RESTRAINTS UPON THE ALIENATION OF LEGAL INTERESTS: I

MERRILL I. SCHNEBLY

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THE power of alienation is so commonly one of the constituent elements of property that it is now regarded as a characteristic attribute of ownership. Since an early date in the history of the English common law, it has been thought socially and economically desirable that the owner of a present fee simple in land, or of a corresponding absolute interest in chattels, should have the power to transfer his interest. This policy in favor of freedom of alienation has played a large part in the development of our legal system, particularly of our land law. Indeed, a substantial portion of the history of real property law consists in the record of various legal devices whereby it was sought to make land inalienable, and of the means whereby the courts thwarted those efforts in order to protect what they deemed to be the larger social good. Naturally, the first efforts to achieve inalienability of property were exerted by the owners of land, who wished to keep it within their families, for land was the principal form of wealth in the early period of English history. Since the quantity of land was limited by Nature, the social and economic results of inalienability appeared especially objectionable in respect to this type of property.

The antagonism of the law toward devices designed to produce some degree of inalienability is evidenced by a large number of legal rules. The long history of the common law conditional fee and the estate tail,
culminating in the judicially and legislatively evolved rules for barring the entail, is one of the earliest and most conspicuous examples. 4 Of greater present significance are the rule against perpetuities, 5 and the rules against restraints upon alienation. 6 There are other rules directed to the same end: the statutory rule limiting accumulations of income within narrower bounds than required by the rule against perpetuities; 7 the rule of equity which requires the termination of a trust when a single beneficiary, sui juris, is entitled to the whole equitable interest; 8 and the statutory procedure whereby land may be sold absolutely and the future interests limited therein recreated in a fund formed from the proceeds of sale. 9

It is the purpose of this article and those that follow to discuss the rules which have been framed by the courts of law to secure and preserve freedom of alienation to the owners of legal interests as distinguished from equitable interests. A clear understanding of the distinction between the rule against perpetuities and the rule against restraints upon alienation is necessary as a foundation upon which to build the present discussion. Both rules have the same fundamental purpose—to keep property alienable. The two rules, however, accomplish their objectives by quite different methods, as that distinguished scholar, Professor John Chipman Gray, has clearly explained. The rule against perpetuities prescribes a period of time within which a future interest must vest in order that it may be a valid limitation; 10 by forbidding the creation of future interests which may not vest until too remote a day, this rule circumscribes the power of an owner of property to make that property inalienable by the creation of future interests therein. Any future interest impedes alienation to some degree, 11 because it necessitates the

6. Gray, Restraints upon the Alienation of Property (2d ed. 1895) §§ 3, 8-10.
8. There has been considerable dissent from this rule in the United States. Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889) is the leading decision contra. See Gray, op. cit. supra note 5, at §§ 120, 121 c; Gray, op. cit. supra note 6, §§ 124-124 p.
9. Schnebly, Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process (1928) 42 Harv. L. Rev. 30, 62 et seq.
10. Supra, note 5.
11. Professor Gray has declared that a future interest is not "strictly speaking" a restraint upon alienation, though he freely concedes that the existence of such an interest may render the property in which it subsists less marketable. Op. cit. supra note 6, § 8. If, as is often the case, the future interest is itself inalienable because of its contingency,
joint action of two or more persons to effect a complete alienation. It would not be socially desirable, however, to forbid the creation of all future interests in land, any more than it would be socially expedient to abolish joint tenancy and tenancy in common, each of which in some measure tends to produce inalienability.\(^{12}\) A balancing of social interests has resulted in the formulation of the common law rule against perpetuities, which admits of the creation of future interests with a large degree of freedom, yet does not permit the use of these interests to effect inalienability for an undue length of time.

The rule against restraints upon alienation is directed primarily against attempts to make vested interests, present or future, inalienable.\(^{13}\) These attempts have taken two general forms.\(^{14}\) One method of restraint is the insertion in the conveyance\(^{15}\) of a provision that alienation shall cause a forfeiture of the conveyee's interest. This forfeiture provision will usually assume the form of a reservation by the conveyor of a power of reentry, exercisable upon the conveyee's alienation, or of an express limitation over of the property to another in event of an alienation. A second method of restraint is a provision which withholds from the conveyee the power to make a transfer. If this device is successful, any transfer by the conveyee is null and void; there is no forfeiture, and the property remains in the ownership of the conveyee who has attempted to alienate, as if no such attempt had been made. This type of restraint will be referred to hereafter as a "disabling restraint,"\(^{16}\) because it ren-

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12. The obstacles to conveyancing resulting from the tenancy in common, with division of the ownership into many small shares, was one of the important factors in the enactment in England of the Law of Property Act, 15 Geo. V, c. 20 (1925), and the Settled Land Act, 15 Geo. V, c. 18 (1925). See Schnebly, "Legal" and "Equitable" Interests in Land under the English Legislation of 1925 (1926) 40 Harv. L. Rev. 248, 251-252, 281-283.

13. Gray, op. cit. supra note 5, § 268. For further discussion of the distinction between the rule against perpetuities and the rule against restraints upon alienation, see Gray, supra, §§ 236, 278-278d.


15. The word "conveyance" is used in this discussion to embrace any act sufficient in law to transfer a property interest, thus including both deeds and wills. A "conveyor" is anyone who has made a conveyance, whether grantor or deviser; and "conveyee" in like manner includes grantees, devisees, assignees, legatees, etc.

16. It is desirable to have some word which will enable one to differentiate between those restraint provisions which operate through forfeitures, and those which merely subtract the power of alienation. In his work cited supra note 6, Professor Gray uses the general title, "Restraints on the Alienation of Property." He then divides the work into two principal parts, the first of which deals with "Forfeiture for Alienation," and the second, with "Restraints on Alienation," meaning thereby that class of provisions which the writer has described as "disabling restraints." This use of the term "restraint" in both a general and a particular sense is confusing.
ders the conveyee powerless to do what he otherwise could.

Restraints which make it practically impossible for the owner of property to transfer his interest therein have grave social and economic consequences. Such restraints keep the property out of commerce, and tend toward a concentration of wealth. In this country, at least, the latter objection is more weighty than the former, as there is here no acute shortage of marketable property of the ordinary types, such as land and chattels. The tendency toward concentration of wealth is obvious, and is present whether the restraint be upon an interest in land or an interest in movables. A valid restraint makes it practically impossible for the present owner of property to consume it; the most that he can spend is the income derived from it. There is yet another objection in addition to those already mentioned, which may be considered even more important. The restraint, in the case of land, tends to prevent improvement. 17

A land owner will be reluctant to make improvements upon land that he cannot sell during the period of restraint, which may be a long term of years, or even his whole life. In many instances, therefore, the restraint deters the owner from obtaining the maximum enjoyment of the land; it may also retard the development of a particular section of the community, and prevent the increase in taxable values which would otherwise naturally occur. If a substantial portion of our land were subject to restraints upon alienation, the resulting effects upon social and economic life would be serious.

In so far as a restraint operates to prevent a creditor from resorting to property of his debtor for satisfaction of his claim, it works an obvious hardship upon him. While a creditor may not rely definitely upon the debtor's ownership of particular property as a specific means for payment of his demand, he undoubtedly is influenced in extending credit by the general reputation of the debtor as a man of property, and by the appearance of prosperity which the latter's enjoyment of property enables him to sustain. 18

Against these social and economic disadvantages, what benefit can be urged? The conveyor who attempts to impose a restraint upon the alienation of property conveyed usually has one of two motives in mind.

17. See the remarks in Mandlebaum v. McDonnell, 29 Mich. 78, 107 (1874); Morse v. Blood, 68 Minn. 442, 443 et seq., 71 N. W. 682 (1897). In the view of Professor Oliver S. Rundell, the chief objection to a restraint upon alienation is found in its effect as a deterrent to improvement and maximum utilization of the land. The Suspension of the Absolute Power of Alienation (1921) 19 Mich. L. Rev. 235, 237-238; Concentration Versus Distribution of the Power of Alienation (1924) 2 Wis. L. Rev. 449, 449-450.

18. In the opinion of Professor Gray, the objection from the point of view of creditors is not so much the deception which may result, as the immorality and social inexpediency of a system of law in which a man may enjoy property without its liability for his debts. This argument is more particularly applicable to a disabling restraint than to a forfeiture provision. See op. cit. supra note 6, §§ 258, 262, 264.
He may be actuated by the desire to keep the property in his family for as long a time as possible, either because he has a sentimental attachment to it and cannot abide the thought of its falling into alien hands, or because he wishes to preserve the prestige of his family by assuring to its future generations a position of credit and esteem in the community. He may, however, be influenced merely by the wish to provide a sure means of maintenance for the immediate conveyee. Should the desire of the conveyor to perpetuate ownership within the family be gratified in view of the social disadvantages heretofore pointed out? Should the wish to make certain the comfort of the conveyee be effectuated? This latter motive seems worthy of more consideration than the sentimental desire to keep property within the family. It is easy to understand the attitude of a parent who may wish to assure a child a comfortable support for his life.

That courts have looked with sympathy upon this natural inclination is evidenced by the very general recognition in this country of the so-called "spendthrift trust," which, in its typical form, creates an inalienable equitable life interest. This doctrine of equity has been subjected to severe criticism. It may well be questioned whether such a restraint is actually conducive to the physical and moral well-being of the beneficiary himself. Doubtless, it often encourages extravagant living, removes the incentive of ambition, and results in a degeneration of the moral and physical fiber.

It is perhaps possible to justify some greater degree of liberality in upholding restraints upon equitable interests, for two reasons. First, a restraint upon an equitable interest does not necessarily render the subject matter of the trust unmarketable, since the trustee may have power to transfer it free of trust; if the subject matter be an interest in land, it is not necessarily withdrawn from commerce by reason of the fact that the equitable interest cannot be transferred by the beneficiary alone. If the trustee has power to convey, the land can be transferred absolutely, though a trust attaches to the proceeds of the sale. Second, persons dealing with the owner of an equitable interest are perhaps not

19. SCOTT, CASES ON TRUSTS (2d ed. 1931) 643 n.; 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 386a. The rule that alienation of an equitable life interest may be subjected to a disabling restraint has been adopted in the RESTATEMENT OF TRUSTS (Tent. Draft 2, 1931) § 148. In some jurisdictions even an equitable fee simple or absolute interest in personalty may in this manner be made inalienable. See authorities cited supra. The RESTATEMENT OF TRUSTS §§ 147 and 149, adopts the rule that a disabling restraint upon the alienation of the cestui's right in the corpus, as distinguished from his right to income, is invalid.

20. The most vigorous and striking criticism is to be found in Gray, op. cit. supra note 6, Introduction, and §§ 258-264.

so likely to place reliance upon his ownership as they would if that interest were legal; and they may be held to have assumed a greater risk in relying upon such ownership without full investigation of the limitations which the trust instrument may have placed upon the transfer of the beneficiary’s interest, particularly where the beneficiary is not in actual possession of the subject matter.

Whatever may be the merits of the spendthrift trust doctrine, it is not the purpose of the writer to attempt its justification here. There is certainly no reason for carrying indulgence to the extent of reproducing it in respect to legal interests. The present discussion is limited strictly to restraints upon legal interests as distinguished from equitable.

Inasmuch as a system of restraints which may defeat creditors is inconsistent with the ideas of moral justice entertained by a considerable portion of society, it tends to reduce the esteem in which our legal system is held. The unequal distribution of wealth under our present scheme of society has become a matter of grave concern; the policy of permitting unlimited and unqualified transmission of property at death has been seriously questioned. The imposition of progressively heavy inheritance taxes is but one indication of a belief that such transmission should be restricted. Social conditions might be greatly improved if every member of society were required to depend more largely upon his individual efforts to secure those things essential to the comfortable enjoyment of life, without so much reliance upon the generosity of some deceased benefactor. This view of a sound social policy requires strict limitations upon the power to restrain the alienation of property.

