERTY 398 (1947).

44 Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 at 406 (1935).

concluded that the interest of a beneficiary under a spendthrift trust may really be alienable at his election after all.[45]

(2) The underlying reason for the allowing of restraints of limited time duration on the power to partition is historical. Partition was considered to be a change in possession and not in ownership. However, it should be noted that such a restraint hinders practical alienability in only a limited way, since (a) any co-tenant can convey his undivided interest and (b) partition may be accomplished by agreement of all co-tenants.

(3) Restraints directed against a large group of persons are considered objectionable.[46] And, of course, restraints directed against a social group, large or small, now run afoul of the constitutional prohibition set forth in *Shelley v. Kraemer*[47] and its successor cases.[48] However, restraints directed against a small group of persons which do not fall within the constitutional prohibition are sometimes upheld,[49] in part because of the effect of some early historical writings.[50] The objection to upholding any such restraint raised by some authors is the difficulty of knowing where to draw the line. On the other hand, the actual hindrance on alienability in the practical sense is often slight,[51] and one can sympathize with a conveyor who may have strong emotions against specified persons.[52]

(4) Forfeiture restraints on a life or lesser estate generally have been upheld[53] since the case of *Lockyer v. Savage*.[54] One basis for this exception is that in the case of such an estate someone other than the tenant has a large interest in the property which might be put in jeopardy if the tenant is indifferent or antagonistic. Further, life estates are generally given for the laudable

45 29 BOST. UNIV. L. REV. 99 at 106 (1949).

46 But see the discussion of the English cases in 70 L.Q. REV. 15 (1954); 21 AUSTRALIAN L.J. 148 (1947).

47 334 U.S. 1 (1948).

48 See, generally, McDermott, "The Effects of the Rule in the Modern Shelley's Case," 13 UNIV. PITT. L. REV. 647 (1952); 3 A.L.R. (2d) 446 (1949). For the situation in Canada where, of course, the Shelley case does not apply, see Smout, "An Inquiry into the Law on Racial and Religious Restraints on Alienation," 30 CAN. B. REV. 863 (1952).

49 Blevins v. Pittman, 189 Ga. 789, 7 S.E. (2d) 662 (1940).

50 See CO. LITT. 223a, 223b.

51 6 AMERICAN LAW OF PROPERTY §26.33 (1952).

52 E.g., see the will of Herman Oberweiss in PROSSER, THE JUDICIAL HUMORIST 248 (1952).

53 Where an estate for years is involved, the *Restatement* would limit the exception to the case of a business transaction. §410.

54 2 Str. 947, 93 Eng. Rep. 959 (1733).

purpose of providing support for the life tenant and the restraint may help further this purpose. Indeed, life estates are of doubtful marketability in any event.

(5) Another well-recognized exception is a promissory, and sometimes the forfeiture,[55] restraint in the form of a right of pre-emption. In part this recognition is due to the similarity with the ordinary present option to purchase, which is universally enforced even though it effects some hindrance of alienation. Indeed, the present option is often an even greater restraint than a right of pre-emption, since the holder of a present option may take the initiative in compelling transfer to him, while the maturing of a pre-emption right is normally beyond the power of its holder.

Whether or not the right of pre-emption actually hinders alienability in the practical sense depends on the characteristics of the option. If the pre-emption right merely allows the holder thereof to meet the best outside offer or to purchase at market value, the effect on alienability is insignificant. However, if the right is such that alienation will involve a sacrifice to the property owner, then the restraint is much less likely to be upheld.[56] Also of significance is the question of whether the right of pre-emption is specifically enforceable. Liability in damages, while an indirect restraint, is a less effective restraint than direct enforceability.

Finally, it should be noted that the one obtaining the right often has a legitimate property interest to protect which might be upset if his conveyee were free to alien to anyone. For example, tenants in common may wish to be protected from the intrusion of strangers into the co-tenancy.[57]

(6) Much that was said in justification of rights of pre-emption also applies to the case of provisions inserted in a land sale contract to prevent alienation of the vendee's interest. In addition, there is the fact that the vendor's interest is often large.

(7) Reasonable provisions in business organization articles prohibiting the transfer of shares are often upheld. One element is the concept that a businessman should be allowed to choose his associates as he wishes. This results from a recognition of such

[55] There is less justification for upholding a forfeiture restraint than there is for upholding promissory restraint in a right of pre-emption situation because the contractual right is generally held to be subject to the rule against perpetuities while the possibility of reverter or power of termination are not.

[56] Cf. 4 PROPERTY RESTATEMENT §413 (1944). But see Allen v. Biltmore Tissue Corp., 2 N.Y. (2d) 534, 161 N.Y.S. (2d) 418, 141 N.E. (2d) 812 (1957).

