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Future Interests - Validity of Shifting Executory Interest on Event Certain to Occur

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FUTURE INTERESTS—VALIDITY OF SHIFTING EXECUTORY INTEREST ON EVENT CERTAIN TO OCCUR—Testator's will provided for alternative devisees of his business real estate. If employees of the business exercised an option granted by the will to purchase his partnership interest within eight months after his death, the real estate was to pass to a bank in trust for his daughter and her children. If the option was not exercised within this period,

the real estate was to pass to his widow. A residuary clause divided the remainder of his estate equally between his widow, absolutely, and the named bank as trustee. After passage of the eight-month period, testator's daughter sought a declaration that she was owner in fee of the land in question. She asserted that, as testator's sole heir at law, the real estate passed to her as intestate property during the eight-month interim. Since performance of the conditions relating to the exercise of the option had been rendered impossible through actions by the widow, neither of the alternative devises in the will could take effect and title consequently remained in her absolutely. The probate department of the Circuit Court of Multnomah County rejected the daughter's contention and determined that title to the property had now vested in the widow. On appeal, *held*, affirmed. The land did not pass temporarily as intestate property, but passed under the residuary clause as a fee simple defeasible subject to alternative executory devises,¹ one of which was certain to take effect at the end of the eight-month period. Title was to pass absolutely to the widow if for any reason the option was not exercised by the employees, even though one of the reasons was impossibility of performance.² *Estate of Palmer*, (Ore. 1957) 315 P. (2d) 164.

The real significance of the principal case³ appears to lie in the nature of the estate created by the devise of the land in dispute—a fee simple defeasible subject to alternative executory devises, one of which was certain to take effect within a computable period of time. There is a considerable body of authority to the effect that a grant or devise similar to that in question may *not* be construed so as to create an estate in fee simple that is certain to terminate at a given time.⁴ In support of this view there exists the notion that a fee simple must be potentially durable forever,⁵ and a limitation over that is inconsistent with this characteristic

¹ "An executory devise is, strictly, such a limitation of a future estate or interest in lands or chattels . . . as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void. . . ." 1 FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVISES, 10th ed., 386 (1844).

² The court further indicated that it would not permit the widow to take advantage of her own wrong if she had deliberately prevented the employees from exercising the option. There was no showing to this effect, however.

³ The court's conclusion that title was to vest in the widow if the option was not exercised for any reason, including impossibility of performance, was quite properly based on the testator's probable intention as construed from the language of the will. See 4 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., c. 60 (1956).

⁴ 1 PROPERTY RESTATEMENT §14 and §46, comment *i* (1936). See generally *Liesman v. Liesman*, 331 Ill. 287, 162 N.E. 855 (1928); *Stophlet v. Stophlet*, 22 Ohio App. 327, 153 N.E. 867 (1926); *Ewering v. Ewering*, 199 Ky. 450, 251 S.W. 645 (1923); *Den v. Gifford*, 9 N.J. L. 46 (1827); *Chudleigh's Case*, 1 Co. Rep. 113b, 76 Eng. Rep. 261 (1589-1595). See also *Boraston's Case*, 3 Co. Rep. 16a, 76 Eng. Rep. 664 (1587).

⁵ "No estate is deemed a fee, unless it *may* continue forever." 1 PRESTON, AN ELEMENTARY TREATISE ON ESTATES, 2d ed., 479 (1820).

in that it would terminate the fee on an event certain to occur must either be construed so as to avoid this inconsistency,⁶ operate to reduce the fee to a lesser estate,⁷ or be declared void for repugnancy.⁸ This approach seems to be without justification. Holding in fee simple absolute, an owner should be permitted to dispose of his property in any manner consistent with existing rules of law and public policy, and the intention of the owner manifested in making such dispositions should be given effect to the fullest possible extent. The development of the law of executory interests has qualified the earlier concept of a fee simple through general recognition of the validity of an estate in fee simple subject to a springing executory interest on an event certain to occur.⁹ Thus it seems difficult to understand why there should be any objection to the creation of an estate in fee simple subject to a similar executory limitation of the shifting variety.¹⁰ If an owner of property may retain a fee simple that will be cut off on the occurrence of the stated event on which a springing executory interest is certain to take effect, the owner should also be allowed to convey away a fee simple subject to a limitation certain to take effect in defeasance of the first taker's interest.¹¹ This latter type of estate is in effect the type of estate construed by the Oregon court to have passed under testator's will in the principal case. In favor of recognition of estates of this nature is the fact that, in accordance with the owner's manifested

⁶ See 1 SIMES AND SMITH, *FUTURE INTERESTS*, 2d ed., §549 (1956), and cases cited therein; 3 JARMAN, *WILLS*, 8th ed., c. 54 (1951).

⁷ *Liesman v. Liesman*, note 4 supra (reducing preceding estate to an estate for life); 1 *PROPERTY RESTATEMENT* §46, comment *i*, illus. 10 (1936) (reducing preceding estate to an estate for years).

