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# Conditions in Restraint of Alienation of Real Property

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T H E S I S

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CONDITIONS IN RESTRAINT OF ALIENATION OF  
REAL PROPERTY

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Presented for the Degree

of

Bachelor of Laws

by

Carl D. Stephan

Cornell University

1894.

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## CONDITIONS IN RESTRAINT OF ALIENATION

of

REAL PROPERTY

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There is scarcely a subject in the broad field of law which is more interesting than that of the alienation of the law of Real Property, and how far such a right may be restricted by the imposition of conditions upon the violation of which the estate may be forfeited or some other penalty imposed.

The right to alienation of real property dates back to a very early period and an historical sketch alone, following the changes and development of the law upon the subject, would in itself afford ample material for an interesting and most creditable thesis. Therefore, I can do no better than to quote from an eminent commentator of the law, a brief historical sketch of the law of the alienation of real property and conditions restricting the same which have from time to time been allowed to be imposed.

"The alienation of real property is among the earliest suggestions flowing from its existence. The capacity to dispose of it becomes material to the purpose of

social life as soon as property is rendered secure and valuable from the state and turbulence and rudeness to order and refinement. The purpose of alienation is a necessary consequence of ownership and it is founded upon natural right.

It is stated by very respectable authorities that in the time of the Anglo Saxons lands were alienable either by deed or by will, When conveyed by charter or deed they were distinguished by the name of 'boc' or 'bookland' and the other kind of land called 'folkland' was held and conveyed without writing. But the notion of free disposition of land must be understood in a very qualified sense; and the jus disponendi even at that day was subject, as it is and ought to be, in every country and in every stage of society, to the restraints and modification suggested by convenience and dictated by civil institutions. It was reserved, however, to the feudal policy to impose restraints upon the enjoyment and circulation of landed property to the extent then unprecedented in the annals of Europe. There were checks (though they were comparatively inconsiderable) in favor of the heir upon the alienation of land. among the Jews,

Greeks and Romans. The feudal restrictions were vastly greater however and founded upon different policy. They arose in favor of the heir of the tenant; for the law of feuds would not allow the vassal to alien the paternal feud even with the consent of the Lord, without the consent of the heirs of the paternal line. But the restraint arose principally from favor to the lord of the fee. He was considered as having a strong interest in the abilities and fidelity of his vassal; and it was deemed to be a great hardship and repugnant to the entire genius of the feudal system to allow land which the chieftain one family to pass without his consent into the possession of another and to be transferred, perhaps to an enemy, or at least to a person not well qualified to perform the feudal engagements. The restrictions were perfectly in accordance with the doctrine of feuds and proper and expedient in reference to that system and to that system alone. The whole feudal establishment proved itself to be inconsistent with the civilized and pacific state of society; and wherever freedom, commerce and art penetrated and shed their benign influence, the feudal fabric was gradually undermined and all its proud and stately columns were successively prostrated in the dust.

/ The history of the gradual decline of the feudal restraints in England upon alienation from the reign of Henry I. when the earliest innovations were made upon them down to the final recovery of the full and free exercise of the right of disposition, forms an interesting view of the progress of society.

The first step taken in the mitigation of the law of feuds and in favor of voluntary alienation was the countenance given to the practice of 'subinfeudation'. They were calculated to evade the restraint upon alienation and consisted in carving out portions of the fief to be held of the vassal by the same tenure with which he held of the chief lord of the fee. The alienation prohibited by the feudal law all over Europe was the substitution of a new feudatory in the place of the old one but subinfeudation was a feoffment by the tenant to hold of himself. The purchaser became his vassal and the vendor still continued liable to the chief lord for the feudal obligations.