[57] Cf. 54 HARV. L. REV. 1081 (1941). See, generally, 124 A.L.R. 222 (1940).

factors as the possibility that the business may involve a secret process or the possibility that the entry of a party with interests hostile to those of the remaining shareholders might shatter existing harmony.[58] Another factor stems from the undesirability of the arbitrary disruption of commercial enterprises. Thus restraints designed to stop the automatic dissolution which occurred under the common law upon the sale by a partner of his partnership interest are deemed justifiable.

(8) Restraints in charitable gifts are another special case. Since present-day policy seems to be to give charities favorable treatment with respect to many of the property rules, it is not surprising that such an exception would be created. Also, the donor may have specific purposes in mind which would be thwarted by allowing free alienation. Often these purposes are not merely an attempt to exercise dead hand control and are more laudable than the mere desire to build a family dynasty. Lastly, property in the hands of a charity—particularly if a trust form is used—is usually almost inalienable as a practical matter anyhow.

III. COMPARISON OF THE MAJORITY AND MINORITY DOCTRINES

The primary characteristic of the minority doctrine is its flexibility. Occasions continually arise where, for the particular situation, the policy in favor of the restraint outweighs the policy against it. This undoubtedly occurred less frequently in earlier times than it does today when new concepts of property hold sway and new uses of property arise so frequently. Indeed, many of the exceptions recognized by the majority have come into widespread use only recently. Mass production of chattels, development of tremendous tracts of land, the modern corporation and similar phenomena give rise to situations which were not conceived of a century or two ago. The minority doctrine obviously is in a better position to weigh new situations properly than is any system which requires the creation of a new class of exceptions to uphold a restraint.

A second characteristic of the minority doctrine is that the court in using it is in a position to weigh the true interests involved. The underlying social interests involved are not so much concerned with the question of legal *power* to restrain alienation

58 Cf. Cataldo, "Stock Transfer Restrictions and the Closed Corporation," 37 VA. L. REV. 229 (1951).

as with the question of whether alienation is *in fact* hindered. The power and the fact may, of course, be roughly equated, but they are by no means equivalent, as much of our previous discussion shows. Accordingly, the majority doctrine can result in a restraining of alienability rather than in promoting it.[59]

Similarly, but looking to the other side of the scale, the purpose behind each particular restraint which arises can be viewed. To illustrate: As one reason for sustaining a restraint for the protection of the vendor in a land contract, Professors Simes and Smith point out that the vendor's interest "may" be very large.[60] Under the majority doctrine, once a court holds such a restraint valid (or invalid) all later similar restraints will be treated the same way, whether the vendor's interest is in fact large or not. The minority doctrine discards the question of "may" and can always look to what "is." Thus, the minority doctrine allows weighing of the purpose of the particular restraint against its actual effect on practical alienability, whereas the majority doctrine is not geared to do this and is patently arbitrary in its operation.

In comparing the operation of the minority doctrine to that of the majority, one should note that in its present state the majority doctrine is in some ways approaching the adoption of a reasonableness criterion. If the recognized exceptions are examined closely, we see incorporated quite a few standards involving reasonableness or similar concepts. To this extent, consider the following statements of the law, appearing in Simes and Smith: (Emphasis supplied.)

(a) ". . . by the weight of authority, restraints on partition are held valid if they are not to last *for too long a time.*"[61]

(b) ". . . there are several jurisdictions in which indications can be found that the court will tolerate a forfeiture restraint *for a limited time.*"[62]

(c) ". . . in some cases the courts do apparently discriminate as to *the degree of restraint* of alienability. . . ."[63]

(d) ". . . a provision in the articles of a partnership or

59 See Northwest Real Estate Co. v. Serio, 156 Md. 229, 144 A. (2d) 245 (1929).
60 3 SIMES AND SMITH, §1164.
61 Id. at §1141.
62 Id. at §1149.
63 Id. at §1151.

> corporation restricting the membership in any *reasonable* way to further this end is valid."[64]

Similar statements can be found throughout the literature.[65] It would appear to be more sound jurisprudentially to adopt a general standard of reasonableness than to adopt a rigorous rule of law, then water it down with more and more exceptions as time passes, all the while defining some of the exceptions in terms of reasonableness. Further, this area of the law is no different from many others—when the inevitable "hard" case arises, the rigorous rule is abandoned in one fashion or another, with the court often not bothering to create an exception.[66]

Also noteworthy is the fact that it is often possible in "majority" states to avoid the rule against restraints by means of shrewd draftsmanship.[67] Thus, because of the class-by-class treatment, a change in language may make the difference between validity and invalidity even though there is no corresponding change in the social interests involved. This is less likely under the minority doctrine, where the court weighs the actual interests appearing in each case.

