Direct Restraints on Alienation in Kentucky

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rule does not necessarily prevent the trying of title to land in a suit for money damages based on breach of contract, and there would seem to be no reason why such a prevention would be desirable in the first place. There does not appear to be any more danger of fraud between the vendee and the one asserting the paramount claim in a situation in which a default judgment can be obtained than in one in which there may be a voluntary submission. If the basis for the rule is some feeling upon the part of the court that a grantee should not be allowed to dispute his grantor’s title, such a principle has no application where covenants in a deed are involved, since such a dispute must always occur before the covenants can be enforced or given effect. It is therefore submitted that the Kentucky rule is undesirable because, without sufficient reason, it requires an unnecessary multiplicity of law suits.

James C. Blair

DIRECT RESTRAINTS ON ALIENATION IN KENTUCKY

It has long been recognized that one of the incidents of ownership of property is the right to convey it. Consequently, the law will not permit this right of ownership to be unduly limited by the imposition of restraints by grantors or testators who endeavor to dispose of their property and at the same time maintain control over its alienation or use. The law seeks to encourage the ready alienation of property and to discourage restraints upon alienation which would have the effect of withdrawing such property from the ordinary channels of trade and commerce. For these reasons, conditions operating as restraints on alienation are usually held to be void as contrary to public policy. With some exceptions to be noted, this principle applies to all interests in property, whether real or personal, legal or equitable, and whether present or future. It applies to interests in fee simple and to legal life estates.

The purpose of this note is to analyze the different types of direct restraints on alienation, with special emphasis on Kentucky law, and to determine the basis for the rules which the law has established in its treatment of these restraints. It is not concerned with indirect restraints on alienation which arise when an attempt is made to ac-

\[41\] Jones v. Caldwell, 176 Ky. 15, 195 S.W 122 (1917); see Burchett v. Blackburne, 198 Ky. 304, 306, 248 S.W 853, 854 (1923) and cases cited therein.
complish some purpose other than the restraint of alienability. Such restraints arise on the creation of future interests and of trusts and they ordinarily do not restrict the power of alienation but only the fact of alienability.

It is well to remember that the law is concerned primarily with practical alienability. The validity of a given provision depends upon a number of circumstances, but, reduced to their lowest terms, these considerations amount to no more than these two questions: First, to what extent does the provision tend to decrease practical alienability; second, what is the purpose of the restraint in question? It should be noted that these two considerations are not weighed in each individual case. The law is worked out for type situations and when a case falls within one of these types, the rule is applied despite other circumstances affecting practical alienability in the particular case. In other words, it is not a matter of practical alienability in a particular case, but in a particular class of cases.

A direct restraint on alienation is a provision which by its terms prohibits or penalizes the exercise of the power of alienation. Such a provision is usually found in wills, deeds, contracts or similar instruments. There may be a direction in the devise or conveyance that the devisee or grantee shall not alienate, and this constitutes a disabling restraint. Or the instrument may contain a condition to the effect that any attempted alienation will result in a forfeiture of the estate such being a forfeiture restraint. Finally, there may be a contract whereby the grantee is bound to refrain from alienation, this being referred to as a promissory restraint.

### Disabling Restraints

In general, a disabling restraint is found where property is devised or conveyed with a direction to the effect that it shall not be alienated. Where such a provision is contained in an instrument, the courts for the most part proceed on the assumption that if the direction is held valid, any attempt to alienate on the part of the transferee will be void and since it is ineffective, it will have no bearing upon the title. Furthermore, where such restraints are deemed valid, the property cannot subsequently be alienated even though all parties with interests therein so desire. As a result, the property is removed from commerce completely. For this reason, most courts hold nearly all disabling restraints void.  