Alienation first became prevalent in cities and boroughs where the title to houses and lands was chiefly allodial and where the genius of commerce dictated and impelled a more free circulation of property. The Cru--

sades had an indirect but powerful influence upon alienation of land, as those who engaged in the wild and romantic enterprises ceased to place any value upon the inheritance which they were obliged to leave behind them. A law of Henry 1. relaxed the restraint as to purchased lands while it restrained it as to those which were ancestral. In the time of Granville considerable relaxations as to the disposition of real property acquired by purchase, were tolerated. Conditional fees had been introduced by the policy of the individual, to impose further restraints upon alienation; but the tendency of public opinion in its favor, induced the courts of justice which had partaken of the same spirit, to give to conditional fees a construction inconsistent with donor's intention. This led the feudal aristocracy to procure from Parliament the statute of "De donis", of 13 Edward 1., which was intended to check the judicial construction that had in a great degree discharged the conditional fees with the limitation imposed by grant.

The statute of Quia Emptores, 18 Edward 1., finally and permanently established the free right of alienation by the sub-vassal without the lord's consent; but this

broke down subinfeudation, which had been already checked by Magna Charta; and it declared that the grantor should not hold the land of his immediate feoffor, but the chief lord of the fee, of whom the grantor himself held it".

Now this, I think, gives us a condensed view of the progress of the common law right of alienation from the state of servitude to freedom.

Having now before us this historical sketch it may be well to know, since the right to free alienation of property is an incident to the true ownership of it, how far, if at all, this right might be restricted by the imposition of conditions which will not be considered repugnant to the nature of the estate granted. We find the following laid down by Littleton at a very early date:--

"And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void; and so a grant, release or confederation, or any other conveyance whereby the fee simple doth pass. For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to al-

ien".

There have been many conflicting cases both in this country and in England as to how far such conditional restrictions should be sustained, and perhaps the earliest leading English decision is that of *Largis Case*, (2 Leonard, 82) where a testator devised to his wife until his son William should come to the age of twenty five, remainder after that event to certain other sons, providing that if any of his sons before that period should "go about" to sell his share, he should forfeit the same. It was held, that such a condition should be void and an estate in fee, free from any restraints, was conveyed. The court laying down the rule that "All restraints on alienation must be limited to a certain person or time and if this is too remote, the restraint is also bad". This case has been the leading authority for the proposition that an absolute restriction on the alienation of realty is void. But we find in 1805 the leading case of *Doe-v-Pearson*, (6 East 173), which ~~sustained~~ sustained a restraint upon alienation but which was not considered absolute and therefore not inconsistent. It was a case <sup>in which</sup> ~~when~~ a person devised certain lands in ~~V. to~~ A. & H. (two daughters)

and their heirs, as tenants in common on condition that in case they, or either of them, should have no issue, they or she having no issue should have no power to dispose of her share except to her sister or sisters, or their children. On the testator's death A. & H. entered and afterwards A. levied a fine of moiety to the use of her husband in fee and died. Held that such a condition against alienation, except to sister or children, annexed to a devise to A. and H. and their heirs was good; and that for the breach of it by A. in levying such a fine, the heirs of the deviser might enter on the moiety/

This case is undoubtedly an extreme one and was decided more on its own facts and circumstances out of which which it arose, than by ~~the~~ sound law, for in no later case than *Atwater vs Atwater*, (18 Beavan, 330) we find it directly overruled, that case deciding a similar restraint as repugnant to the estate granted and therefore void, the case holding in effect that a condition restraining alienation for the term of twenty-five years was inoperative and an estate in fee, free from all such restraints, would vest. In the opinion it was argued that notwithstanding the case of *Doe v. Pearson*, such a

condition restraining alienation absolutely for twenty-five years was bad as being repugnant to the quality of the estate given. It is obvious that the introduction of one person's name as the only person to whom the property may be sold renders such a proviso valid. A restraint on alienation may be treated as complete and perfect as if no person whatever was named in as much as the name of the person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all .

The law in England was in great conflict, as is obvious, and each court decided each case as it came before it, upon the individual facts and circumstances, following no set rules, and in fact scarcely observing precedents. This is clearly demonstrated by the holding in the case of *In re Malelay* (15 Law Reports, 20 Eq. 186) which sustained a conditional restraint of alienation which was, that the "devisee should never sell it out of the family." This case was decided upon the ground that such a condition was simply in partial restraint of alienation and therefore not repugnant to the nature of the estate de-

vised.