I

THE DISTINCTION BETWEEN RESTRAINTS OPERATING THROUGH FORFEITURE AND DISABLING RESTRAINTS

In the introductory part of this discussion, the writer has stated the general nature of the difference between disabling restraints and those

22. Kessner v. Phillips, 189 Mo. 515, 528, 88 S. W. 66, 69 (1905); Kerns v. Carr, 82 W. Va. 78, 81-82, 95 S. E. 606, 607-608 (1918). Even if it should be thought that a restraint upon the alienation of a legal interest is no more objectionable than a similar restraint upon an equitable interest, it is still not clear to the writer that the rules of the law court should be made conformable to those established in equity. It must first be determined whether the equity rules subserve better the social interests involved. It is not expedient to match a bad equity rule with a bad law rule merely to secure symmetry in our system of jurisprudence. See, however, Fraser, The Rules against Restraints on Alienation, etc., in Minnesota (1924) 8 Minn. L. Rev. 185, 194.

23. Supra note 18.

which operate through forfeiture. The disabling restraint is designed to secure to the conveyee continued enjoyment of the property conveyed despite any attempt upon his part to transfer it, and despite any attempt by a creditor to seize and apply it to the payment of his claim. Such a restraint, if valid, confers upon the conveyee all the benefits of ownership according to the natural extent of his estate, except the power to make a voluntary transfer; and relieves him of the usual liability of an owner to have his property divested against his will for the benefit of a creditor.

A restraint operating by way of forfeiture upon alienation either extinguishes completely the interest of the conveyee subject thereto, upon his alienation in violation thereof, or else makes his interest subject to destruction at the volition of the creator of the restraint or his heirs. If the instrument creating the restraint has conveyed a fee simple which is determinable upon alienation, but has not limited the fee over to a third person upon such event, a possibility of reverter is retained by the conveyor; and this future interest will automatically become a possessory interest upon violation of the restraint if it be valid. In such case, the interest of the conveyee is extinguished at once upon his violation of the restraint; and the person to whom he has attempted to transfer gets nothing. In like manner, if the creator of the restraint has limited the fee over to a third person upon alienation by the conveyee, the latter's interest is extinguished immediately by his attempted transfer. If the conveyor has reserved to himself a power to reenter for condition broken, then his power becomes immediately exercisable upon an alienation, and he may by appropriate acts put an end to the estate of the conveyee. A forfeiture restraint, therefore, necessarily involves the creation of a future interest.

The division of the cases into classes according to the intended nature of the restraint as one operating by way of forfeiture, or as one disabling the conveyee from transferring, is a matter of great difficulty. Theoretically, the problem is one of intention as manifested by the language of the conveyance, construed in the light of surrounding circumstances. As a practical matter, there is rarely anything on which to rely except the language used in declaring the restraint, and this is

25. Supra note 14.
26. It has been previously noted that the disabling restraint is almost universally upheld in this country when imposed upon an equitable life estate, and in some jurisdictions when imposed upon an equitable absolute interest. Note 19, supra. In these cases one finds the best illustrations of the practical operation of this form of restraint.
27. As to the nature of a determinable fee simple, and the difference between it and a fee on condition subsequent with a power of reentry in the conveyor, see 1 Tiffany, op. cit. supra note 4, §§ 90, 132; Gray, op. cit. supra note 5, at §§ 12-13.
28. As to what acts are required to divest an estate limited on condition subsequent, see 1 Tiffany, op. cit. supra note 4, at § 85.
often highly ambiguous. The legal consequences of adopting the one construction or the other are quite different, as the description of the respective natures of the two types of restraints has shown. If one should emphasize the intention of the conveyor to create some sort of restraint, he might adopt as a guiding principle the rule that in doubtful cases the restraint will be construed as being of the forfeiture type, since the attitude of the courts has been distinctly more favorable to this type. With this construction, the supposed dominant intent to restrain alienation can more likely be given legal effect. It must be remembered, however, that a forfeiture restraint penalizes the conveyee for an attempted alienation by divesting him of the property. Such divestiture might be quite contrary to what the conveyor would have desired had he given actual thought to the problem.

Since the difficulty of ascertaining the intention of the conveyor is great, and since in most instances a restraint of either classification would be void, it is not surprising that in many instances courts have not attempted to make the distinction, or have not succeeded in making clear which construction they have put upon the language. In many instances the distinction seems to have been overlooked entirely, and a restraint phrased in either form treated as a case of condition subsequent, with a power of reentry in the conveyor where there was no limitation over on alienation.

In certain situations it is wholly unnecessary to determine to which of the two classes a restraint belongs. In a suit for specific performance by the conveyee against a defendant who has contracted to buy the property, the sole issue, as far as the restraint is concerned, is whether the conveyee can make valid title; a valid restraint of either type will prevent his making title, and no distinction need be taken if restraints of both types are equally valid, or equally void. Nor is it usually necessary to classify the restraint in a suit for partition by sale of the property and division of the proceeds.

In certain other actions or suits, it would seem more or less necessary to determine the exact nature of the restraint involved. In a suit for construction of the conveyance creating the restraint, its validity as a disabling restraint cannot be in issue, since such a restraint creates no interest in any other person. Decisions in such cases doubtless conclude all parties thereto who would have an interest if the restraint were a valid one of the forfeiture type, but cannot be regarded as adjudications

29. The truth of this statement will appear in the subsequent discussion. It should be noted that even in those jurisdictions, such as England, where a disabling restraint upon an equitable life interest is void, a restraint in the forfeiture form is valid. Rochford v. Hackman, 9 Hare 475 (Ch. 1852); and see Brandon v. Robinson, 18 Ves. 429 (Ch. 1811).
upon the validity of disabling restraints. A decision rendered in such a suit might, however, have a strongly persuasive influence in a subsequent action.

If an action to recover possession be brought by the conveyor or his heirs, it is maintainable only if a power of reentry or possibility of reverter has been created; theoretically, a decision calls for a distinction between forfeiture and disabling restraints. Since, however, the actual decision must be the same under either construction if both types of restraint are invalid, the distinction may easily be overlooked. Where an action has been brought by the conveyee or his heir to recover land which the conveyee has attempted to alienate in violation of a restraint, or a suit to set aside his deed of transfer, a distinction is also required theoretically, since the plaintiff can succeed only by establishing the existence of a valid disabling restraint. But inasmuch as the plaintiff must fail if the disabling restraint is invalid, or if the restraint is properly by way of forfeiture, whether valid or not, the distinction may again be overlooked.

To express clearly a restraint of either form is not difficult. Where the conveyance makes express provision for reentry by the conveyor or his heirs in event of an alienation, or stipulates for an automatic reverter to him, or makes a gift over upon alienation, the restraint is

30. If the conveyee should make a contract to convey after a decision in a suit for construction, and should sue his contract vendee for specific performance, it seems clear that neither party would be bound by the decree rendered in the suit to construe. In the first place, as pointed out in the text supra, any decision on the validity of the restraint as one of the disabling type was beyond the issues as presented in that suit. Secondly, the present defendant was not a party of record to that suit, nor privy of a party, nor represented in interest under the rules of equitable representation; therefore, he is neither bound by the decree nor entitled to claim its benefit as an adjudication binding upon the present plaintiff. See 1 & 2 FREMAN, JUDGMENTS (5th ed. 1925) §§ 407, 430, 438, 659. Cf. Monarque v. Monarque, 50 N. Y. 320 (1880); Van Cortlandt v. Laidley, 59 Hun 161, 11 N. Y. Supp. 148 (Sup. Ct. 1891); In re Leach, [1912] 2 Ch. 422.

31. The plaintiff's success depends upon his establishment of a valid condition subsequent, creating a power to reenter; if there is a void condition subsequent, or a disabling restraint (whether valid or invalid), he must fail. For a similar reason, where there is a gift over to a third person upon alienation, in any action by him to recover possession of the land, it is theoretically necessary to decide whether the restraint is of the forfeiture or disabling type. And in a suit by a transferee of the conveyee to quiet title against the conveyor or his heirs, it would seem that the plaintiff is entitled to relief only if the restraint is an invalid one of the forfeiture type.


33. A provision that upon alienation the land shall "revert" to the conveyor, could well be construed as intended to create a fee simple determinable upon alienation. E. g., see Walker v. Shepard, 210 Ill. 109, 71 N. E. 422 (1904); Koesser v. Phillips, 189 Mo. 515, 88 S. W. 66 (1909). Also, a provision that upon alienation the conveyance shall become "null and void." E. g., Cobb v. Moore, 90 W. Va. 63, 110 S. E. 463 (1922). In dealing with problems of restraints, it is usually unnecessary to make the distinction between a fee
intended to be of the forfeiture type. Where the word "condition" is employed in introducing the restraint, without an express provision for reentry or reverter, the same conclusion might be drawn. Perhaps the same significance should be given to the words "provided that," which have sometimes been held to indicate a condition subsequent. Where, however, the conveyor has declared that the conveyee shall not have power to alienate, and that any instrument executed by him in an attempt to transfer his interest shall be void, a disabling restraint is undoubtedly intended. Probably the same interpretation ought to be given a clause which states merely that the conveyee shall not have the "power" to transfer, or that the land is not to be "subject or liable" to conveyance or attachment. Expressions to the effect that the conveyee "shall not determinable upon alienation, and one subject to a condition subsequent with a power of reentry in the conveyor. This matter is discussed further in the text, infra, at note 6.

34. See cases infra note 89.


37. It seems to be the general view that the words "upon condition" prima facie create a condition subsequent, with a power of reentry in the conveyor, even though there be no express clause of reentry. Kales, Estates, Future Interests, etc., in Illinois (1920) § 222. But cf. Fowler v. Duhrn, 143 Ind. 248, 42 N. E. 623 (1896); Van Osdell v. Champion, 89 Wis. 651, 62 N. W. 539 (1895). It has been stated that the word "provided" is equivalent in significance to the word "condition." Littleton, Tenures (Wambaugh's ed. 1903) § 329; and see 1 Tiffany, op. cit. supra note 4, § 78; Fowlkes v. Wagoner, 46 S. W. 586 (Tenn. 1898). There is, however, a reluctance to admit such equivalence. Kales, op. cit. supra, § 220; and see Stone v. Easter, 93 Okla. 68, 219 Pac. 653 (1923); cf. Patrin v. Scott, 270 Pa. 49, 112 Atl. 911 (1921). If the word "provided" does not create a condition subsequent, it would seem that it must be construed to create either a disabling restraint or a covenant not to alien. See note 42, infra.


