RESTRAINTS UPON THE ALIENATION OF LEGAL INTERESTS: III*

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V

THE INTENTION TO CREATE A RESTRAINT

IN dealing with the subject of restraints upon alienation, the first question to be considered in a particular case is whether, by a fair construction of the language employed, the intent to create a restraint is manifested. If this question can be answered in the negative, there is no need to discuss the validity of such a restriction. From one point of view, the problem of intention ought to be considered first in a discussion of restraints. It is easier, however, to study the intent problem with the background of knowledge supplied by a familiarity with the rules governing restraints.

It is clear that language which, reasonably interpreted, expresses merely a desire that the grantee shall not alienate, or which advises against alienation, does not create a restraint. If the conveyor should say, "I desire that the grantee herein shall not alienate the land conveyed during his lifetime, but I do not prohibit such alienation," undoubtedly no problem in restraints would arise. Unfortunately, in some instances conveyors probably intend precatory language to express an actual prohibition. It might be a reasonable rule to hold that *prima facie* the words "desire", "wish", etc., do not express a prohibition, since they are at least ambiguous.²⁵⁸ The problem is analogous to that found in the law of Trusts, where the question arises whether such language should be construed to express the intent to create a trust. The trend of modern authority answers that question in the negative.²⁵⁹

Courts have sometimes characterized as "precatory", or "admonitory", language which, by a reasonable interpretation, must be taken to express a restraint upon alienation. In *Wright v. Jenks*,²⁶⁰ a testator devised land to *H* for life, and on his death to *S* and *D* "during their natural lives and to their children of their bodies after them, they not having the right to sell, encumber or dispose of the same." It is difficult to imagine language more clearly adapted to express a disabling restraint. Yet the court declared that "a mere admonitory gesture"

*Continued from 44 YALE L. J. 1186.

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258. Such language was held not to express a restraint in *Blackshire v. Samuel Ready School*, 94 Md. 773, 51 Atl. 1056 (1902). See also note 208 *supra*: remarks in *Bramley v. White*, 281 Mass. 343, 349, 183 N. E. 761, 763 (1933).

259. In *re Humphrey's Estate* [1916] 1 Ir. R. 21; RESTATEMENT, TRUSTS (Tent. Draft No. 1, 1930) § 37.

260. 124 Kan. 604, 261 Pac. 840 (1927).

was insufficient to create a restraint. One would likely not quarrel with the disposition to hold invalid the restraint here attempted; but to characterize the language used as "admonitory" is inaccurate, and leads to confusion. That the court was moved primarily by the feeling that such a restraint ought to be void, appears from the further statement that a restraint is invalid unless there is a trust created, a power of reentry, or a gift over. The decision is merely a holding phrased in misleading language, that a disabling restraint is void.²⁶¹

Even when the language of restraint is mandatory in form, it need not be interpreted literally. Many of the decisions dealing with this problem have adopted a highly mechanical standard of construction, which assumes that language in terms restraining alienation is to be interpreted literally, in the sense in which it would be used by a skilled draftsman, despite the fact that the instrument was obviously not drafted by such a person. Since there is no rule which requires a conveyor to express himself in particular words, the problem is to determine what the particular conveyor meant by the language of his instrument. Doubtless, words must be construed in their ordinary sense, unless there is something in the context to indicate that they have been used in a different sense. Two inquiries, therefore, are suggested: What is the ordinary meaning of the language employed? And, is there anything in the context to suggest a deviation from that common meaning?

The expert lawyer knows that a life tenant has power to alienate his life estate, and that he does not have power to transfer any greater interest. It cannot be assumed that the layman understands clearly the scope of the life tenant's power. Many instruments of conveyance are drafted by laymen, or by lawyers whose knowledge of real property law is not extensive. The writer believes that the unskilled draftsman often employs the language of restraint to express the intent to create a life estate only. If the conveyor declares in substance that he conveys land to *A*; that *A* is not to sell or otherwise dispose of it; and that, upon the death of *A*, it shall pass to *A*'s children, the instrument may reasonably be construed to create a life estate in *A*, with a remainder to his children. To create a life estate, it is not necessary to use the words "life estate", or to state that the conveyee is to have the enjoyment for his life only.²⁶² The sale of a life estate is a relatively uncommon transaction, outside of the experience of the average layman; to him, a sale of land means a sale of the fee simple interest. When he states,

261. For further illustrations of the loose use of the words "precatory", "admonitory", and "advisory" see note 208, *supra*. See also, *Bourget v. Blanchard*, 7 Q. L. Rep. 322, 323 (1881); cf. *McIntyre v. McIntyre*, 123 Pa. 329, 16 Atl. 783 (1889); *Sparr v. Kidder*, 265 Pa. 61, 108 Atl. 204 (1919).