⁸ See *Den v. Gifford*, note 4 supra.

⁹ An example of an estate in fee simple subject to a springing executory interest on an event certain to occur would be a conveyance by *A*, owning in fee simple absolute, to *B* and his heirs from and after two years from date. See 1 *PROPERTY RESTATEMENT* §14 and §46, comment *i* (1936); 1 SIMES AND SMITH, *FUTURE INTERESTS*, 2d ed., §223 (1956); *KALES, ESTATES AND FUTURE INTERESTS*, 2d ed., §§464 to 466 (1920). See also *Davies v. Speed*, 2 Salk. 676, 91 Eng. Rep. 574 (1692).

¹⁰ See *Ashby v. McKinlock*, 271 Ill. 254, 111 N.E. 101 (1915), where a devise to testator's niece of the entire estate, with alternative limitations over on her death which exhausted all possibilities, was held to create a fee simple determinable subject to alternative executory devises, one of which was certain to vest on the death of the niece. But see *Drager v. McIntosh*, 316 Ill. 460, 147 N.E. 433 (1925), and *Liesman v. Liesman*, note 4 supra, noted in 23 *ILL. L. REV.* 713 (1929), reducing similar devises to life estates in the first taker. See also *Trimble v. Fairbanks*, 209 Ga. 741, 76 S.E. (2d) 16 (1953).

¹¹ See 1 SIMES AND SMITH, *FUTURE INTERESTS*, 2d ed., §§223 and 502 (1956); 1 *AMERICAN LAW OF PROPERTY* §4.56 (1952); Schnebly, "Limitations Over on the Death of a First Taker or on His Death Without Issue: Illinois Decisions," 7 *UNIV. CHI. L. REV.* 587 (1940). It is indicated in 1 *FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVICES*, 10th ed., 398, n. (d) (1844), that the event on which an executory devise is to arise may be one certain to occur in cases where the deviser departs with the whole fee simple subject to a limitation over or where the deviser does not depart with the immediate fee. But see *COLEMAN, AN EPIHOME OF FEARNE ON CONTINGENT REMAINDERS AND EXECUTORY DEVICES* 78 (1878), to the effect that executory devises certain to take effect are restricted to cases where the deviser retains the immediate fee simple.

intention, the taker of the preceding estate will be granted the more extensive privileges of user that accompany ownership of an estate in fee simple.¹² However, since the executory interest is certain to take effect in possession at the specified time, the holder of this future interest should be afforded adequate protection against waste in cases of extreme conduct by the preceding owner.¹³ In most jurisdictions the holder of the executory interest would also be protected against dower or curtesy claims by the surviving spouse of the first taker, such claims being divested along with the fee on the occurrence of the specified event.¹⁴ It is also undisputed that a conveyance by the owner of the preceding estate would not operate to prevent the executory interest from taking effect at the proper time.¹⁵ Further, the absence of contingencies and uncertainties regarding the duration of the preceding estate and the vesting in possession of the future estate should serve to make both interests more readily marketable in this respect.¹⁶ Thus recognition of the validity of this type of estate would not violate existing rules of law and would serve to advance general conceptions of public policy regarding ownership of property, while in no way precluding the holder of the future estate from the protection necessary to preserve his existing interest. Since the validity of this type of estate was not directly in issue,¹⁷ the principal case cannot be cited as controlling authority for the proposition that it is now possible to create an estate in fee simple defeasible subject to a shifting executory interest on an event certain to occur. Nevertheless, the principal case does serve to indicate the willingness of one court to give effect to such a devise when it was deemed necessary in order to carry out the testator's manifested intention.

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¹² See 2 POWELL, REAL PROPERTY §191 (1950); 1 PROPERTY RESTATEMENT §49 (1936).

¹³ The holder of an executory interest limited to take effect on an uncertain event will be awarded injunctive relief in proper circumstances, but generally will be unable to recover damages for waste from the preceding owner. However, when the executory interest is certain to vest, it would seem that the holder of such an interest should also be entitled to recover damages for waste, since the value of this type of interest can be readily ascertained. See 2 POWELL, REAL PROPERTY §191 (1950); 5 *id.*, §§642, 644 and 646 (1956); 1 PROPERTY RESTATEMENT §49 (1936); 2 *id.*, §193.

¹⁴ See 2 POWELL, REAL PROPERTY §191 (1950); 1 PROPERTY RESTATEMENT §54 (1936).

¹⁵ The indestructibility of an executory interest has been established since *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

¹⁶ See Schnebly, "Limitations Over on the Death of a First Taker or on His Death Without Issue: Illinois Decisions," 7 UNIV. CHI. L. REV. 587 at 589 (1940), to the effect that limitations of this type cannot be objected to on the ground that they constitute restraints upon alienation.

¹⁷ All parties to the dispute apparently assumed that the property passed in fee for the eight-month period. The issue presented was whether it passed under the will or as intestate property. It should be pointed out that had the court reduced the preceding estate to an estate for eight months, the ultimate outcome of this case would in no way have been affected.