Finally, however, we find the case of *Roller v. Rosher* (26 Ch. Div. 800) making a careful review of all the cases previously decided and laying down a rule which is reasonable and capable of being applied in all cases. It seems that the testator devised an estate to his son in fee providing that if he or his heirs should desire to sell it or any portion thereof, during the life time of his widow, she should have the option to purchase the same at the price of 5000 pounds for the whole or at a proportionate price for any part thereof. The real selling value of the estate was, at the date of the will and at the time of the testator's death, 5000 pounds. Such a proviso was held to amount to an absolute restraint on alienation during the life of the testator's wife and was therefore void. And that the son was entitled to dispose of the estate as he pleased.

## THE AMERICAN DECISIONS.

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The great difficulty experienced by all the courts, then as well as at the present day, is to decide what conditions should be considered in absolute restraint of alienation and therefore bad and what simply in partial ~~a~~ restraint and therefore to be upheld. If it was not for the court's tendency to always favor and carry out the intention of the testator so far as possible, it would be a comparatively easy task. That is, by deciding all conditions in restraint of alienation, however limited, as void, and the conveyance as good.

For this reason we find the law in the states greatly in conflict on certain propositions, especially on what is a limited restraint and what not? It is, however, almost universally accepted in this country that an absolute restraint on alienation should be void. On this point Chancellor Kent says:-- Conditions are not sustained when they are repugnant to the nature of the estate granted or infringe upon the essential enjoyment and independent rights of property and tend manifestly to public inconvenience. A condition annexed to a conveyance

in fee or by devise not to alienate, is unlawful and void.

Mr. Boone, in his work on Real Property, very logically remarks that the law has annexed to every estate in fee simple certain inseparable incidents one of the most important of which is the power of alienation. And it is a well settled rule that a condition annexed to the creation of an estate in fee simple, against alienation, is absolutely void.

Such is the law in the state of New York as was decided in the early case of DePeyster v. Mechose, (6 N. Y. 467), in which the judge writing the opinion remarked:- "Upon the highest authority therefore it may be affirmed that in a fee simple grant of land a condition that the grantee shall not alien or that he shall pay a certain sum of money to the grantor on alienation, is void upon the ground that it is repugnant to the estate granted". Also in the case of Oxley v. Lane, (35 N. Y. 346), the judge, speaking for the court through his able opinion, says, it is a well settled rule at common law, a perpetual and total restriction upon the power of alienation of an estate is void as repugnant to the estate and its

failure does not affect the validity of the grant or devise. In support of which he cites, Littleton, 465; 4 Kent's Comm., 131; 2 Maurice, 345; 1 Denio, 467. A few of the states in which similar decisions hold absolute restrictions on alienation to be void are:- Monroe v. Hall (97 N. C. 206), Hall v. Tufts (18 Pick. Mass. 455), Reifsnnyder v. Hunter (19 Pa. St. 841) (159 Ind. 476) (73 Md. 228). While on the contrary, I think there is not a single jurisdiction which supports a decision allowing a person to put conditions on estates absolutely restraining the alienation of the same. In every instance where such an attempt has been made and the court has been called upon to construe the same, they have invariably decided the condition as void, being repugnant to the estate and an estate in fee as vesting. And if the estate had been conveyed in violation of such conditional restraints a good title was conveyed. It seems to be so ~~invariably~~ <sup>universally</sup> accepted now, that it shall be unlawful for a testator to annex conditions to a devise, absolutely restraining the power of alienation, that it is seldom attempted, but we find a great many cases where a testator attempts to control the devisees disposition of

their property, to a ~~limited~~, extent at least ~~at least~~, by way of annexing conditions that the devisee shall not alienate the property to any one but a certain person or persons named by the testator. These limited restraints have caused an endless amount of litigation and we find the ~~variety~~ of decisions, about as great. New York has been very conservative in allowing devises to be hampered with conditions in restraint of alienation, as the holding of a leading case indicates.

