LEGAL RESTRAINTS ON THE CHOICE OF A DWELLING

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INTRODUCTION

An interesting situation is presented in the many efforts to restrict the occupancy or even the ownership of land and to exclude therefrom certain groups or classes of persons. A person in the prohibited group finds himself excluded, not for any reason personal to himself, but because of the class to which he belongs. It is proposed here to consider briefly the limitation on the power of the individual to restrain the occupancy and use of his land, which is imposed by the common law.

It is desirable to consider the legal problems involved, dissociated, so far as they may be, from any discussion of racial feeling or difference; but it is necessary to assume certain racial preferences. Perhaps it would be useful to make a preliminary statement based on definite assumptions and using the impersonal classroom designations, *X* and *Y*. We may suppose that class *X* comprises seventy-five per cent of the population of a given community, and class *Y* comprises twenty-five per cent. The vast majority of class *X* do not care to live as neighbors of the members of class *Y*, and the same feeling is shared by many members of *Y* with regard to *X*. The occupation of a house by a member of *Y* in a neighborhood composed largely of members of class *X* makes the district less desirable to members of the latter class, thereby reducing the market value of the surrounding property. The close proximity of the two classes may tend to various disturbances and other undesirable consequences. On these facts what can be done by the individual property owners? Clearly, no problems of law can be fully considered without regard to actual conditions and human elements involved. However, an impersonal statement, on an assumption of facts, may help in presenting the problems.

The restraints here considered are direct restraints on alienation or use of the fee created by acts of the parties, and designed to be binding on remote grantees. Such restraints will take the form of covenants intended to run with the land, conditions, and conditional limitations. It is designed here to consider in general the power to restrain, rather than the means of effecting such a restraint.[1] For the sake of comparison it will be necessary to include some comment on direct restraints other than those involving classes of persons. Practical restraints on alienation, as by the creation of contingent future interests and the restraints involved in charitable trusts, spendthrift trusts, and equitable separate estates, are beyond the scope of this discussion.

A. RESTRAINTS ON ALIENATION

In many of the earlier cases, as well as in some of the later ones, restraints on alienation of the fee simple are held void on the ground of repugnancy.[2] It is stated that such restraints are inconsistent with the nature of the fee simple and consequently must fail. Such a statement seems to consider the ownership of a fee simple a more or less perfect unit, somewhat analogous to a chemical compound composed of certain elements. The compound cannot exist as such in the event any element is removed. Hence a reference to the compound necessarily implies the existence of the constituent elements and the exclusion of one of the elements would be repugnant. It is quite obvious that ownership of the fee may be qualified in so many ways that no such

[1] There is support for the proposition that if the restraint on alienation be in the form of a special limitation it will be upheld. See Hutchinson v. Maxwell, 100 Va. 169, 177, 40 S. E. 655, 657 (1902); In *re* Leach, [1912] 2 Ch. 422. By what seems to be the weight of authority, however, a conditional limitation or a special limitation on alienation is subject to the same rules, in general, as other forms of direct restraints. GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) §§ 12, 29a, 79, 80; 3 TIFFANY, REAL PROPERTY (2d ed. 1920) 592.

[2] In Potter v. Couch, 141 U. S. 296, 315, 11 Sup. Ct. 1005, 1010 (1890): "But the right of alienation is an inherent and inseparable quality of an estate in fee-simple. In a devise of land in fee-simple, therefore, a condition against all alienation is void, because repugnant to the estate devised". See also Putensen v. Dreeszen, 219 N. W. 490 (Iowa 1928); Brown v. Hobbs, 132 Md. 559, 104 Atl. 283 (1918); Mandlebaum v. McDonnell, 29 Mich. 78 (1874). The statement of repugnancy is frequently coupled with the reason that the restraint is against public policy: Department of Public Buildings and Works v. Porter, 327 Ill. 28, 158 N. E. 366 (1927); Palmateer v. Reid, 121 Ore. 179, 254 Pac. 359 (1927).

idea of complete unity can be applied to it. The exclusion of one of many ordinary incidents of ownership in fee is not necessarily so repugnant that the exclusion must fall and the incident stand. Also, if the qualifications in a given conveyance are so great that the grantee of the estate which is termed a fee simple can in no proper sense be called the owner of a fee, it does not necessarily follow that the qualifications must fail, but rather the case becomes one of the effect to be given the conflicting words in the conveyance.[3]

The law permits the use and enjoyment of an estate in land to be limited in many ways. Thus there may be a fee simple subject to a condition subsequent; a fee simple may likewise be subject to a mortgage, or to easements and servitudes. Each of these can be said to be repugnant to absolute and complete ownership, yet the law allows these qualifications and restrictions on ownership, because it is in accord with the public interest. There seems to be nothing essentially more "repugnant" in a fee simple to which a condition against alienation is attached than in a fee simple on any valid condition subsequent. Likewise, since the estate is conveyed without the right of alienation, the denial of such right is not repugnant to the estate conveyed.[4] Actual inconsistency between expressions in a conveyance gives rise to the need for construction, but to say that a restraint on alienation is void because it is inconsistent with the concept contained in the expression "fee simple", is practically to say that a certain qualified interest cannot exist because we have no word or name which exactly fits it.