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1 The terms disabling restraint, forfeiture restraint and promissory restraint are the base of classification of restraints on alienation in the American Law Institute Restatement. See 4 RESTATEMENT, PROPERTY sec. 404 (1944). SIMES, FUTURE INTERESTS 338 (hornbook series, 1951).
Where the language in the instrument is in the form of a direction, most courts given the provision a literal (disabling) interpretation. In this respect Kentucky differs from the majority of states and in the case of restraints on legal interests which are \textit{directions} in form, the courts have implied a \textit{condition} subsequent in favor of the grantor or his heirs, although no divesting provision or limitation is expressed. For all practical purposes then, Kentucky construes what is in form a disabling restraint to be a forfeiture restraint and in many cases has held such restraints to be valid. In \textit{Kentland Coal & Coke Co. v Keen}, the court declared that where a direction in restraint of alienation is reasonable and no condition is expressed, a condition subsequent will be implied. Thus the conveyance by the grantee in violation of the direction against alienation was held voidable and not void after the breach had occurred. It should be emphasized that the conveyance is voidable at the instance of the grantor and therefore he has the power to re-enter and regain title to the land. If all restraints of this kind were invalid there would be no problem. But as will be shown below, since Kentucky upholds restraints of this type which are reasonable in time the grantor must exercise his power to avoid the conveyance during the time within which the alienation was restrained; otherwise he will be deemed to have waived it.

In most states nearly all disabling restraints are void, with two exceptions—namely, restraints on the alienation of the beneficiary's interest in a spendthrift trust and restraints on the alienation of separate estates in equity of married women. The first exception is the important one today since the other is obsolete due to existing statutory provisions giving a married woman a separate estate in property at law. Since most American courts recognize spendthrift trusts, some consideration should be given to the question why such devices are deemed valid as disabling restraints. In every spendthrift trust there are two elements which tend to restrict alienability; the direct restraint contained in the direction against alienation of the equitable interest, and the indirect restraint resulting from the fact that a trust is present. Any trust tends to impair practical alienability to some degree since it is difficult to sell the beneficial interest even though the settlor has not prohibited alienation of such interest. Hence the addition of an express prohibition against the alienation of the beneficial interest does not go much further in the direction of restraining alienability.

\footnotetext[3]{169 Ky. 836, 183 S.W 247 (1916); accord, Francis v. Big Sandy Co., 171 Ky. 209, 188 S.W 345 (1916); see Cooper v. Knuckles, 212 Ky. 608, 279 S.W 1084 (1926).}

\footnotetext[4]{Kentland Coal & Coke Co. v. Keen, \textit{supra} note 3.}
than the trust device itself. Certainly the extent of decrease of alienability when the spendthrift provision is added is not nearly to great as if a restraint were applied to a legal fee simple. This is one of the primary reasons the spendthrift trust has been held valid as a disabling restraint while the courts have refused to countenance other such restraints. Spendthrift trusts have also been held valid on the theory that the donor of property has the right to choose the object of his bounty and the right to protect his gift from creditors of the donee. That the protection of impecunious beneficiaries is in accord with public policy, at least to the extent of keeping such beneficiaries from becoming public charges is an additional factor sometimes emphasized.6

Although Kentucky has held various disabling restraints on legal interests valid, yet it is one of a minority of states which do not recognize spendthrift trusts. The theories on which such trusts are rejected have been said to be, first, that the right of alienation is a necessary incident to an equitable estate for life, and, second, that it is contrary to public policy that one should have the right to enjoy the income of property to the exclusion of his creditors.6 A Kentucky Statute7 has been held to prevent the creditors of spendthrift trusts, at least so far as the rights of creditors are concerned. This statute reads:

“Estates of every kind held or possessed in trust are subject to the debts and charges of the beneficiaries thereof the same as if the beneficiaries also owned the similar legal interest in the property.”

In Meade v Rowe's Executor and Trustee8 the court, in holding void a spendthrift trust provision in a will, said: “One cannot devise his property so that it will not be subject to the debts of the devisee unless the devise contains a condition of cessor upon an attempted alienation or the estate created is a mere use at the absolute and uncontrolled discretion of the trustee.” Thus, in order to protect the interest of a beneficiary in Kentucky, the settlor must provide an absolute discretion in the trustee,9 or a forfeiture on alienation.10 In