39. This language was viewed as creating a disabling restraint in Jones v. Fort Huron Engine Co., 171 Ill. 503, 49 N. E. 700 (1899); and Goldsmith v. Petersen, 159 Iowa 692, 141 N. W. 60 (1913). Similar language appears in Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001 (1907); Cropper v. Bowles, 150 Ky. 393, 150 S. W. 280 (1912); Triplett v. Trimplet, 332 Mo. 870, 60 S. W. (2d) 13 (1933); McIntyre v. McIntyre, 123 Pa. 329, 16 Atl. 783 (1889). The word "right" was used instead of "power" in Gleason v. Fayerweather, 70 Mass. 348 (1855), and Patrin v. Scott, 270 Pa. 49, 112 Atl. 911 (1921); and the word "privilege," in Teany v. Mains, 113 Iowa 53, 84 N. W. 953 (1901). Both these words were probably intended to have the meaning of "power."

sell," or that the land "shall not be sold," while somewhat more doubtful in import,\footnote{41} seem prima facie to express the same intention.\footnote{42}

In citing the authorities, the writer has felt obliged to rely largely upon his own judgment in determining which of the two types of restraints discussed was involved in a particular case. Where the court deciding the case has not clearly made its own classification, he has followed the suggestions for construction above set forth. His classifica-

\footnote[41]{This language has usually been thought to create a disabling restraint. \textit{Davidson v. Auwerda}, 192 Iowa 1338, 186 N. W. 406 (1922); \textit{Ernst v. Shinkle}, 95 Ky. 603, 26 S. W. 813 (1894); \textit{Clark v. Clark}, 99 Md. 356, 58 Atl. 24 (1904); \textit{Krueger v. Frederich}, 83 N. J. Eq. 258, 102 Atl. 697 (1917); \textit{Anderson v. Cary}, 36 Ohio St. 506 (1891); \textit{Fowlkes v. Wagoner}, 46 S. W. 586 (Tenn. 1898); \textit{Bouldin v. Miller}, 87 Tex. 359, 28 S. W. 940 (1894); \textit{Blackburn v. McCallum}, 33 Can. Sup. Ct. 65 (1903) (opinion of Taschereau, C. J.). Similar language was employed to express the restraints in \textit{Hause v. O'Leary}, 160 Iowa 293, 170 Ky. 836, 183 S. W. 940 (1917); \textit{Foster v. Lee}, 150 N. C. 668, 64 S. E. 761 (1909); \textit{Fowler v. Wyman}, 169 Wash. 307, 13 P. (2d) 501 (1932). Cf. the language in \textit{McDowell v. Brown}, 21 Mo. 57 (1855) (devise to D and her heirs, that they may enjoy it forever, "without, however, disposing of it").

\footnote[42]{Unless the language mentioned be construed to create a disabling restraint, it would seem that it must make either a covenant not to alien, or a forfeiture restraint. In certain cases not involving restraints, courts have often construed the language of condition to create a covenant. This result has been reached, partly because of reluctance to enforce a penalty, and partly because of the belief that a covenant approximated more nearly the actual intention of the parties. \textit{Post v. Well}, 115 N. Y. 361, 22 N. E. 145 (1889). In that class of cases there is no objection to specific enforcement of the covenant in equity. In the restraint cases, however, it is futile to interpret language of the kind discussed here to create a covenant or contract rather than a disabling restraint. The remedy of money damages would obviously be inadequate. To enforce such a contract specifically would make it almost as objectionable to public policy as a disabling restraint. It is clear, moreover, that a contract in restraint of alienation is ordinarily void both at law and in equity. \textit{Frey v. Stanley}, 110 Cal. 423, 42 Pac. 938 (1895); \textit{Windsor v. Mills}, 157 Mass. 362, 32 N. E. 352 (1892); \textit{Billing v. Welch}, 6 Ir. R. C. L. 88 (1871); \textit{State of Robert Lunham}, 5 Ir. R. Eq. 170 (1871); \textit{Restatement, Contracts} (1932) §§ 514, 515 (d), 593. Cf. also the following cases in which the language restraining alienation was suggestive of contract: \textit{Woodford v. Glass}, 168 Iowa 299, 150 N. W. 69 (1914); \textit{Teany v. Maines}, 113 Iowa 53, 84 N. W. 953 (1901); \textit{Re Thomas and Shannon}, 30 Ont. Rep. 49 (1893).

Nor would it seem reasonable to construe such language to create a forfeiture restraint. \textit{Blackburn v. McCallum}, 33 Can. Sup. Ct. 65, 74-76 (1903); \textit{Gallagher v. Herbert}, 117 Ill. 160, 169-170, 7 N. E. 511, 512 (1856); \textit{Fowlkes v. Wagoner}, 46 S. W. 586, 591 (1893); \textit{Nashville, etc., Ry. v. Bell}, 162 Tenn. 651, 670, 39 S. W. (2d) 1026, 1028 (1931). Yet it has been so construed in a few jurisdictions where the courts have been conspicuously liberal in upholding the validity of qualified restraints of the forfeiture type. \textit{Kentland Coal & Coke Co. v. Keen}, 168 Ky. 836, 183 S. W. 247 (1916); \textit{Francis v. Big Sandy Co.}, 171 Ky. 209, 183 S. W. 345 (1916); \textit{Hale v. Elkhorn Coal Corp.}, 205 Ky. 629, 263 S. W. 304 (1925); \textit{Cooper v. Knuckles}, 212 Ky. 608, 279 S. W. 1034 (1926); \textit{Pennyman v. McGrogan}, 18 U. C. C. P. 132 (1888); \textit{Earls v. McAlpine}, 6 Ont. App. 145 (1831). \textit{Kentland Coal & Coke Co. v. Keen}, supra, overruled earlier Kentucky decisions which gave actual effect to the restraint as one of the disabling type, viz.: \textit{Frazier v. Combs}, 140 Ky. 77, 130 S. W. 812 (1910); \textit{Pond Creek Coal Co. v. Runyan}, 161 Ky. 64, 170 S. W. 901 (1914). In \textit{Hale v. Elkhorn Coal Corp.}, supra, at 631, 268 S. W. at 305, it was declared broadly that any restriction upon alienation presumptively created a condition.
tion has been influenced, however, by such considerations as the particular manner in which the question arose, and the general tone of the opinion rendered.

II

RESTRAINTS UPON THE ALIENATION OF PRESENT FEES SIMPLE OR OTHER ABSOLUTE INTERESTS

In respect to their scope of operation, restraints upon alienation exhibit great differences. In its broadest form, a restraint may attempt to prevent alienation of the property conveyed perpetually and absolutely. In a narrower form, the restraint may be designed to make alienation impossible for a limited period of time; or to restrict alienation to particular persons, or members of a social group; or to limit alienation to particular modes of transfer. The qualified restraints just enumerated are those most commonly occurring, but other qualifications are to be found in the cases, and will be referred to hereafter.

A. Restraints Unqualified in Any Particular

When the conveyor of property attempts to create a perpetual and absolute restraint upon subsequent alienation, his language is likely to take the form of a disabling restraint. The ordinary purpose of such unqualified restraints is to keep the property in the family perpetually; a conveyor with this end in view is not likely to make a limitation over upon alienation, to some person outside of the family. Such a limitation over would be void under the rule against perpetuities, even if no restraint upon alienation were involved. Nor is a conveyor seeking to accomplish the supposed purpose likely to reserve a power of reentry exercisable upon alienation, since such a power would in many instances descend to the very persons subject to the restraint. The authorities are unanimous in holding that a perpetual and unqualified disabling restraint is void when imposed on an otherwise absolute legal interest.43

An unqualified provision for forfeiture upon alienation is equally void. This conclusion is deducible, not only from the direct decisions, but also from many decisions upon restraints phrased in the disabling form, in which the courts discussed the problem in terms broad enough to include the case of a condition subsequent or an executory limitation over upon alienation. Further corroboration of the conclusion is found in the decisions hereinafter discussed, in which it was held that a forfeiture restraint unqualified as to time was void, though so qualified as to allow alienation to certain persons; in the cases which have held void restrictions which operate as a perpetual clog upon alienation, though they do not directly prohibit it; and in the fact that, by the great weight of authority, forfeiture provisions limited in point of time are invalid. If a forfeiture provision qualified as to time is invalid, it follows naturally that one unqualified is void.

B. Restraints Qualified as to Time

Rather rarely does the conveyer of property attempt to make a restraint upon alienation operative perpetually and unqualifiedly. Usually the restraint is limited in duration, either expressly or impliedly. Restraints of limited duration are often disabling in form. When this is the case, they are void by the overwhelming weight of authority, whether


In Libby v. Winston, 207 Ala. 681, 93 So. 631 (1922), the court upheld a condition that neither the grantee nor her lawful representatives would sell the premises without having first offered them to the grantors or their lawful representatives. This decision might possibly be supported on the ground that such a condition did not operate as a serious impediment to alienation. See, infra, subtitle VI. The language of the opinion, however, is broad enough to uphold any restraint upon alienation when phrased in the forfeiture form. See comment on this case (1923) 36 Harv. L. Rev. 755.

45. E.g., Ogle v. Burmister; Courts v. Courts' Guardian; Hacker v. Hacker, all supra note 43; Blackstone Bank v. Davis, 38 Mass. 315 (1838). Where the validity of a restraint disabling in form is questioned in a suit for construction of the instrument creating it, as in the three cases first mentioned, and the person in whom the future interest would be vested if the restraint were of the forfeiture type is a party, the court can scarcely fail to consider the possible validity of a restraint of the latter class. The omission of any discussion of a distinction between the two types of restraint would suggest that the court regarded both as invalid.


47. DePeyster v. Michael, 6 N. Y. 457 (1852), is a good illustration of this class of cases, which is discussed infra, Subtitle VI. See the succeeding installments of this article.

48. See infra, Subtitle II, at note 86 et seq.
restricted to a life,\(^{49}\) or to the period preceding the conveyee's attainment of a stipulated age,\(^{50}\) or to a gross term of years;\(^{61}\) and whether directed

\(^{49}\) Gamble v. Gamble, 200 Ala. 176, 75 So. 924 (1917); Murray v. Green, 64 Cal. 363, 28 Pac. 118 (1883); Stamely v. McCormick, 145 Ga. 226, 88 S. E. 935 (1916); Little v. Bowman, 276 Ill. 125, 114 N. E. 519 (1916); Tenny v. Mains, 113 Iowa 53, 84 N. W. 953 (1901); Goodman v. Petersen, 159 Iowa 692, 141 N. W. 60 (1914); Woodford v. Glass, 168 Iowa 299, 150 N. W. 69 (1914); Wright v. Jenks, 124 Kan. 604, 261 Pac. 840 (1927); Turner v. Hallowell Savings Institution, 76 Me. 527 (1884); Gischell v. Ballman, 131 Md. 260, 101 Atl. 698 (1917); Gleason v. Fayerweather, 70 Mass. 348 (1855); Triplett v. Tripplett, 332 Mo. 870, 60 S. W. (2d) 13 (1933); McDowell v. Brown, 21 Mo. 57 (1855); Loosig v. Loosig, 85 Neb. 66, 122 N. W. 707 (1909); Davis v. Davis, 39 Misc. 90, 78 N. Y. Supp. 899 (Sup. Ct. 1902); Grems v. Parsons, 149 N. Y. Supp. 577 (Sup. Ct. 1914); Munroe v. Hall, 97 N. C. 206, 1 S. E. 651 (1887); Pritchard v. Bailey, 113 N. C. 521, 18 S. E. 668 (1893); Ricks v. Pope, 129 N. C. 52, 39 S. E. 638 (1901); Foster v. Lee, 150 N. C. 688, 64 S. E. 761 (1909); Brown v. Bonnell, 4 Walk. 271 (Pa. 1880); Jaureche v. Proctor, 48 Pa. 466 (1865); Kepple's Appeal, 53 Pa. 211 (1866); Breign v. Smith, 267 Pa. 207, 110 Atl. 285 (1920); Grant v. Carpenter, 8 R. I. 36 (1864); Goffe v. Karanacopoulos, 166 Atl. 547 (R. I. 1933); Sandford v. Sandford, 106 S. C. 304, 91 S. E. 294 (1917); Son v. Shealy, 112 S. C. 312, 99 S. E. 825 (1919); White v. Dedmon, 57 S. W. 870 (Tex. Civ. App. 1900); Seay v. Cockrell, 102 Tex. 280, 115 S. W. 1160 (1909); Fowler v. Wyman, 169 Wash. 307, 13 P. (2d) 501 (1932); Van Osdel v. Champion, 89 Ws. 661, 62 N. W. 539 (1895). See also: Hill v. Gray, 160 Ala. 273, 49 So. 676 (1909); Bowen v. John, 201 Ill. 292, 65 N. E. 357 (1903); McIntyre v. McIntyre, 123 Pa. St. 329, 16 Atl. 783 (1889). In practically all these cases the period of restraint was the life of the conveyee. In Tripplett v. Tripplett, supra, the restraint would have been operative for the life of the conveyee and twenty-one years thereafter.