It appears that the argument of repugnancy is often substantially one of terminology. If a restraint, otherwise unobjectionable, is held invalid simply because it is "repugnant to the fee simple", the idea is immediately suggested that in this regard a matter of conventional definition is being allowed to determine the law. Such considerations lead to the inference that the argu-

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[3] *Ibid.*

[4] See In *re* Rosher, 26 Ch. D. 801 (1884); GRAY, *op. cit. supra* note 1, § 257; KALES, ESTATES AND FUTURE INTERESTS (2d ed. 1920) §§ 447, 714, 723, 735; 1 MINOR, REAL PROPERTY (2d ed. 1928) 553; Fraser, *Rules against Restraints on Alienation* (1924) 8 MINN. L. REV. 185.

ment of repugnancy has no merit, except where used in construing conflicting expressions in the instrument in question. In these cases it involves simply an application of the general rules of construction.

The true and sufficient basis today of the rule limiting restraints on alienation seems to be one of public policy. Obviously a strong policy favors an advantageous use and development of property; to accomplish this end the property must be freely alienable so that it may readily come into the ownership of one who may use it to good advantage. It is clearly contrary to the public good to allow the wishes of a former owner long to control the use and disposition of property. Whether such restraints are to be allowed would seem to depend on whether there are other reasons of policy, favoring the restrictions in question, which outweight the general disfavor in which all such restraints are held—the amount of that disfavor depending, of course, on the extent of the restraint in the given case.[5]

Instances of practical restraints on alienation are, of course, quite frequent. While a discussion of such cases is outside the scope of this article, some may be mentioned as illustrations of the policy which is controlling. A most useful illustration may be borrowed from the application of the Rule against Perpetuities. If a testator devises his farm to his first grandson to reach twenty-one, the gift is valid under the common law, although by this devise the alienation of the property may be effectively restrained for many years. In this case the law deems its policy well served by allowing an owner freedom in the disposition of his property so as to provide for unborn persons, even at the cost of a long restraint on alienation. Similarly, a gift of real property to a charity, so long as it is used for the charitable purpose, is valid, although the alienation of the property may thereby be actually restrained indefinitely.[6]

It has been frequently said that a complete restraint on the alienation of a fee simple, whether in the form of a covenant

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[5] See Sweet, *Restraints on Alienation* (1917) 33 LAW Q. REV. 236; GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) § 118a *et seq.*

[6] *Ibid.* 590 *et seq.*

against alienation, a condition, or a conditional limitation on alienation, is void even though the restraint is only for a very short time.[7] If the above principles are sound, it would seem that this cannot be stated as a distinct rule; but rather is it a statement of the actual result in many cases. In a vast number of instances no sufficient policy is presented to justify the complete suspension of alienation, even for a short time. Thus, the policy against restraints on alienation outweighs the policy or policies favoring the restraint in question. Yet it seems extreme to say that this must be true in every conceivable case.[8] Since the extent of, and justification for, restraints differ so widely in the different cases, it is apparent that it may be misleading to refer to a general weight of authority in this connection without further analysis. A court may hold a limited restraint invalid in one case and valid in another without inconsistency, because of the difference in the restraints in question. If the true inquiry in restraints on alienation is in regard to the relative strength of the policies involved, a total restraint, unlimited in time, would be valid if it served a purpose sufficiently useful to justify its existence, despite the

[7] Mandlebaum v. McDonell, *supra* note 2, at 107. In giving the opinion of the Court, Christiancy, L. said:

"The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void." For decisions in which direct restraints on alienation for a limited time have been held void see Department of Public Works and Buildings v. Porter, *supra* note 4; Goodman v. Andrews, 203 Iowa 979, 213 N. W. 605 (1927); Northwest Realty Co. v. Serio, 144 Atl. 245 (Md. 1929); Watkins v. Minor, 214 Mich. 380, 183 N. W. 186 (1921); Combs v. Paul, 191 N. C. 789, 133 S. E. 93 (1926).