On the other hand, the modern desire is to simplify the incidents of ownership of property and to simplify the incidents of transfer of such ownership. The more restraints allowed, the less this goal is accomplished. To this extent, the minority doctrine is inferior to the majority doctrine.

Are there other points of such inferiority? It has been claimed[68] that the minority doctrine would be a litigation breeder, and, in the abstract, this would appear to be true. Persons knowing that a restraint has a chance to be upheld are more likely to include restraints in conveyances than if the courts' views are otherwise. Further, it would appear on the surface that counsel might have a more difficult time determining whether a restraint in a chain of title would be upheld in a minority-doctrine jurisdiction than

64 Id. at §1166.

65 E.g., see Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 at 376 (1935).

66 A classic example is Williams v. Ash, 42 U.S. 1 (1843), where the court built up a fiction of an executory interest. Actually the decision resulted from an out-weighing of the policy against restraints by the policy in favor of the voluntary emancipation of slaves.

67 6 AMERICAN LAW OF PROPERTY §26.25 (1952). Still more forms for evasion will undoubtedly result from Shelley v. Kraemer, 334 U.S. 1 (1948). See 15 MO. L. REV. 77 (1950).

68 40 KY. L.J. 337 at 343 (1952); 54 MICH. L. REV. 1006 at 1008 (1956).

in another state, and therefore more suits to try title would be required. However, empirical evidence does not particularly seem to support the theory. While the writer has taken no actual count, a quick check of the A.L.R. annotations on the subject indicates that (a) while there are more cases in Kentucky than in most other states, there are not significantly more than in many such states, and (b) Nebraska, where for many years the doctrine of reasonable restraints was thought to be in force, is not high on the list. As further negating evidence, one could note that in the hundreds of years from the time Littleton and then Coke asserted the validity of a restraint on alienation to a particular class until the time that this doctrine was questioned in *In re Rosher,*[69] very few cases involving such a partial restraint appear to have arisen in the English Commonwealth.

Also, often mentioned as a failing of the minority doctrine is the nebulousness of a reasonableness standard.[70] Thus the court in *Andrews v. Hall,*[71] in re-aligning Nebraska with the majority doctrine said:

> "The validity or extent of one's title to real estate ought not to rest upon considerations of reasonableness in the imposing of restrictions. Such a relaxation by judicial interpretation can only bring confusion where certainty ought to exist."

However, it is not self-evident[72] that a reasonableness standard here will be any more unsettling than it has proved to be in other areas of law, where it has been successfully applied. Further, the large proportion of Kentucky cases which have been decided on grounds of stare decisis implies that, even under a reasonableness doctrine, judges and lawyers promptly find a starting point from which to work.

[69] L.R. 26 Ch. Div. 801 (1884), discussed in 92 SOL. J. 240, 254 (1948).

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

[71] 156 Neb. 817 at 821, 58 N.W. (2d) 201 (1953).

[72] Nor is it self-evident that there is any less certainty when a rule of law is defined in terms of reasonableness and then followed than when a rule of law is defined in some other way and then in fact disregarded. Compare the restrictive provisions involved in Janss Inv. Co. v. Walden, 196 Cal. 753, 239 P. 34 (1925) and in Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 P. 596 (1919) (in which the courts upheld what they characterized as a restraint against occupancy) with those in Foster v. Stewart, 134 Cal. App. 482, 25 P. (2d) 497 (1933), noted 23 CALIF. L. REV. 361 (1935) (in which the court struck down what it characterized as a restraint against alienation).

IV. CONCLUSIONS

The writer's conclusions are as follows:

(1) The policy against the actual hindering of alienability of property is very solidly grounded in social institutions.

(2) Situations can and do arise where other social considerations outweigh those which led to this policy against actual inalienability.

(3) The majority doctrine, which treats all restraints as void unless they fall within certain specific exception categories, does not sufficiently distinguish between the legal power of alienation and the fact of whether or not alienability is actually hindered. The majority doctrine overstresses the policy against inalienability and does not adequately weigh policies in conflict with it which may arise. The exceptions which majority courts recognize do not fully compensate for this.

(4) The minority doctrine, which upholds restraints which are reasonable under the circumstances, could be used in such a fashion as adequately to weigh all the conflicting policies. The problems which a flexible standard raises do not outweigh the desirability of such a standard in determining the validity of restraints on alienation.

(5) The minority doctrine is preferable to the majority doctrine.