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7 Smith v. Towers, 69 Md. 77, 14 Atl. 497 (1888); see Sherman v. Havens, 94 Kan. 654, 146 Pac. 1030, 1031 (1915).
9 Smith v. Towers, 69 Md. 77, 14 Atl. 497 (1888); see Sherman v. Havens, 94 Kan. 654, 146 Pac. 1030, 1031 (1915).
the first situation, the trustee may withhold any payments from the beneficiary and thus the latter may not get anything. In the second instance, the court construes the provision to be a condition subsequent rather than a restraint on alienation. A good example is a provision in the trust instrument that the life estate or interest shall go over to a third person upon the grantee's becoming bankrupt or upon an attempt of his creditors to subject the estate or interest to the payment of their claims. Kentucky holds such a provision valid.\(^1\) In considering the question of forfeiture upon an involuntary alienation, it must be borne in mind that if there is no gift over to a third person upon insolvency or attempt of creditor to reach the interest, the condition is of no effect.\(^2\)

It is submitted that those states which recognize spendthrift trusts proceed on the theory that the settlor's intent and the practicability of giving effect to such intent outweigh the factors that such trusts curtail alienability and work a hardship on creditors, whereas those states rejecting such trusts give the rights of the creditor preference over the intent of the settlor. Since the argument that such trusts curb alienability is weakened by the fact that the trust itself tends to remove the interest from commerce, apparently the problem is whether public policy should swing the judicial pendulum in favor of the settlor's intent or should instead recognize the creditor's rights. Most states believe that the advantages resulting from the enforcement of spendthrift trust provisions outweigh the advantages of free alienability.

**Forfeiture Restraints**

A forfeiture restraint exists where the creating instrument contains a condition, a special limitation, or an executory limitation by which the estate of the grantor may be divested or terminated on alienation. A majority of jurisdictions hold such restraints on estates greater than life estates void, and take the view that the grantee has an absolute interest in the property.\(^3\) Here, however, there is a somewhat stronger minority view than in the case of disabling restraints, probably because a forfeiture restraint does not cut down on the transferability of land to the same degree as does a disabling restraint. Where forfeiture restraints are held valid, and the grantee breaches the restraint, such breach divests title from him and thenceforth the land is alienable. Such a break in no way affects the grantee's title.

\(^1\) Bull v. Kentucky National Bank, 90 Ky. 452, 14 S.W 425 (1890).
\(^3\) Siems, op. cit. supra, note 1, at 344.
where a disabling restraint is involved. Kentucky adheres to the minority rule and recognizes forfeiture restraints. In addition Kentucky fails to discriminate between disabling and forfeiture restraints and implies a condition subsequent where the language is that of a direction,\(^1\) which in effect establishes a single category.

In the states recognizing the type of restraint under consideration, where the title goes upon a breach by the grantee depends upon the nature of the restraint. If it is an executory limitation, the title passes to the party with the executory interest named in the instrument; if it is a special limitation, the title passes to the grantor; and if it is a condition subsequent, the grantor, should he elect to take advantage of the forfeiture, may enter and reacquire title. In the latter case, the title is in the grantee's transferee until the grantor elects to take advantage of the forfeiture, since the conveyance is merely voidable and not void.

Kentucky is one of the few states which recognizes restraints on the alienation of legal interests. Only restraints against voluntary alienation are permitted,\(^1\) and they are in no way effective to limit the rights of creditors.\(^1\) These restraints against the voluntary alienation of legal interests are valid only if they are reasonable restraints. When we come to inquire what constitutes a reasonable restraint within the Kentucky rule, the answer is not easy. Although Kentucky has a statute\(^1\) which purports on its face to prohibit the suspension of the power of alienation for a longer period than during the continuance of lives in being at the creation of the estate and twenty-one years thereafter, Cammack v Allen\(^1\) held that the statute is merely declaratory of the common law rule against perpetuities and has no bearing on restraints on alienation. Although the case of Perry v Metcalfe\(^1\) later rejected the conclusion reached in the Cammack case, the recent case of Gray v Gray\(^1\) is in accord with Cammack v Allen. In the Gray case the court said: "Sometimes there is confusion or a failure to regard as distinct laws the rule against perpetuities, which is principally covered by [this] statute and the rule against unreasonable restraints on the power of alienation, which is common law. The statute applies only to the suspension of the ultimate vesting of an estate and not to any restraint upon the right or power of

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\(^1\) Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916).
\(^3\) Brock v. Brock, 168 Ky. 847, 183 S.W. 213 (1916).
\(^5\) 199 Ky. 263, 250 S.W. 963 (1923).
\(^6\) 216 Ky. 755, 298 S.W. 694 (1926).
\(^7\) 300 Ky. 265, 188 S.W. 2d 440 (1945).
alienation of an estate already vested, or which is or but for the restraint would be indefeasible."\(^2\)