\(^{50}\) Askins v. Merritt, 254 Ill. 92, 98 N. E. 256 (1912); Noth v. Noth, 292 Ill. 536, 127 N. E. 113 (1920); Bennett v. Chapin, 77 Mich. 526, 43 N. W. 893 (1889); Stone v. Easter, 93 Okla. 68, 219 Pac. 653 (1923); Fowlkes v. Wagoner, 46 S. W. 886 (Tenn. 1893). Similarly, a disabling restraint until one of two or more conveyees shall have attained a stipulated age is void: Mandlebaum v. McDonnell, 29 Mich. 78 (1874); In re Estate of Schilling, 102 Mich. 612, 61 N. W. 62 (1894); Anderson v. Cary, 36 Ohio St. 506 (1881) (transfer from one conveyee to the other permitted); Bouldin v. Miller, 87 Tex. 359, 28 S. W. 940 (1894). A restraint until a child or grandchild of the conveyor or the conveyee has attained a given age is also void: Krueger v. Frederick, 88 S. C. 547, 141 N. E. 60 (1914); Perry v. Brown, 45 R. I. 210, 121 Atl. 209 (1923); and see Roosevelt v. Thurman, 1 Johns. Ch. 220 (N. Y. 1814).

In McIntyre v. Dietrich, 294 Ill. 126, 128 N. E. 321 (1920), land was devised "in fee simple" to S, "upon the express condition" that he should not alienate the same before having attained the age of thirty years, and it was further provided that any transfer prior to that time should be "null and void," and that the land thus transferred should "go and descend to the lawful issue of S surviving him." S conveyed before having attained the stipulated age. In a suit by children of S after his death, seeking partition, it was held that they had no interest in the land. This result was correct. In the course of its opinion, the court remarked that, if the attempted restraint was valid, a transfer by S before the age of thirty would give his transferee an estate pur auree vie, and contingent interests would be created in favor of the issue of S; that a fee devised to S subject to such limitations over would not be within any known definition of a "determinable fee." This case offers an excellent illustration of the difficulty of differentiating between a disabling restraint and one operating through forfeiture. Since the word "condition" appears, a forfeiture restraint upon alienation is suggested; and this is apparently the view which the court took. When, however, it is considered that any conveyance in violation of the
against voluntary or involuntary alienation. In very few of the cases is it possible to determine certainly in what category the courts placed the restraints involved; indeed, it would appear doubtful in many instances whether any distinction of type was present in the minds of the courts. In a relatively small number of cases, emphasis has been placed upon the disabling nature of the restraints.

There is some authority to the contrary. In Kentucky, some decisions have clearly sustained the validity of disabling restraints limited in duration, and have held that any transfer in violation of such a restraint is declared to be "null and void", one may infer the intent to create a disabling restraint. The provision that upon the death of $S$ the land shall, despite his transfer, go and descend to his lawful issue, is probably a mere attempt to state the consequences which would naturally follow from an effective disabling restraint. Even if the restraint should be construed as creating a forfeiture in favor of the issue surviving, there is no such difficulty as the court envisaged. See text infra at note 143.


52. A restraint upon alienation in general terms would seem to be intended to apply to either voluntary or involuntary alienation. The term "involuntary alienation," as here used, refers to a sale under legal process to satisfy a debt due from the owner of the interest sold. So far as validity is concerned, no distinction has usually been taken between restraints against voluntary alienation and those directed against involuntary alienation. See note 186 infra. Disabling restraints for a limited time, in terms applicable to involuntary alienation only, were held void in Davis v. Davis, Ricks v. Pope, and Breinig v. Smith, all supra note 49; and Van Osdell v. Champion, 89 Wis. 653, 62 N. W. 539 (1895). In Jones v. Port Huron Engine Co., 171 Ill. 502, 49 N. E. 700 (1898), and in Renaud v. Tourangeau, L. R. 2 P. C. 4 (1867), the restraints were general in form, but the cases involved the power of creditors to subject the property to sale for payment of debts.

was void. These decisions, however, have been overruled. There would now appear to be a decided tendency in Kentucky to construe provisions restraining voluntary alienation to create restraints of the forfeiture type, regardless of the form of language used. Because of this mode of dealing with the problem, the Kentucky cases in general will be cited hereafter in the discussion of forfeiture restraints limited as to time. Restraints against involuntary alienation, however, are more likely to be construed according to the form of the language employed, and those of the disabling type to be held invalid, though limited in time.

The law in Ontario was doubtful prior to the decision of Blackburn v. McCallum by the Supreme Court of Canada in 1903. Before that decision, it had been held by the Ontario courts that a restraint disabling in form, limited to the life of the conveyee, was void. It had also been held, however, that a restraint for twenty-five years, and a restraint until the conveyee should have attained the age of forty years, were valid. And in at least one case, a restraint limited to the life of the conveyee, and further qualified to permit alienation during that period in

54. Stewart v. Barrow, 70 Ky. 368 (1870); Frazier v. Coombs, 140 Ky. 77, 130 S. W. 812 (1910) (for life of conveyor); Pond Creek Coal Co. v. Runyan, 161 Ky. 64, 170 S. W. 501 (1914) (same). Restraints disabling in form were also upheld in the following cases upon the ground of "reasonableness," although it is not clear whether the court regarded them as disabling restraints: Wallace v. Smith, 113 Ky. 263, 68 S. W. 131 (1902) (until conveyee should attain 35); Lawson v. Lightfoot, 27 Ky. L. Rep. 217, 84 S. W. 739 (1905) (restraint on remainder for life of the life tenant); see also, Smith v. Isaacs, 25 Ky. L. Rep. 1727, 78 S. W. 434 (1904) (until conveyee should attain 35); Speckman v. Meyer, 187 Ky. 687, 220 S. W. 529 (1920) (for fifteen years). In the following cases, restraints disabling in form were held invalid on the ground of "unreasonableness," without particular attention to form: Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264 (1909) (for life of the conveyee); Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380 (1912) (same); Chappel v. Frick Co., 166 Ky. 311, 179 S. W. 203 (1915) (same).

55. In so far as they gave effect to a disabling restraint as such, Frazier v. Combs and Pond Creek Coal Co. v. Runyan, both supra note 42, were expressly overruled in Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247 (1916), and the latter decision was followed in Francis v. Big Sandy Co., 171 Ky. 209, 188 S. W. 345 (1916); Price v. Virginia Iron Co., 171 Ky. 523, 188 S. W. 658 (1916); Cooper v. Knuckles, 212 Ky. 608, 279 S. W. 1084 (1926); Howard's Adm'x v. Asher Coal Mining Co., 215 Ky. 88, 284 S. W. 419 (1926). See also cases infra note 57.

56. In Kentland Coal & Coke Co. v. Keen, and the decisions following it, supra note 55, the court refused to give to a restraint disabling in form the effect which the form demanded; it treated it, however, as creating a condition subsequent with a power of re-entry in the conveyor. This peculiarity of interpretation is discussed in note 42, supra.


58. 33 Can. Sup. Ct. 65 (1903).


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one or more particular ways, had been upheld. It is difficult to determine in this last case the precise extent to which the decision depended upon the qualification as to mode of alienation. It must be noted also in this case that the restraint, though disabling in form, may have been regarded by the court as a forfeiture restraint.

Blackburn v. McCallum, above mentioned, has clarified the Ontario law to some extent. The restraint involved in that case was disabling in form and operative for twenty-five years. It was held that the land subject to the restraint could be sold to satisfy a debt of the conveyee, and that a purchaser at execution sale would acquire a valid and indefeasible title. The majority of the judges placed no emphasis upon the disabling form of the restraint, but based their opinions upon the broad proposition that a restraint upon alienation was not valid merely by reason of a time qualification. If a forfeiture restraint is invalid when limited in time, a fortiori, a disabling restraint similarly qualified is void. It would seem, therefore, that this decision has established the invalidity in Ontario of disabling restraints limited in time only. That such is the effect of this decision seems to be conceded in subsequent cases.

In Bourget v. Blanchard, decided in Quebec, a devise contained a provision for forfeiture in event of alienation within the life of the conveyee. In proceedings begun by a creditor to subject the property to payment of his claim, it was held that the property could not be sold. The decision was based upon the proposition that a restraint was valid in the forfeiture form. This decision would appear to give a forfeiture restraint a disabling character in so far as a creditor is concerned. Why such a result should be reached is not apparent.


63. The same comment is applicable to the cases cited supra notes 60 and 61. The issue in Re Winstanley, 6 Ont. Rep. 315 (1884), was whether the conveyee could make good title under a contract to convey. It was held that he could not make good title, without any clear indication of opinion as to the exact type of the restraint. In Smith v. Faught, 45 U. C. Q. B. 484 (1881), the court seems to have recognized the disabling character of the restraint, and to have regarded it as valid. The decision was actually made to turn, however, on the point that a mortgage was not a violation of the restraint. Cf. Earls v. McAlpine, 6 Ont. App. 145 (1881), in which a restraint disabling in form was construed and enforced as a forfeiture restraint.

64. Taschereau, C. J., recognized the disabling nature of the restraint, discussing it clearly and cogently. He held the restraint invalid in respect to involuntary alienation. He refused to determine its validity with respect to voluntary alienation, on the ground that this question was not fairly involved.

65. Re Martin & Dagneau, 11 Ont. L. R. 349 (1907); Re Porter, 13 Ont. L. R. 399 (1907); Hutt v. Hutt, 24 Ont. L. R. 574 (1911).

66. 7 Q. L. Rep. 322 (1881).

67. Since the restraint is by hypothesis of the forfeiture type, a voluntary alienation by the conveyee would render his interest liable to forfeiture. Any proceeding by a creditor
In Indiana, the Supreme Court of the state held in *Fowler v. Duhme*, that a restraint disabling in form and operative for twenty years was void. The decision was based partly upon the ground that no disabling restraint could be legally effective, and partly upon the proposition that the restraint, being for a term of twenty years, was in violation of the statute prohibiting the suspension of the power of alienation for more than lives in being. Properly construed, this statute had no application to the case. Its purpose was to provide a substitute for the common law rule against perpetuities, which would more effectively limit the extent to which property might be made inalienable by the creation of future interests therein. It was not designed to affect restraints upon the alienation of present interests. The influence of this statute upon the validity of restraints upon present interests is also observable in subsequent decisions in the Appellate Courts of the state. Restraints disabling in form and limited to a gross term of years have been held void; but those limited to the life of the conveyee have been held valid. In the majority of cases in the latter group, to be sure, the question of validity arose in such manner that it was perhaps not imperative to determine whether or not the restraint was of a disabling nature. In one case involving somewhat peculiar facts, however, the Appellate Court seems actually to have enforced a disabling restraint by holding a transfer in violation of its terms void.

*to subject the property to payment of his claim should have the same effect. The person entitled to the benefit of the forfeiture might be allowed to enjoin a sale by the creditor on the ground that forfeiture had already occurred, and that a sale would operate to cloud his title. Mizell v. Bazemore, 194 N. C. 324, 139 S. E. 453 (1927); Lynch v. Lynch, 161 S. C. 170, 159 S. E. 26 (1931). It is not apparent, however, on what ground the person subject to the forfeiture restraint can object to a sale at the suit of a creditor. If he can prevent a sale, it would seem to follow that no forfeiture has occurred, and that none can be occasioned by the creditor's proceeding.*

67. 143 Ind. 248, 42 N. E. 623 (1896).

68. 143 Ind. 248, 42 N. E. 623 (1896).

69. This statute, which is a modification of the well known New York statute, reads as follows: "The absolute power of aliening lands shall not be suspended by any limitation or condition whatever, contained in any grant, conveyance or devise, for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed, granted, devised…." *Ind. Stat. Ann.* (Burns, 1926) § 13416.