[8] It would be difficult to justify a rule which arbitrarily declared a direct restraint void. Permissible limitations which have the effect of restraints, such as exist in cases of contingent future interests and restraints such as are allowed in charitable trusts, spendthrift trusts, and equitable separate estates of married women, seem to show that there is no basis in policy for an absolute prohibition of all restraint, but rather that restraints on alienation will be sustained if the public good is better served thereby. And certainly, if this benefit is attained, there is no reason why such restraints should not be sustained. Direct restraints on alienation for a limited time have been sustained in some jurisdictions: Turner v. Lewis, 189 Ky. 837, 226 S. W. 367 (1929); Furst v. Lacher, 49 Minn. 53, 182 N. W. 720 (1921); Gaines v. Sullivan, 117 S. C. 475, 109 S. E. 276 (1921); see Price v. Va. Iron, Coal and Coke Co., 171 Ky. 523, 188 S. W. 658 (1916). But see Ramey v. Ramey, 195 Ky. 673, 243 S. W. 934 (1922).

A rule of law prohibiting all total restraints even for a limited time would have the advantages of definiteness and certainty, advantages possessed by any arbitrary rule.

general detrimental effect of allowing such restraints. Their failure means that such purposes do not appear. Obviously, where the restraint is limited in time it is much less objectionable, and hence the sustaining purpose need not be so strong. The cases would be very rare, however, where the grantor or testator would have an adequate reason to justify the prohibition of all alienation, even for a brief period.

In a number of cases prohibitions and conditions against alienation to a class of persons have been held invalid, as being unreasonable restraints on the fee simple.[9] In other cases such prohibitions, whether by way of covenant or condition, have been sustained.[10] It seems quite clear that, if the true inquiry is into the relative weights of conflicting policies involved, different conclusions will constantly be reached in different jurisdictions, according to the weight those jurisdictions give to the policies in question. Likewise, the extent of the restraint enters into its reasonableness, and the extent varies in the different cases. Finally, it may be suggested that a court's finding that the restraint is reasonable, and consequently valid, is simply a way of saying that the court believes that the policies favoring the restraint outweigh the policies opposed to it, so that the state's welfare is better served by allowing the validity of the restraint than by denying it.

The authorities are somewhat confused by the fact that the conditions or covenants are in many cases *omnibus* provisions. Sale to, lease to, and occupation by the excluded class are prohibited. In such cases, where there is a sale to a member of the class who subsequently occupies the premises, and a forfeiture is enforced, it is impossible to say whether the court is enforcing

[9] Los Angeles Investment Co. v. Gary, 181 Cal. 689, 186 Pac. 596 (1919), 9 A. L. R. 115 (1920); Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925), 42 A. L. R. 1267 (1926). See also Gandolfo v. Hartman, 49 Fed. 181 (C. C. S. D. Cal. 1892); Barnard v. Bailey, 2 Harr. 56 (Del. 1818); Manierre v. Welling, 32 R. I. 104, 78 Atl. 507 (1911); (1919) 18 MICH. L. REV. 59, 548; (1920) 8 CAL. L. REV. 188.

[10] Corrigan v. Buckley, 299 Fed. 899 (Ct. of App. D. C. 1924); Torrey v. Wolfes, 6 F. (2d) 702 (Ct. of App. D. C. 1925); Russell v. Wallace, 30 F. (2d) 981 (Ct. of App. D. C. 1929); Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); Kochler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918), 9 A. L. R. 107 (1920) (condition against the transfer, lease or renting of property to negroes for twenty-five years).

the condition against sale or the condition against occupancy, or both. The authority of a court's statement that the condition against alienation is valid is clearly weakened by the other ground of decision.

This situation was presented in *Los Angeles Investment Company v. Gary.*[11] In that case there was a condition providing that "the said property shall not be sold, leased, or rented to any person other than of the Caucasian race, nor shall any person or persons other than of the Caucasian race be permitted to occupy said lot or lots". The court reached the conclusion that the condition against sale was void but the condition against occupancy valid. Since the breach of one condition warranted the relief sought, the statements as to the other are, in fact, *obiter dicta.*

The District of Columbia has been most fruitful in precedents on the validity of restraints on alienation to members of the colored race. *Torrey v. Wolfes* [12] involved the validity of a restriction contained in all of the deeds to property in a certain subdivision. The restriction was as follows:

> "Subject to the covenant that said lots shall never be rented, leased, sold, transferred, or conveyed unto any negro or colored person under a penalty of two thousand dollars, which shall be a lien against said lot".