The case was that of Shemmergorn v. Negus (1 Denio 448) where landswere devised to certain children upon the condition that they should not sell nor alienate the same to any one except each other upon pain of forfeiting the estate. The devise was legal and valid but the provision itself was repugnant to the estate devised and therefore void.

Pennsylvania is of the same holding. In McCullough v. Gilmore (11 Pa.St. 376), in which a testator indicated that it was his will and desire that certain lands should fall into the possession of W., laying this injunction and prohibition not to leave the same to any one but the legitimate heirs of W's. father's family.at his (W's)

death. It was held that this evinces a general intent to give the fee to W. with an apparent particular intent in relation to the power of alienation which particular intent is void because inconsistent with a reasonable enjoyment of the fee.

McWilliams v. Nesly (2 Sar. & Rawles) may be cited in support of the above rule.

The following jurisdictions seem to be unwilling to admit of such a restriction and base the reasoning on that upon which the cases above were decided:

Gerris v. Rogers (7 S. W. 543);  
 Anderson v. Carey (55 O. St. 506);  
 Walker v. Vincent 18 Mo. 211);  
 Gosbury v. Sheppard (27 Mass. 203).

Another example of limited restraints upon alienation and which has given rise to much controversy and conflict of decision, is that not to alienate to a certain person or persons or for a certain fixed time, designating it. Some authorities hold that all such conditions should be supported as being in no way inconsistent nor repugnant to the nature of the estate granted and are therefore considered as only a partial restraint, which power is no more than just that the grantors and devisors should be allowed to exercise, in case he wishes to take advantage of it in any particular instance. Is it more

than just that a devisor should be allowed to say that such and such a person should not come into possession of his property, by restraining his devisee from alienating such property by way of a condition, upon violation of which the estate is to end? I think not. No more so than in the case wher a person is allowed to attack a condition to an estate that if liquor is ever sold on the premises the estate shall vest in some one else. This seems to be the holding of the weight of authority but still there are some leading and well considered cases to the contrary. Mr. Washburn, in his work on Real Property at page 54 volume 1., remarks that, "if the restriction only be to a limited extent, as to A. B. and the ~~like~~ like, or for a certain time, provided it be a reasonable time, the condition may be a valid one and the grantee or may forfeit the estate by violating it".

And Boone on Real Property also says that, "there are however cases where particular restrictions upon the power of alienation, such as conditions not to sell to a particular person or for a particular time, have been held good".

North Carolina seems to be of the holding that such

particular restrictions are to be supported, as it is stated in *Monroe v. Hall* (97 N. C. 206), that the rule is not so comprehensive in all its application as to prevent all conditions and restraints upon the power of alienation such as are limited and reasonable in their application and as to the time they must operate etc. are valid and will be upheld.

In Massachusetts also the holding is the same in the case of *Blackstone v. Davis* (21 Pick. 45), in which a condition that the grantee or devisee should not alienate for a particular time or to a particular person or persons was held to be good. Also in *Langdon v. Ingram* (28 Ind. 360); *Turner v. Johnson* (7 Dana, Ky. 459); *Stewart v. Brady* (3 Bush 623).

But doubts have been expressed to the correctness of such a rule and a contrary view has been taken in Pennsylvania in the leading case of <sup>Kepples</sup> ~~Heppus~~' Appeal (53 Pa. St. 211) in which a devisee to a son in trust for the use of his heirs at law for his natural life, but upon the condition that he in no way sell or dispose of the same during his life, passed the fee, the clause prohibiting the alienation was void. This was followed by the case of

Jannetche v. Proctor (113 Pa.St. 466).

South Carolina seems to be of the contrary view according to the holding of Tunly v. Camp (Phillips Eq. 61).