70. In reference to this type of statute, Professor Rundell has remarked: "It is sometimes said that it constitutes an attempt to treat restraints on alienation and perpetuities together. Nothing could be further from the truth. The common law rules affecting restraints on alienation remain entirely unaffected by this legislation except insofar as they may be deemed to apply to the inalienable trusts previously referred to." Rundell, *Concentration Versus Distribution of the Power of Alienation, supra* note 17, at 463-464.


73. Minter v. People's Nat. Bank, 95 Ind. App. 204, 182 N. E. 87 (1932). In this case land had been given to D for fifty years, with a provision that she should have the fee
In a recent Nebraska decision, a restraint disabling in form, and operative for a period of ten years, was declared valid. The conveyee, who had transferred in violation of the restraint, was denied a decree to quiet title, apparently upon the ground of estoppel, or laches.\textsuperscript{74} The New York statute against suspension of the power of alienation is the source of the Indiana legislation. An occasional statement may be found in the New York decisions to the effect that this statute invalidates a restraint for a gross term of years.\textsuperscript{75} The New York decisions heretofore cited, however, make it clear that disabling restraints limited in time are invalid in New York, whether the period of restraint is measured in lives\textsuperscript{76} or in years.\textsuperscript{77} The invalidity, therefore, is not due to the statute, but to the common law rule against restraints upon alienation.\textsuperscript{78}

at the end of that period if she should then be living. It was further provided that she should not have power to convey or encumber; and there was a gift over on her death within the fifty-year period. $D$ executed a mortgage. In a suit to foreclose the mortgage was held invalid. The court declared that the mortgage purported to encumber the fee in the land; that while $D$ may possibly have had an interest in the rents and profits which she could have mortgaged, she was precluded from mortgaging the fee simple by the restraint, which prima facie did not constitute a violation of the rule against suspension of the power of alienation. It would seem that the devise to $D$ should be construed to create in her a fee simple subject to divestiture on her death within fifty years, and subject to a restraint upon alienation during that period. The restraint by this construction was laid upon a defeasible fee simple. The fact that a fee is defeasible has not usually been regarded as validating an otherwise invalid restraint. See note 135, infra. The restraint would apparently terminate with the death of $D$ within the fifty-year period, and could not, therefore, be operative for more than a life in being. Perhaps it was upon this ground that the court felt impelled to sustain it. A less plausible construction of the will would give $D$ a fifty-year term with an executory interest in fee conditioned on her surviving the expiration of the term. There would also be an alternative executory interest contingent on her death within the term; and a fee in the heirs of the testator, subject to divestiture. On this construction, the restraint would be imposed upon the contingent future interest, and might conceivably be upheld with respect to such an interest. See infra, Subtitle IV.

\textsuperscript{74} Peters v. Northwestern Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917 (1929) While the decision is not clear upon the point, it would seem that the court regarded the restriction upon alienation as a valid disabling restraint, being lead to this conclusion in large measure by a misunderstanding of the Kentucky precedents which were relied upon. These Kentucky decisions would have treated the restraint as one of the forfeiture types. See notes 55-56, supra. In denying the conveyee the relief prayed for, the court emphasized several factors: that he had conveyed by warranty deed, that he had not brought his suit until two years after the expiration of the period of restraint, and that valuable improvements had been made upon the land with his knowledge, subsequently to his transfer.

\textsuperscript{75} The statute is N. Y. REAL PROP. LAW (1917) \S 42. See Oxley v. Lane, 35 N. Y. 340, 347 (1866); cf. Empson v. Empson, 123 Misc. 1, 204 N. Y. Supp. 118 (Sup. Ct. 1924).

\textsuperscript{76} Davis v. Davis, Grems v. Parsons, both supra note 49; and see Roosevelt v. Thurman, 1 Johns. Ch. 220 (N. Y. 1814).

\textsuperscript{77} Oxley v. Lane, Adams v. Berger, both supra note 51. See Greene v. Greene, Empson v. Empson, both supra note 51.

\textsuperscript{78} In Adams v. Berger, and Greene v. Greene, both supra note 51, restraints for terms of years were clearly regarded as invalid, without reliance upon the statute against suspension of the power of alienation.
A few scattered decisions and dicta in other jurisdictions, declaring the validity of disabling restraints limited in time, must be regarded as overruled by later cases. An early decision in Missouri upholding a disabling restraint was based principally upon the rule of the Spanish law once in force in the territory; subsequent decisions have overruled it in effect. In the early Pennsylvania case of _M'Williams v. Nisly_ is a frequently cited dictum, expressly overruled in _Pattin v. Scott_ and other cases. A rather clear dictum in New Jersey has also been repudiated. A few other decisions which seem to uphold restraints in the disabling form when limited in time are explainable upon special grounds.

We may now turn our attention to forfeiture restraints operative for a limited period. A condition which empowers the conveyor or his heirs to enter into possession upon an alienation by the conveyee during specified lives, or prior to his attainment of a stipulated age, or before the expiration of a definite term of years, is void. A conditional li-
tation over to another upon the conveyee's alienation is also void, though limited in time.90 Doubtless, the more restricted a restraint is in duration, the less objectionable are its consequences. It does not necessarily follow, however, that a restraint limited in time should be tolerated. The relative advantages and disadvantages which have been heretofore discussed must be considered and weighed, and a balance of social convenience found. The problem cannot be solved by the simple statement, so often repeated in the opinions, that any restraint upon alienation is "repugnant" to the "nature" of a fee simple in land, or an absolute interest in personalty. The power of alienation is normally an incident of such interests; but if, in the creation of such an interest, a forfeiture for alienation is expressly stipulated, then the "nature" of the interest is to be determined in the light of that stipulation; its "nature" is entirely different than it would have been had no such forfeiture provision been inserted in the conveyance. The "repugnancy" argument is nothing more than an inaccurate expression of the proposition that public policy is opposed to such a restraint.91

Since the objection to a restraint upon alienation is grounded on the social and economic disadvantages resulting therefrom, the validity of such a restraint should depend upon its actual effect on transfer, and not upon mere matters of form having no relation to such effect. A special limitation upon a fee simple by which the fee will automatically terminate upon alienation should be void. Usually no future interest is expressly limited after a determinable fee of this sort, and therefore a possibility of reverter remains in the conveyor.92 A future interest may, however, be expressly limited after a determinable fee if the terminating event is one which must occur, if at all, within the period of the rule against perpetuities. In the former case, the future interest created is as effective an impediment to alienation as a power of re-entry in

caused the land to be sold under execution. It was held that the purchaser at execution sale acquired an indefeasible title.

89. Limitations over upon alienation by the conveyee at any time during his life are void: Freeman v. Phillips, 113 Ga. 589, 38 S. E. 943 (1901); Diamond v. Rotan, 53 Tex. Civ. App. 263, 124 S. W. 196 (1910) (land sold under execution); Bradley v. Peixoto, 3 Ves. 32 (Ch. 1797) (personality); Ware v. Cann, 10 B. & C. 433 (K. B. 1830); In re Machu, 21 Ch. D. 838 (1882); Metcalfe v. Metcalfe, 43 Ch. D. 633 (1889) (personality); Barker v. Davis, 12 U. C. C. P. 344 (1862) (personalty). Limitations over upon alienation by the conveyee before having attained a stipulated age are void: McIntyre v. Districh, 394 Ill. 126, 128 N. E. 321 (1920); Twitty v. Camp, 62 N. C. 61 (1865). A limitation over upon alienation of an equitable absolute interest in a fund embracing both realty and personalty is void: Potter v. Couch, 141 U. S. 296 (1891); Rishton v. Cobb, 5 Myl. & C. 145 (Ch. 1839); In re Dugdale, 38 Ch. D. 176 (1888); Corbett v. Corbett, 14 P. D. 7 (1888).

90. "In truth, the rule seems not to allow nor call for any reason except public policy:"

Gray, op. cit. supra note 6, § 21. See also §§ 257-258.

91. Supra note 27.
the conveyor. And where a future interest has been limited after, the situation is like the ordinary case of an executory limitation over of a fee, except that the determinable fee will certainly come to an end by force of its own limitation even though the gift over may fail for one reason or another.\textsuperscript{92} The future interest thus limited after a determinable fee is in every respect as much a bar to alienation as the executory limitation which divests a defeasible fee simple. Any penalty which deprives the conveyee of the property upon an alienation is offensive to the declared public policy against restraints, irrespective of the identity of the person who may benefit by the penalty, or the particular form of language which may be employed in stipulating it. It is, therefore, remarkable to find a recent English decision holding that a fee may be specially limited to terminate upon alienation;\textsuperscript{93} and to find in certain other cases, either intimations to like effect, or at least doubt upon the subject.\textsuperscript{94}

\textsuperscript{92} 1 TIZANY, op. cit. supra note 4, at 559-561; Id. § 175.

\textsuperscript{93} In re Leach, [1912] 2 Ch. 422. The testator had devised land on trust to pay the income to R "until he shall assign ... or become bankrupt," and then to accumulate it for the heir male of his body. There was also a provision that if he should die without leaving an heir male, the property should go over to others. In a suit by R for construction of the will, it was held that R took an equitable estate in fee simple, determinable upon his assignment or bankruptcy, and subject to an executory devise over on his death without leaving an heir male. The decision was based upon the proposition that land could be limited to a man specially so that his estate in fee would determine by force of its own limitation upon assignment, without reference to the gift over upon alienation. Since this gift over would vest within a life, it would be valid, and the court appears so to have regarded it. Thus, the forfeiture is upheld purely because of the form of the limitation, without regard to its effect as an impediment to alienation. If the land had been given in trust for R and his heirs, with a common executory limitation over divesting the fee "in event of his assignment," the limitation over would have been void as a restraint upon alienation. The use of the magic phrase "until he shall assign" produced quite a different result. No pertinent authorities were cited. See criticism of the case in Sweet, Restrains upon Alienation (1917) 33 L. Q. Rev. 235, 241.

\textsuperscript{94} In the following cases the courts took pains to show that the limitations did not create fees determinable upon alienation, but rather conditions subsequent with powers of re-entry in the conveyors, or fees defeasible by executory limitations over on alienation: In re Machu, 21 Ch. D. 838 (1882); Davis v. Hutchinson, 282 Ill. 523, 118 N. E. 721 (1918); Brown v. Hobbs, 132 Md. 559, 104 Atl. 283 (1918); Diamond v. Rotan, 58 Tex. Civ. App. 263, 124 S. W. 196 (1910). In the first three cases it would appear that the courts thought a fee determinable upon alienation was void. In Diamond v. Rotan the court expressed the opinion that a fee thus determinable was valid. Yet in fact, that case was the one of the four in which the limitation could, with the greatest degree of plausibility, have been construed to create a determinable fee.

The case of In re Machu, supra, is certainly not deserving of all the criticism that has been levelled at it. The limitation was to D in fee, subject to a provision that if she should be declared bankrupt, the property should go over to her children. Professor Gray has said of this decision: "The learned judge considered that the proviso purported to create a condition. It certainly did not purport to create a condition, for upon a condition there can be no gift over to a third person; none but the heir can take advantage of it." Gray,
The distinction between a determinable fee with a possibility of reverter in the conveyor, and a fee subject to a condition subsequent, which leaves a power of re-entry in the conveyor, is difficult to make in many instances.\(^5\) Similarly, where a future interest is expressly limited over upon alienation of a fee, it is often hard to decide whether the result is a determinable fee or a defeasible fee simple.\(^6\) In both instances, the problem is theoretically one of the conveyor's intent. That intent must be deduced from the language of the instrument involved. The particular phraseology employed is likely to be a matter of accident, since it is improbable that any layman, or even the average practitioner of law, is thoroughly familiar with the subtleties involved in the rules of construction laid down in the decisions. Certainly it is not sound policy to make the validity of a restraint depend upon such tenuous distinctions, or to make a rule against restraints so easy of evasion by the exceptionally skilled draftsman.\(^7\)

A similarly futile distinction is sometimes suggested between the validity of an executory limitation over to a third person upon alienation, and a condition with power of re-entry in the conveyor. In *Camp v. Cleary*,\(^8\) a deed conveyed to a grantee for life a lot upon which a mausoleum was located, and also two other lots in fee. The deed pro-

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\(^5\) See the forms of limitation in the following cases: Walker v. Shepard, 210 Ill. 169, 71 N. E. 422 (1904); Davis v. Hutchinson; O'Connor v. Thetford, both *supra* note 86; Cobb v. Moore, 90 W. Va. 63, 110 S. E. 465 (1922).