The owner of a house and lot in this subdivision conveyed the property to a negro. Adjacent property owners brought a suit to enforce the restrictive features of the covenant, ignoring the penalty clause, and the court granted the relief sought. Though the fact might well be presumed, the report of the case does not show that the negro grantee actually occupied the property, or intended to occupy the property.

In *Corrigan v. Buckley* [13] the restriction was imposed by a covenant which was mutually executed and delivered by thirty property owners, and was duly recorded. The covenant bound the parties thereto and their respective heirs and assignees that

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[11] *Supra* note 9. This case arose under a provision of the California Code.

[12] *Supra* note 10.

[13] *Supra* note 10, *aff'd,* 271 U. S. 323, 46 Sup. Ct. 521 (1926) (holding there was no Constitutional question involved in this case).

no part of the land included in the agreement should "ever be used or occupied by, or sold, conveyed, leased, rented or given to negroes, or any person of the negro race or blood". It was further expressly provided that the covenant should run with the land and be binding for the period of twenty-one years. A party to the agreement contracted to sell to a negro a house and lot included in the covenant. The suit was brought by another party to the agreement to enjoin the vendor from carrying out the contract of sale during the prescribed period, and to enjoin the vendee from occupying the land. The injunction was granted.[14]

It is difficult to see how the ownership of property by any member of a class of persons, as distinguished from its occupation or use, can be so objectionable as to justify the exclusion of that class from acquiring title. The economic or social objection to excluded classes deals with proximity of members of that class and not with the mere holding of the legal title. Certainly no one can validly raise an objection because his neighbor's absent landlord does not suit his fancy. Thus the decisions upholding conditions against alienation to excluded classes would seem to accept the idea that the right to occupation is necessarily incidental to ownership, so that, although the discussion concerns ownership, the real objection is to occupation. A distinction between restraints on alienation and restraints on use is made in two Michigan cases. In *Porter v. Barrett*[15] the court held invalid a covenant forbidding alienation to persons of the colored race, while in *Parmalee v. Morris*[16] the court held valid a covenant forbidding occupation by colored persons.

B. RESTRAINTS ON OCCUPATION

Restraints on the use of property which are binding on remote grantees with notice are, of course, very frequent, and are sustained when reasonable. The terms "reasonable" is con-

[14] The determination of the validity of a similar agreement was before the court in Russell v. Wallace, *supra* note 10, in which the decision in this case was approved.

[15] *Supra* note 9.

[16] 218 Mich. 625, 188 N. W. 330 (1923), 38 A. L. R. 1180 (1925); see also Schulte v. Starks, 238 Mich. 102, 213 N. W. 102 (1927). For a similar comparison in California see Title Guaranty and Trust Co. v. Garrot, 42 Cal. App. 152, 183 Pac. 470 (1919); see also White v. White, 150 S. E. 531 (W. Va. 1929).

veniently vague and uncertain. In the nature of things there can be no adequate test of reasonableness which can be applied as a yardstick to the cases as they arise.

To furnish a basis of comparison with restrictions on occupation of property, and possibly to provide a background for the use of the term "reasonable", it may be wise to refer briefly to restraints on use in general.

Restrictions on the free use of land, like restrictions on its free alienation, are not favored by the law. A wise public policy naturally promotes those principles of law which allow the most beneficial use of the resources of the country. Normally, that policy is best served by allowing property to be freely transferable so that it may come into the hands of him who can best use it. The same policy would allow such a person to put the property to the lawful use he considers most advantageous. Yet the policy of gaining the greatest benefit from land is not always served by the prevention of restrictions. Frequently, the most profitable use of a small tract will result in a decreased value of surrounding property. If the use of the small tract constitutes a nuisance, it can be enjoined. Likewise, the state, under its police power, may prohibit certain uses of property when the prohibition reasonably promotes the public good.[17] There are many uses, however, which are not prohibited by any legislative enactment, but which are to some extent harmful to adjacent property. A simple example is the corner grocery store in a select residential section of a city. The owner of the corner lot may gain a greater value by this use than if a residence were erected on his lot; but his gain is his neighbor's loss, and the greatest value for the entire section is realized by prohibiting commercial enterprises. Consequently, building and use restrictions are often in accord with the policy stated above and hence are allowed.[18]

As there can be no definitive test of reasonableness, a conception of the principles involved must be built up by the gradual

[17] See Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878); Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567 (1909). A most pertinent illustration is presented in Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926).