But the state which has gone the farthest in considering all such restraints as void is that of Michigan in the case of Maudle baum v. McDonnell (29 Mich. 73) in which a devise for life was made to the widow of the testator remainder in fee to his sons and grandsons, with the restraint upon alienation during the life of the widow, if she remained unmarried, and until the grandson should attain the age of twenty-five. The restriction upon the right of alienation was held void.

After an exhaustive review of the authorities and decisions in point, the court, speaking through Judge Christancy argues, as has been suggested above, that where ~~there~~ is a dividing line to be made between restrictions which are to be considered partial and ~~upheld~~ and ~~to~~ those which are repugnant to the estate and ~~void~~ therefore <sup>void,</sup> If a condition not to alienate for a day month or year is to be supported, why not allow such restriction for a life time or forever? If we are to take the length of time for which the restriction is made as a basis for deciding, in each case, whether the restriction is in fact

absolute or partial simply, it would be highly improbable that any court would come to a unanimous decision in any given case as to whether it was absolute or simply a partial restriction on alienation and whether it should be void or not. This seemed to be in effect the reasoning by which the court decided the case of Maudlebaum v. McDonnell. The judges evidently could not distinguish between a condition restraining alienation for a reasonable time and therefore valid and that which was unreasonable and void, hence laid down the broad and sweeping rule that any condition restraining the power of alienation for any period of time, is absolutely void and an estate in fee free from all such restraints will vest.

Now as a result of this brief discussion of the English and American authorities and decisions I think the following may be accepted as the probable law on the subject, showing how far restrictions upon the alienation of real property will be supported, if at all.

First, it is safe to say that any condition annexed to a devise or grant absolutely restraining the power of alienation is undoubtedly void, but the estate so granted or devised ~~and~~ will vest the same as if no conditions

had been annexed.

Secondly, conditions in partial restraint of alienation will be supported when such conditions are in fact partial in their effect and not practically absolute.

For example, I think we found above that a condition not to alienate but to a certain person or persons was what might appear to be only in partial restraint of alienation, but which the great weight of authority holds to be in effect an absolute restraint and therefore void. But on the other hand, a condition not to sell to a certain person or persons or for a certain length of time will undoubtedly <sup>be</sup> supported. Such, for example, would be the case of a condition annexed to a devise or grant not to alienate to John Brown and his heirs, or not to dispose of the property until arriving at the age of twenty-one. This, it is true is not the universal rule and the contrary view has some well considered cases supporting it. Nevertheless I think the weight of authority is in favor of supporting such conditions, so restraining the power of alienation, as being no more than reasonable and in no way interfering with the reasonable enjoyment of the estate by the grantee or devisee or their heirs.

Although I have not specifically discussed the propositions above it seems to be the law that conditions in a conveyance or devise of estates tail, that the tenant shall not alienate nor bar the entail, is void being repugnant to the estate conveyed or devised. (3 Vesey 324); Hawley v. Northampton (8 Mass. 37); (64 Pa. St. 95)

Such is also the law in case of life estates. The donor cannot take away the incidents of such an estate by a restraint on the power of disposal. (18 Vesey 429) (75 N. C. 119); (5 P. J. 205).

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I have attempted in this brief discussion of conditions in restraint of the power of alienation of real property, after an historical sketch of the law of alienation of realty from the earliest period to the destruction of the Feudal System, to follow the law through its changes and development in England by a discussion of the leading cases and authorities. Then following the law in the United States as we find it built up by the long line of authorities, endeavoring to classify the respective states as their decisions seem to dictate.

And finally sifting from the many cases what may probably <sup>be</sup> accepted as the law in this country by the gen-

eral weight of authority.

I have confined myself in this discussion, exclusively to conditions in restraint of alienation, avoiding the field of perpetuities and unlawful suspension of alienation, knowing too well I would soon find myself lost in a wilderness out of which I would have little hope of **guid**ing myself in the time allotted for this work.

Leah D. Stepha  
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