\(^7\) See comment of Professor Gray on *In re Machu*, op. cit. *supra* note 6, § 22 n. See also note 94, *supra*.

\(^8\) 76 Va. 140 (1882).
vided that if the conveyee should ever dispose of the mausoleum lot, then all three lots should pass to his sister. The conveyee transferred a part of the mausoleum lot. The plaintiffs, claiming under the sister, brought ejectment for all the lots, and recovered. The decision possibly could be supported upon a ground which will be discussed later, but was actually based upon the proposition that a limitation over on alienation was valid, even though a condition with power of re-entry was void. Here again it is clear that the precise type of the future interest created had no relation to the effect of the restraint as a substantial impediment to alienation. The distinction is clearly untenable.\footnote{See authorities cited supra note 89. “Neither is there any distinction, on principle or authority, based upon the limitation over on a breach of the condition so that the testator designates who shall take the estate, or the want of such a limitation, so that the estate goes to the testator’s heirs.” McIntyre v. Dietrich, 294 Ill. 126, 135, 128 N. E. 321, 324 (1920).}

There are a few jurisdictions in which, without attempting either of the impossible distinctions above discussed, the courts have exhibited a distinct liberality toward forfeiture restraints limited in time. Of these minority jurisdictions, Kentucky is conspicuous. There, a fairly well defined policy toward limited restraints seems to have been established. The marked tendency in that state to treat restraint provisions as creating forfeitures, regardless of the language used, has been indicated.\footnote{In Williams v. Ash, 1 How. 1 (U. S. 1843), a slave was bequeathed with a provislon that if the donee should sell him, the slave should be free. On sale of the slave by the donee, a petition for freedom was filed, and it was adjudged that the slave had become free. This provision was the equivalent of a gift over on alienation. It is not at all certain, however, that the court had in mind a distinction between the validity of a gift over on alienation and a condition with power of re-entry. There were obvious reasons why a court might be inclined to uphold either in respect to the gift of a slave. Cf. also Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1908). It was suggested in Fowlkes v. Wagoner, 46 S. W. 586 (Tenn. 1898), that a forfeiture to the conveyor was less objectionable than a gift over, because the power of re-entry was always releaseable. As a practical matter, however, one form of forfeiture is as obnoxious to public policy as the other. Cf. also Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1908).}

The Kentucky decisions may be considered here, therefore, without especial regard to the form of the restraint. A forfeiture restraint for the life of the conveyor is valid;\footnote{Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247 (1916); Turner v. Lewis, 189 Ky. 837, 226 S. W. 367 (1920); Pond Creek Coal Co. v. Runyan, 161 Ky. 64, 170 S. W. 501 (1914) (disabling restraint enforced as such).} also, a restraint upon the alienation of a remainder during the life of the life tenant, who frequently is the conveyor.\footnote{Hale v. Elkhorn Coal Corporation; Frazier v. Combs, both supra note 42 (disabling restraint enforced as such in latter case); Kentucky River Consol. Coal Co. v. Frazier, 161 Ky. 374, 170 S. W. 986 (1914) (ibid.); Lawson v. Lightfoot, 27 Ky. L. Rep. 217, 84 S. W. 739 (1935); and see Cahill v. Pelzer, 204 Ky. 644, 265 S. W. 32 (1924). Apparently a restraint for the life of the life tenant and fifteen years thereafter is valid. See Speckman v. Meyer, 187 Ky. 687, 220 S. W. 529 (1920).} A restraint operative until the conveyee shall attain a stipu-
lated age is likewise valid; but a restraint for the whole life of the con-
veyee is void. Where the period of the restraint is measured in years
only, it is valid for any period of twenty-one years or less. This
system of rules appears to be the result of a confusion, or combination,
of two ideas. The dominant theory found in the Kentucky decisions is
that a restraint is lawful if limited to a reasonable period. Obviously,
the test here suggested is vague and uncertain. Quite frequently there
appears the idea that a restraint is valid if for not longer than lives in
being and twenty-one years. This notion, which confounds the rule
against perpetuities with the rule against restraints upon alienation,
is more readily understandable because the Kentucky statutory rule
against perpetuities is phrased in terms of suspension of the power of
alienation. In a comparatively recent decision, the Kentucky court
declared clearly and unequivocally that the rule against perpetuities
had to do only with the vesting of future interests, and that it did not
by implication authorize a restraint upon the alienation of a vested
interest for any length of time whatsoever; that the test of validity
of a restraint was its reasonableness. In certain subsequent decisions,
however, the court has apparently reverted to the rule against perpetui-
ties as a criterion of validity. The liberality of the Kentucky policy
103. Stewart v. Brady, 66 Ky. 623 (1868); Wallace v. Smith, 113 Ky. 263, 68 S. W
131 (1902); see Howard's Adm'x v. Asher Coal Mining Co., 215 Ky. 88, 284 S. W. 419
(1926).
104. Harkness v. Lisle; Cropper v. Bowles; Chappel v. Frick Co., all supra note 54;
Carpenter v. Allen, 198 Ky. 252, 248 S. W. 523 (1923); Cammack v. Allen, 199 Ky. 268,
250 S. W. 963 (1923). But see Scott v. Ratliff, 179 Ky. 267, 200 S. W. 462 (1918); cf.
105. Francis v. Big Sandy Co., 171 Ky. 209, 188 S. W. 345 (1916); Price v. Virginia
Iron Company, 171 Ky. 523, 188 S. W. 658 (1916); Cooper v. Knuckles, 212 Ky. 603, 279
S. W. 1084 (1926); Auxier's Ex'x v. Theobald, 255 Ky. 583, 75 S. W. (2d) 39 (1934); see
than 21 years is void: Saulsberry v. Saulsberry, 140 Ky. 603, 131 S. W. 491 (1910); Perry
106. "The absolute power of alienation shall not be suspended, by any limitation or
condition whatever, for a longer period than during the continuance of a life or lives in
being at the creation of the estate, and 21 years and 10 months thereafter." Ky. Stat.
(Carroll, 1930) § 2360.
108. This is the test which appears to have been followed in the great majority of the
Kentucky cases. See, in addition to Cammack v. Allen, 199 Ky. 268, 250 S. W. 963 (1923):
Stewart v. Brady, 66 Ky. 623 (1868); Cropper v. Bowles, 150 Ky. 393, 150 S. W. 369
(1912); Frazier v. Combs; Francis v. Big Sandy Co., both supra note 42; Lawson v.
Lightfoot; Harkness v. Lisle, both supra note 54.
608, 279 S. W. 1084 (1926). And see also Saulsberry v. Saulsberry, 140 Ky. 603, 131 S. W.
491 (1910). Note also dicta regarding the effect of the statute in Gillespie v. Winston's
Trustee, 170 Ky. 667, 670, 186 S. W. 517, 519 (1916); Sparrow v. Sparrow, 171 Ky. 101,
103, 186 S. W. 904, 905 (1916).
is slightly minimized by a subsidiary rule in respect to enforcement of a forfeiture. Re-entry for breach of a condition against alienation must be made by the person entitled during the period of the restraint.\textsuperscript{110} In Canada, also, there was at one time some indulgence toward restraints limited in time, even when phrased in the disabling form.\textsuperscript{111} In Earls \textit{v. McAlpine},\textsuperscript{112} a testator had devised land to his two sons with a provision that they should not alienate it during the life of their mother without her consent. It was further provided that they should furnish the mother a comfortable support. One son mortgaged his interest without the consent of his mother, who lived upon the land. Other heirs of the testator brought suit for a declaration that the said son had forfeited his interest, and for partition of the land. The decree was for the plaintiffs, the court holding that the will had created a forfeiture restraint which was valid because limited in time, and stipulated for the purpose of making more certain support of the widow.\textsuperscript{113} In two other cases, restraints limited in time and further qualified to permit alienation during the period of restraint, by certain modes of conveyance, or to particular persons, were held valid.\textsuperscript{114} Against these

A more detailed discussion of the Kentucky decisions may be found in Roberts, \textit{Future Property Interests in Kentucky} (1925) 13 Ky. L. J. 186; \textit{Recent Kentucky Cases on Future Interests} (1933) 21 Ky. L. J. 219, 225-236.

110. Forfeiture by reason of re-entry within the period of restraint: Turner \textit{v. Lewis}, 189 Ky. 837, 226 S. W. 367 (1920); Cooper \textit{v. Knuckles}, 212 Ky. 608, 279 S. W. 1084 (1926). No forfeiture because of failure to re-enter within the period of restraint: Kentland Coal \& Coke Co. \textit{v. Keen}; Francis \textit{v. Big Sandy Co.}, both \textit{supra} note 42; Howard's Adm't. \textit{v. Asher Coal Mining Co.}, 215 Ky. 88, 284 S. W. 419 (1926). The power to re-enter during the period of restraint may be lost by the conveyor's acquiescence in the breach: Hale \textit{v. Elkhorn Coal Corporation}, 206 Ky. 629, 268 S. W. 304 (1925).

111. See text \textit{supra} at notes 59-65.

112. 6 Ont. App. 145 (1881).

113. It had previously been held in Armstrong \textit{v. McAlpine}, 4 Ont. App. 250 (1879), that the widow could not enjoin the mortgagee from selling upon default in payment of the debt. The peculiar circumstances of the case doubtless influenced strongly the decision upholding the validity of the restraint. Not only was it limited to the life of the widow, but it was also qualified to permit alienation during that period with her consent. The purpose of the restraint was to protect the widow's support, which the court clearly regarded as charged upon the land. The significance of the factors mentioned appears more clearly in the report of the original hearing before Blake, Vice-Chancellor, in 27 Grant 161 (Ch. 1879).

In McRae \textit{v. McRae}, 30 Ont. Rep. 54, 57 (1898), T had devised land to his son, S, with this proviso: "I direct that before my said son . . . shall sell . . . or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister Mary." In a suit for construction of the will, it was held by a majority of the court that the restraint on alienation was absolute, and not limited to the life of Mary McRae. It was therefore void. The able dissenting opinion of R. M. Meredith, J., shows that the restraint, properly construed, was limited to the life of Mary McRae. He was of the opinion that it was valid under the rule of Earls \textit{v. McAlpine}, \textit{supra} note 112.

114. Re Northcote, 18 Ont. Rep. 107 (Ch. 1889) (alienable by particular mode of transfer); Pennyman \textit{v. McGrogan}, 18 U. C. C. P. 132 (1868) (alienable to particular persons). For decisions holding valid restraints in the disabling form, limited in time, see notes 60-62 \textit{supra}.
decisions upholding, or favoring, restraints limited in time, stand at least two cases in which such restraints were held void. The decision in *Blackburn v. McCallum*, which has been discussed in connection with the subject of disabling restraints limited in time, would seem to have settled the English law in Canada to this extent: that no forfeiture restraint is valid merely because of a limitation in time.

In Indiana, Kansas, Minnesota, and South Carolina, forfeitures for alienation, limited in time, have been upheld. The decision in Indiana held valid a restraint until the conveyee should have attained the age of forty years, with a gift over on breach. It seems to have been influenced largely by the idea that the Indiana statute against suspension of the power of alienation impliedly permitted a restraint for a life.