As said in Lawson v Lightfoot,\(^2\)\(^2\) the court has never fixed a limit to a restraint, but what restraints are reasonable and what are unreasonable must be determined upon the particular circumstances of each case as it comes before the court. A provision that the grantee should not trade or sell the property for twenty years except to the grantor's bodily heirs was sustained by the court in Francis v Big Sandy Co.\(^2\)\(^3\) A proviso that land should not be sold until twenty years had elapsed after the testator's death was held good in Johnson v Dumeyer,\(^2\)\(^4\) and one to the effect that the devisee should not alienate until he arrived at the age of twenty-eight years was sustained in Kean's Guardian v Kean.\(^2\)\(^5\) Several cases have held that such a provision forbidding alienation before reaching the age of thirty-five was valid.\(^2\)\(^6\) However, where the limitation is for the lifetime of the grantee or devisee, the decisions are numerous that hold such a limitation inconsistent with the estate conveyed and is void.\(^2\)\(^7\) On the other hand, it is clear that the Kentucky Court of Appeals will sustain a restriction on alienation for the lifetime of the grantor or some other person than the grantee or devisee.\(^2\)\(^8\) The court in Saulsberry v Saulsberry,\(^2\)\(^9\) ruled that a provision in a deed of 1896 stipulating that the land should not be alienated before 1950 was invalid.

The "reasonableness" test as applied in Kentucky may appear to be sound, but from a practical viewpoint it is not satisfactory because it results in an increase of litigation since it is difficult to ascertain what titles are secure and what limitations are valid without a law suit. Restraints against voluntary alienation are doubtless valid when applied to equitable interests\(^3\)\(^0\) since the right of creditors would in no way be affected. As in the case of spendthrift trusts, Kentucky protects the creditor in refusing to recognize any involuntary restraints on legal interests, reasonable or otherwise.

\(^{21}\) Gray v. Gray, supra note 20, at 269, 188 S.W 2d at 443.
\(^{22}\) 27 Ky. L. Rep. 217, 84 S.W 739 (1905).
\(^{23}\) 171 Ky. 209, 188 S.W 345 (1916).
\(^{27}\) Thurmond v. Thurmond, 190 Ky. 582, 228 S.W 29 (1921); Cropper v. Bowles, 150 Ky. 393, 150 S.W 380 (1912).
\(^{29}\) 140 Ky. 608, 131 S.W 491 (1910).
Promissory Restraints

A promissory restraint is found in those situations where there is an agreement not to alienate, either in the form of a covenant in a conveyance or lease, or a contract with respect to the sale of an interest in land. The validity of such restraints is important in determining whether such agreements will be specifically enforced. In most jurisdictions, the validity of promissory restraints on real property is determined in the same way as is the validity of analogous forfeiture restraints. As in the case of a forfeiture restraint, a promissory restraint may be dispensed with if all the parties concerned agree to do so. In this respect these two types differ from the disabling restraint under which property cannot thereafter be alienated even though all the parties so desire. This apparently is the reason why promissory restraints are treated similarly to forfeiture restraints, despite the fact that they more closely resemble disabling restraints in form.

In last analysis, a given rule on alienation is a result of balancing the beneficial character of the purposes of the restraint as against the extent to which alienability would be hindered, if the provision in question were held valid. While courts seldom have much to say about purpose, it is a most important factor in determining the character of the rule. One may well anticipate that, in the face of new purposes which are definitely in accord with good public policy, the courts may make new exceptions to the old doctrines with respect to direct restraints.

CHARLES R. GROMLEY

REMEDIES OF GOOD FAITH OCCUPIER WHO HAS IMPROVED LAND – IN KENTUCKY

Courts have long been faced with the problem of providing an adequate remedy for the good faith purchaser of land who makes valuable improvements thereon, and is later ejected from the land because of a superior title in a third person. The purchaser, usually called an “occupying claimant”, cannot recover the improvements themselves where they have become a part of the realty, but since he has expended a sum of money and enhanced the value of another’s property because of an honest mistake, the law should afford him

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31 Simes, op. cit. supra, note 1, at 355.