[18] See 2 Minor, *op. cit. supra* note 4, at 1043 *et seq.* for a fuller discussion by the present writer.

process of judicial inclusion and exclusion as the cases arise. It would seem that the reasonableness of a given restriction must depend upon the weight of the conflicting policies involved in the particular case. The law favors freedom of contract and is unwilling to restrict unduly the right of the parties to contract about their property. Hence some latitude must be given the parties in deciding for themselves what restrictions are wise and proper. In addition, the policy, previously mentioned, of fostering the most beneficial use of land will largely control. As a practical matter this must be a question of cost against gain—can the gain to adjoining property be reasonably said to outweigh the loss to the property restricted? Of course the losses in the restricted area are mutual, and there is a mutual reciprocity of advantage.

The decisions in which restrictions on use have been sustained are numerous. In each the facts of the given case and the location and nature of the property involved are vitally important in determining the reasonableness of the restriction in question. For the purposes of this discussion, it suffices to refer to the more customary examples, such as those excluding all non-residential uses of the property,[19] establishing building lines,[20] excluding advertising signs,[21] etc.

A restriction excluding a class of persons from occupying a piece of property may be fairly classed with use restrictions. It is clearly analogous to the exclusion of mercantile establishments, or to any other use restriction designed to make the surrounding property more desirable to present owners or to future occupants, and thus protect the economic value of property. In some sections of this country the presence of members of certain races in the neighborhood might be more objectionable to adjoining Caucasian property owners, and more harmful to adjacent property values, than would many business establishments. The property owners are not responsible for the racial prejudices and differences which cause this, but the fact remains that they are

[19] Moore v. Stevens, 90 Fla. 879, 106 So. 901 (1925); Taylor v. Lambert, 279 Pa. 514, 124 Atl. 169 (1924).

[20] O'Gallagher v. Lockhart, 263 Ill. 489, 105 N. E. 295 (1914); Cheatham v. Taylor, 148 Va. 26, 138 S. E. 545 (1927).

[21] Starck v. Foley, 209 Ky. 332, 272 S. W. 890 (1925).

confronted with the prospect of economic loss as a result of widespread popular feeling, unless they guard against the chance of that feeling affecting their property.

Consequently, restrictions on the occupation of property by a certain race or races are generally held to be valid where the restrictions are designed to protect the value and enjoyment of adjoining property, and have a fairly adequate and close connection with that purpose.[22]

In *Corrigan v. Buckley*[23] the court, in enjoining a negro purchaser from occupying property contrary to a covenant against such occupancy, to which his vendor was a party, summarized its opinion by saying:

> "It follows that the segregation of the races, whether by statute or private agreement, where the method adopted does not amount to a denial of fundamental constitutional rights cannot be held to be against public policy".[24]

It may be added that a private agreement for the exclusion of any person or any class of persons does not invade the constitutional rights of those excluded.[25] Thus in so far as private agreements are concerned, the common law supplies the test of validity.

This brief survey of restraints on the alienation of the fee simple to a class of persons, such restraints being imposed by the act of the parties and designed to be binding on remote grantees with notice, may suggest several very general observations:

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[22] Corrigan v. Buckley; Russell v. Wallace, both *supra* note 10; Los Angeles Investment Co. v. Gary, *supra* note 9; Janss Investment Co. v. Walden, 196 Cal. 753, 239 Pac. 34 (1925); Schulte v. Starks; Parmalee v. Morris, both *supra* note 16.

[23] *Supra* note 10. It will be observed that the decision in this case was subsequent to that in Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 16 (1916).

[24] The court quoted with approval from People v. Gallagher, 93 N. Y. 438, 448 (1883): "This end [social equality] can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon which they are designed to operate. When the government therefore, has secured to each of its citizens equal rights before the law and equal opportunity for improvement and progress, it has accomplished the end for which it was organized and performed all the functions respecting social advantages with which it is endowed".

[25] The due process clauses of the fifth and fourteenth amendments are limitations on federal and state action respectively, and not on individual action. Slaughter House Cases, 16 Wall. 36 (U. S. 1872); Corrigan v. Buckley, *supra* note 13; Porter v. Barrett, *supra* note 9.

1. A restraint on alienation or use is valid when it is in accord with the policy of the law; *i. e.,* when the policies favoring the restraint in question predominate, in the mind of the court, over the general policy against limiting the free alienability of property as that policy affects the instant case. Under these conditions the restraint may be said to be reasonable.

2. Restraints on alienation to a class of persons, as distinguished from restraints on occupancy, seldom serve any valid purpose, as ownership, distinguished from use, can scarcely be objectionable to others. Consequently such restraints are normally held unreasonable and void.[26]

3. Restraints on occupation by a limited class of persons are reasonable and valid when fairly designed to protect economic values and to render the property, for a substantial number of people, a more pleasant place in which to live.

[26] See White v. White, *supra* note 16.