In the Kansas case, the restraint provided that the land devised should not be subject to attachment or execution in favor of any creditor of the devisee; that if a court should hold it to be subject to payment of any such debt, it should immediately pass to the executor of the will on specified trusts. A creditor attached the land in an action against the devisee on a debt. The executor was allowed to intervene in the action. It was held that the land could not be sold, as it must pass by the gift over to the executor. The Minnesota case involved a restraint for the life of the conveyee, and contained a provision for reverter to the conveyor. Upon insolvency, the conveyee conveyed to the con-

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115. Re Watson & Woods, 14 Ont. Rep. 48 (Ch. 1887); Re Shanacy & Quinlan, 28 Ont. Rep. 372 (1897). The force of the latter decision is minimized by the fact that it was based in part upon another ground. For decisions holding void restraints in the disabling form, limited in time, see note 59 supra.


117. See cases supra note 65. Under the French law in force in the province of Quebec, a forfeiture restraint limited in time would appear to be valid. See Renaud v. Tourangeau, L. R. 2 P. C. 4 (1867).


It should also be noted that restraints disabling in form and limited to the life of the conveyee have been upheld in Indiana. See note 71-73 supra.

119. Supra note 69.

120. Hinshaw v. Wright, 124 Kan. 792, 262 Pac. 601 (1928). In this decision it was asserted broadly that there was nothing contrary to public policy in a restraint upon involuntary alienation. It was pointed out that by constitutional provision the homestead and certain other property were exempt from the claims of creditors, and this provision was taken to indicate the policy of the state. In answer to this argument, it might be suggested that it should not be within the power of the conveyor to increase the exemptions allowed the conveyee by the state constitution or statutes. Apparently the court saw no distinction between a restraint imposed upon a legal fee for the life of the conveyee, and the ordinary spendthrift trust. The limitation in *Hinshaw v. Wright* is unusual in that the gift over cannot, seemingly, take effect until a judgment has been rendered holding the property subject to debts.
veyor. It was held that the trustee in bankruptcy could not have this transfer set aside, as the deed had clearly created a forfeiture restraint which was valid; while such forfeitures were not favored, they would be enforced where the intent was clear. In *Lynch v. Lynch*, decided in South Carolina in 1931, a grantor conveyed land with a provision that if any creditor of the conveyee should undertake to collect a debt through sale of the property, it should pass immediately to the conveyee’s son. The son was allowed an injunction to restrain a sale for the conveyee’s debt. The court thought that properly construed the deed gave the first conveyee only a life estate, with a remainder to his son; but declared that the result would be the same were it construed to give the first conveyee the fee, as there was no rule limiting gifts over upon alienation to cases in which the first donee took a life estate. In a few other jurisdictions dicta are to be found declaring valid a forfeiture restraint limited in time.

121. *Furst v. Lacher*, 149 Minn. 53, 182 N. W. 720 (1921). This decision is difficult to reconcile with *Hause v. O’Leary*, 136 Minn. 126, 161 N. W. 392 (1917). While the latter decision could be distinguished upon the ground that the restraint there involved was disabling in form, the tone of the opinion is strongly against all restraints limited in time. See comment on *Furst v. Lacher* in Fraser, supra note 22, at 192. Cf. also *Morse v. Blood*, 68 Minn. 442, 71 N. W. 682 (1897).

122. 161 S. C. 170, 159 S. E. 26 (1931).

123. *Massachusetts*: Dicta are found in the following early cases: *Blackstone Bank v. Davis*, 38 Mass. 42, 43 (Mass. 1838); *Simonds v. Simonds*, 44 Mass. 558, 562 (1842). Against these dicta may be placed the broad language which has been employed in holding invalid restraints disabling in form and limited in time: *Gleason v. Fayerweather*, 70 Mass. 348, 351 (1855); *Lane v. Lane*, 90 Mass. 350, 353 (1864); *Windsor v. Mills*, 157 Mass. 362, 364, 32 N. E. 352 (1892).


*New York*: Dicta to this effect appear in *Wieting v. Billinger*, 50 Hun 324, 329, 3 N. Y. Supp. 361, 364 (Sup. Ct. 1888), and in *Davis v. Davis*, 39 Misc. 90, 92, 78 N. Y. Supp. 899, 900 (Sup. Ct. 1902). While there is apparently no decision in the Court of Appeals squarely in point, there are distinct intimations that such a restraint is invalid. See *Greene v. Greene*, 125 N. Y. 506, 512, 26 N. E. 739, 741 (1891); *De Peyster v. Michael*, 6 N. Y. 467, 495 (1852); *Osley v. Lane*, 35 N. Y. 340, 346-347 (1866). And cf. *Schermerhorn v. Negus*, 1 Denio 448 (N. Y. 1845); *Roosevelt v. Thurman*, 1 Johns. Ch. 220 (N. Y. 1814).

*Tennessee*: In *Fowlkes v. Wagoner*, 46 S. W. 586 (Tenn. 1898), the court considered the problem at length, and reached the conclusion that a forfeiture restraint limited in time was valid. The restraint actually involved in the case was held disabling in its nature, and therefore invalid. Cf. *Overton v. Lea*, 108 Tenn. 505, 68 S. W. 250 (1902); *Nashville, etc., Ry. v. Bell*, 162 Tenn. 661, 39 S. W. (2d) 1026 (1931).

*Wisconsin*: Dicta in *Bridge v. Ward*, 35 Wis. 687, 690 (1874), and *Van Osdell v. Champion*, 89 Wis. 661, 665, 62 N. W. 539, 540 (1895), are impliedly repudiated by the decision in *Zillmer v. Landguth*, 94 Wis. 607, 69 N. W. 568 (1896).
From the authorities heretofore cited, the following conclusions are deduced: A disabling restraint upon a fee simple in land, or upon an otherwise absolute interest in personalty, though limited in time, is now everywhere invalid, with a possible doubt concerning the States of Indiana and Nebraska. A forfeiture restraint limited in time is likewise void by the overwhelming weight of authority. A contrary rule is certainly established in Kentucky; and probably in Indiana and Kansas. There is also authority contrary in Minnesota and South Carolina. Dicta definitely indicate a contrary view in Tennessee and Nebraska.

One must now face the question, whether the rigid rule adopted in the great majority of jurisdictions is expedient. That many conveyors strongly desire to restrain alienation by their conveyees, is evident from the enormous amount of litigation which has arisen from attempts so to do. This popular desire must give way in so far as it conflicts with the more important interest of society at large. The definite societal disadvantages resulting from restraints upon alienation have been pointed out. It has also been shown, however, that the law does permit the creation of future interests, even though they may in fact make impossible the transfer of a complete title, and thus destroy the marketability of the subject matter. The problem of determining what rule will best serve the interests of society, and at the same time satisfy popular desire, is extremely perplexing.

In the evaluation of any rule of law, the ease or difficulty of its evasion must be taken into consideration. A rule which is simple of evasion for the skilled draftsman has little social utility. It is likely to be thwarted successfully by those persons who are able to employ expert legal counsel; it may accomplish its purpose where a conveyor acts as his own attorney, or engages mediocre legal talent. There are several legal devices whereby one may, with varying degrees of success, effect a desired restraint upon alienation without violating any of the rules against that practice. Perhaps the spendthrift trust is the most obvious method. By this means a conveyor can create at least an equitable life estate, with a disabling restraint. While he cannot in most jurisdictions give an equitable absolute interest subject to such a restraint, he can accomplish such a purpose substantially by limiting after the inalienable equitable life estate a remainder to the issue of the life tenant.

Another device consists in the creation of a legal life estate, upon which a valid forfeiture restraint may be imposed according to the great weight of authority. The remainder may be limited, as above sug-

124. Supra note 19.
125. Infra, subtitle III.
gested, to the issue of the life tenant, or otherwise, as may be desired. It is possible to approach even a step nearer to the accomplishment of the objective by giving the life tenant a power to appoint the remainder by will. This last step, however, involves certain dangers.\(^{126}\)

By reserving to himself a power to revoke, a conveyor may effect a restraint upon alienation for his own life. Since such a power may be exercised at pleasure, without assignment of a reason for such exercise, it may be utilized to divest the estate conveyed upon the conveyee's transfer thereof.\(^{127}\) A power of revocation is fundamentally the same as a power of appointment. Indeed, every power of appointment involves upon its exercise the divestiture of a vested estate, and the vesting of it in another person.\(^{128}\) Conveyances creating life estates, with legal vested remainders subject to divestiture through the exercise of a power reserved to the conveyor, or conferred upon the life tenant, or upon some other person, are of frequent occurrence.\(^{129}\) And in conveyances upon trust, a power of revocation is so commonly inserted that its omission is viewed as some evidence of mistake.\(^{130}\) While it is not as usual for a conveyor to reserve such a power upon the conveyance of a present fee simple, it seems clear that he may do so.\(^{131}\) Whether the power re-

\(^{126}\) The life tenant is not bound to exercise the power. If he does not exercise it, his creditors cannot claim payment of their demands out of the interest in remainder. If, however, the life tenant exercises the power in favor of a volunteer, it is usually held that the appointed property becomes in equity assets for the payment of any debts of the life tenant not barred by the Statute of Limitations at his death. 1 TIFFANY, op. cit. supra note 4, § 332; Simes, The Devolution of Title to Appointed Property (1928) 22 ILL. L. REV. 480, 504 et seq.

\(^{127}\) Ricketts v. Louisville, etc., Ry. Co., 91 Ky. 221, 15 S. W. 182 (1891). In Stewart v. Workman, 85 W. Va. 695, 102 S. E. 474 (1920), the power of the conveyor to revoke upon the conveyee's alienation was fully recognized, although his suit in equity to cancel his deed, and that of his conveyee, was dismissed on the ground of an adequate remedy at law.

\(^{128}\) 1 TIFFANY, op. cit. supra note 4, §§ 315-316.

\(^{129}\) See KALES, op. cit. supra note 67, § 609; Gray, Release and Discharge of Powers (1911) 24 HARV. L. REV. 511, 512.

\(^{130}\) The absence of a power of revocation does not raise a presumption of mistake, but may be taken into consideration as evidence on the point. Aylsworth v. Whltcomb, 12 R. I. 298 (1879); Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089 (1895); 1 PERCY, op. cit. supra note 19, § 104, and footnote 84; Restatement, Trusts (Tent. Draft, 1934) § 322, comment a.

\(^{131}\) Bouton v. Doty, 69 Conn. 531, 37 Atl. 1064 (1897); Ricketts v. Louisville, etc., Ry. Co., 91 Ky. 221, 15 S. W. 182 (1891); Totten v. Pocahontas Coal & Coke Co., 67 W. Va. 639, 68 S. E. 373 (1910); Stewart v. Workman, 85 W. Va. 695, 102 S. E. 474 (1920). The validity of such a power was fully recognized in the following cases, though it had not in fact been exercised; Jones v. Clifton, 101 U. S. 225 (1879); Kokomo Trust Co. v. Hiller, 67 Ind. App. 611, 116 N. E. 332 (1917); Wall v. Wall, 30 Miss. 91 (1855); Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812 (1905). Reservation of such a power does not make the instrument testamentary; see last three cases cited supra.
served is phrased as a power of revocation, a power to appoint, or a power to convey as if no transfer had been made, should be immaterial.\textsuperscript{132}

By the various methods above mentioned, a conveyor can, to a large degree, if not completely, circumvent the rule against restraints limited in time, imposed upon a fee or other absolute interest. The impediment to alienation resulting from any one of the devices suggested is as substantial as a restraint upon the fee, correspondingly limited in duration. The fact is that the various rules designed to preserve the marketability of property have not had a logical and consistent development. The rule permitting the creation of an equitable life interest subject to a disabling restraint was a marked deviation from principle; there was no great necessity for its adoption, and it is certainly of doubtful expediency. The rule which allows a forfeiture restraint upon a life estate, legal or equitable, was based upon a sound reason, as will hereafter be shown.\textsuperscript{133} Its adoption, however, has made it exceedingly difficult to sustain logically the rule against restraints limited in duration when imposed upon the fee. These considerations suggest the desirability of some liberalization of the rule respecting restraints of the latter kind.

Precisely what form a more liberal doctrine should take, is then the problem for solution. One proposition may be predicated with a fair degree of assurance—no disabling restraint should be tolerated. As indicated, such a restraint not only offers an impediment to alienation, but also makes it possible for a man to live in comfort and ease without paying his debts.\textsuperscript{134} The forfeiture restraint is not open to this objection. The owner of land subject to this kind of restraint must either pay his debts or lose the land. While it is true that the creditor cannot subject the land to payment of his claim, he can cause the debtor to be divested of his ownership; this power in the creditor is usually sufficiently coercive to induce the debtor to pay.

Assuming, then, that any permissible restraint must take the forfeiture form, it would appear that such a restraint might well be allowed where in fact there would be inalienability regardless of the restraint. Where a fee simple is subject to a valid executory limitation over, as upon the

\textsuperscript{132} In Totten v. Pocahontas Coal & Coke Co., 67 W. Va. 639, 68 S. E. 373 (1910), the power reserved was “to sell and convey anything embraced in this deed”; this was construed as a power to revoke. To the same effect: Bouton v. Doty; Kokomo Trust Co. v. Hiller, both \textit{supra} note 131. \textit{Contra:} Brady v. Fuller, 78 Kan. 443, 96 Pac. 854 (1903); and cf. Durand v. Higgins, 67 Kan. 110, 72 Pac. 567 (1903).

\textsuperscript{133} \textit{Infra, Subtitle I.}

\textsuperscript{134} See note 18 \textit{supra}; also discussion of this point in Lynch v. Lynch, 161 S. C. 170, 159 S. E. 26 (1931). It has occasionally been asserted that no sound distinction can be made between disabling and forfeiture restraints: O’Connor v. Thetford, 174 S. W. 650 (Tex. Civ. App. 1915); Diamond v. Rotan, 58 Tex. Civ. App. 263, 124 S. W. 196 (1910). This assertion overlooks the obvious difference in effect upon creditors.
death of the first taker without issue surviving him, the defeasible fee is
in practice inalienable, unless joinder of the person entitled by the gift
over can be procured. If the gift over is contingent until death of the
first taker, as in the illustration above, there is entire inalienability dur-
ing his life, in practical effect. If, therefore, a forfeiture restraint upon
alienation is imposed for the life of the first taker, it produces no addi-
tional inalienability. While the situation described has existed in many
cases, no consideration has been given to the relatively innocuous char-
acter of the restraint.135 It would appear in such a case, that one pur-
pose of the restraint is to protect the executory interest against depre-
ciation of the property in the hands of an irresponsible transferree of the
first taker; in this aspect, the restraint is entitled to as much favor as
a restraint upon a life estate, which is allowed chiefly for that reason.136

A restraint is occasionally inserted in a conveyance for the purpose of
securing to the conveyor, or some other person, support for his life, or
payment to him of an annuity. If the support, or the annuity, is
actually charged upon the land, the restraint is not absolutely essential
to the protection of the person to be benefited by the charge, since the
charge cannot be cut off by a transfer of the land.137 But in so far as
the restraint is effective to compel retention of the land by the conveyee,
it may facilitate the enforcement of the charge. In Earls v. McAlpine,138
previously discussed, this factor was emphasized in a decision uphold-
ing the validity of the restraint.139 In such a situation, the charge itself

135. Restraints in forfeiture form: Cammack v. Allen, 199 Ky. 268, 250 S. W. 963 (1923); Corbett v. Corbett, 14 P. D. 7 (1888). Restraints disabling in form: Askins v. Merritt; Noth v. Noth, both supra note 50; Oxley v. Lane, 35 N. Y. 340 (1866); Goldsmith v. Petersen, 159 Iowa 692, 141 N. W. 60 (1913); Wright v. Jenks, 124 Kan. 604, 261 Pac. 840 (1927). In the two cases last cited, some emphasis was put upon the disabling form. Cf. Walker v. Walker, 139 Ga. 547, 77 S. E. 795 (1912). It was held in In re Dugdale, 38 Ch. D. 176 (1888), that the executory limitation over on death without issue was a part of the limitation over upon alienation, and was, therefore, void. In the following cases, the restraint was combined with an executory limitation over; it was held that the restraint was valid, but no emphasis was placed upon the presence of the executory limitation: Matlock v. Lock, 38 Ind. App. 281, 73 N. E. 171 (1906); Re Winstanley, 6 Ont. Rep. 315 (1884); O'Sullivan v. Phelan, 17 Ont. Rep. 730 (1889). And see Vaubel v. Lang, 81 Ind. App. 96, 140 N. E. 69 (1923).

136. Cf. note 133, supra.

137. If the charge is expressly stipulated in the conveyance, there cannot be a bona
fide purchaser for value.

138. 6 Ont. App. 145 (1881); text supra at note 112.

139. "The cases which have not infrequently come before this Court, in which, owing to
the want of such a clause, the property which was to have been primarily preserved for
the support of the wife, has passed into other hands where, encumbered, the widow has
for years remained without her annuity, and when realized it has been obtained by the
lengthy and expensive process of a suit in this Court, lead me to the conclusion that, in
place of this being a repugnant or vicious condition, it is a reasonable restriction, added
for the benefit of the annuitant, and the benefit of which she should be entitled to claim."
Opinion of Blake, V. C., in Earls v. McAlpine, 27 Grant Ch. 166 (Ontario, 1879).
constitutes an impediment to alienation, the extent of which depends upon the particular circumstances of the case. Since the purpose of the restraint is to protect another person's interest in the land from being impaired by waste committed by an irresponsible transferee, and since some degree of inalienability results anyhow from the creation of that other person's interest, the case bears a resemblance to that discussed in the preceding paragraph. A liberal doctrine of restraints might well sustain a restraint of this particular kind.\textsuperscript{140}

In the recent decision in \textit{Northwest Real Estate Co. v. Serio},\textsuperscript{141} one finds another illustration of the need for some modification of the rules against restraints. A realty company inserted in deeds conveying lots in its development a provision that the conveyees should not "have the right to sell or rent the same without the written consent of the grantor \ldots until January 1, 1932." The deed itself referred indirectly to this provision as a "covenant." A lot was conveyed in 1927, with such provision in the deed. The conveyee made a contract to transfer the lot, but the Real Estate Co. refused its assent. The purchaser brought suit for specific performance against the conveyee, and joined the conveyor. A decree was rendered for the plaintiff, the court holding the restraint upon alienation void. Apparently the decision was not based upon the disabling form of the restraint; the fact that the conveyor was a party, and the language of the opinion, suggest that the court regarded it as a forfeiture restraint. In a strong dissenting opinion, Bond, C. J., pointed out that in modern economic life the development of urban areas must be by enterprises involving a large amount of land and a heavy investment of capital; that as a practical matter some degree of temporary control over ownership of the lots sold must be retained by the development company, to protect early purchasers, and to insure a return of the capital outlay; that public interest in urban development required the recognition of such a temporary restraint as valid.

Possibly the rules should be modified even to the extent of permit-

\begin{itemize}
\item In \textit{Gallaher v. Herbert}, 117 III. 160, 7 N. E. 511 (1886), the conveyance was expressed to be upon consideration of the payment of $200 annually to the conveyor, and upon further consideration that the conveyee would not alienate the land during the life of the conveyor. The conveyee neglected to make the payments, and mortgaged the land. The conveyor sued in equity to have his deed, and the mortgage of the conveyee, set aside. It was held that the intent of the conveyance was not to make a condition, but merely to secure payment of the annuity. The annuity was, therefore, declared to be a lien on the land, superior to the mortgage. This decision gave the language of restraint only an indirect effect, as a manifestation of the intent to charge the annuity. Cf. \textit{Iowa Farm Credit Corp. v. Halligan}, 214 Iowa 903, 241 N. W. 475 (1932). See also comments on \textit{McClure v. Cook}, \textit{infra} note 235; \textit{Glenn v. Gross, infra} note 256.
\item \textsuperscript{141} 156 Md. 229, 144 Atl. 245 (1929).
\end{itemize}
ting restraints which have for their purpose a temporary protection of the conveyee against his own improvidence. It has been shown that the Kentucky doctrine recognizes this as a legitimate purpose, and that authorities to the same effect are found in other jurisdictions. It is not within the scope of this essay to undertake the formulation of any definite doctrine which will cover all possible cases. The formulation of a doctrine which will balance conflicting social interests may best be accomplished by the usual process of the common law, which decides problems as they may arise.

Since it is assumed by the writer that any doctrine of permissible restraints which may be adopted should require the restraint to take the forfeiture form, it becomes necessary to consider in somewhat greater detail than heretofore the problem, what constitutes a forfeiture. If a total forfeiture of the conveyee's interest upon his transfer thereof is recognized, a fortiori, a partial forfeiture should be valid. A partial forfeiture will result from a provision which, upon the conveyee's transfer of the land, cuts down his fee simple to a life estate, and limits a remainder over. The transferee of the conveyee acquires, therefore, an estate pur autre vie. A provision which deprives the conveyee of the enjoyment of the property for a specified period as a penalty for transfer, likewise stipulates a partial forfeiture; in this case, the transferee of the conveyee should acquire the future interest left in the conveyee, which will come into possession upon the termination of the forfeiture period. Any provision that such future interest shall remain in the conveyee despite his attempt to transfer, is a disabling restraint, and should not be given effect.

142. It should be noted that under the Kentucky doctrine, permitting "reasonable restraints," a restraint for the whole life of the conveyee is void. Supra note 104. See also O'Connor v. Thetford, 174 S. W. 680 (Tex. Civ. App. 1915).

143. The problem discussed was raised by the limitations in McIntyre v. Dietrich, 294 Ill. 126, 128 N. E. 321 (1920). The court repudiated the idea that the estate of the conveyee could be reduced upon alienation to a life estate, with a contingent remainder to his surviving issue. Inasmuch as a forfeiture restraint limited in time is void in Illinois, the remarks of the court upon this point may be regarded as dictum. See comment supra note 50. Cf. Son v. Shealy, 112 S. C. 312, 99 S. E. 825 (1919).

Cf. also the cases of forfeiture for failure of the conveyee upon an alienation to pay the conveyor a portion of the purchase price, which are discussed infra, subtitle VI.

144. In Matlock v. Lock, 38 Ind. App. 281, 73 N. E. 171 (1905), land was devised to a conveyee in fee, she to have the rents and profits until her age of forty years, with a further provision that if she should attempt to alienate prior to such age, the rents and profits should go to the heirs of the testator until the conveyee should attain forty. In a suit to construe the will, the restraint was held valid, but its precise effect was not discussed. Cf. Davis v. Davis, 39 Misc. 90, 78 N. Y. Supp. 899 (Sup. Ct. 1902). In Bland's Adm'r v. Bland, 90 Ky. 400, 14 S. W. 423 (1890), the conveyance provided that, upon alienation by the conveyee, the income should be accumulated and added to the corpus of the trust fund from which it was derived. The court inferred the intent that the corpus should continue as the property of the conveyee, subject to his power to devise, and held the restraint entirely void.
A provision that, upon alienation, the estate of the conveyee shall terminate, and the land vest in other persons, with a further provision that in such event the conveyee shall, nevertheless, have full enjoyment of the land during the remainder of his life, is obviously a poorly disguised disabling restraint, and should be void.145

[To be continued]