262. *Bramley v. White*, 281 Mass. 343, 183 N. E. 761 (1933) (intent to create a life estate inferred principally from language which "requested" an equal division of what might "remain" at the death of the first taker, among children of the conveyor).

therefore, that he conveys to *A*, and that *A* is not to sell, he means that *A* is not to sell the fee,—thereby manifesting his intent to create in *A* an estate of limited size, which does not carry with it the power to alienate in fee. It is unlikely that he intends specifically to restrain transfer of the life interest which he has attempted to create. Since he thinks in terms of alienation of the fee, the possibility of transfer of the life interest only is not definitely present to his mind. This supposition concerning the layman's mode of expression finds its justification in experience with that large class of persons among whom the average conveyor is numbered; and in a study of the many reported decisions in which the contexts of the instruments involved seem to make evident that the language of restraint was employed with the purpose and in the sense above suggested.²⁶³ We must consider, therefore, whether it is possible to devise reasonable rules of construction which will take into account this supposititious state of mind of the conveyor.

The intent to create a fee simple or absolute interest, and at the same time to impose a restraint upon the alienation thereof, can be clearly expressed. If the conveyor specifically declares that he conveys to *A* in fee simple, but that *A* shall not have power to alienate the land, there would seem to be but one construction admissible,—that the intent is to impose a restraint upon a fee simple.²⁶⁴ While it is possible that the conveyor did not know the meaning of "fee simple", and did not use it in a technical sense, yet it is a word which cannot be said to have any popular meaning as distinguished from its technical significance; and there is nothing in the context to suggest that it was used in any

263. Where the conveyor expressly stipulates a life estate in the first taker, and declares that he shall not alienate *such life estate*, it must be assumed that an actual restraint upon alienation of the life estate is intended. *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755 (1920); cf. *McCormick Harvesting-Machine Co. v. Gates*, 75 Iowa 343, 39 N. W. 657 (1888). Where the conveyor expressly stipulates a life estate in the first taker, it is not necessary to rely upon the language of restraint as indicative of the intent to create such an estate. For this reason, it was clear in the following cases that the first taker had a life estate only: *McCleary v. Ellis* 54 Iowa 311, 6 N. W. 571 (1880); *Nebraska National Bank v. Bayer*, 123 Neb. 391, 243 N. W. 115, (1932); *Walker v. Milligan*, 45 Pa. 178 (1863); *Ehrisman v. Sener*, 162 Pa. 577, 29 Atl. 719 (1894); *Gaines v. Sullivan*, 117 S. C. 475, 109 S. E. 276 (1921); *Simonton v. White*, 93 Tex. 50, 53 S. W. 339 (1899); *Kerns v. Carr*, 82 W. Va. 78, 95 S. E. 606 (1918). In none of these cases did the language of the conveyance expressly state that the first taker should not alienate his *life interest*; in all instances the declaration was that he should not alienate the "land," or some equivalent expression. Taking the language of restraint in conjunction with the gift of the remainder, with which it was closely associated in each case, it would seem reasonable to infer that such language was inserted only for the purpose of protecting the future interest against a power of alienation which the unlearned draftsman feared the life tenant would otherwise have. A fortiori, where the precise quantum of the first taker's estate has not been expressly stated, it is easy to infer that the language of restraint was intended merely to delimit it.

264. *Bowen v. John*, 201 Ill. 292, 66 N. E. 357 (1903).

other sense. It will be noted in the illustration above suggested, that there is no language which could possibly be construed to create a remainder after a life estate.²⁶⁵ To construe the language to create a life estate, would leave the future interest undisposed of, and, if the conveyance be by will, might result in an intestacy as to such interest. Such a construction would conflict with the express specification of a fee simple, and possibly with the presumption of intent to make a complete testamentary disposition.²⁶⁶

By a similar process of reasoning, a gift to A "and his heirs," with no language susceptible of interpretation as the gift of a remainder, should be construed to create a fee simple with an intended restraint where the language of restraint is employed.²⁶⁷ Since it is now generally presumed that a conveyor, whether the conveyance be by deed or by will, intends to transfer his whole interest in the property, it may be reasonable to adopt the same construction, even in the absence of words of inheritance, if there is no language which can be construed to create a remainder.²⁶⁸

Where there is language which can reasonably be construed to express the gift of a remainder, the words of restraint can be viewed as expressive of the intent to limit the first conveyee to a life estate. Even where the intention so to limit the conveyee's estate can be inferred from language other than that restraining alienation, the same conclusion can be reached, for the latter language may be regarded as merely an em-

265. If there be a limitation of a future interest upon a particular contingency, which can be construed as an executory limitation capable of divesting a fee, the inference of an intention to create a fee is corroborated. The limitation of the future interest upon a specified contingency suggests that under all other circumstances the land is to continue in the ownership of the first taker. *Gischell v. Ballman*, 131 Md. 260, 101 Atl. 698 (1917); *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651 (1887); *Re Winstanley*, 6 Ont. Rep. 315 (Ch. 1884).

266. *Burr v. Tierney*, 99 Conn. 647, 122 Atl. 454 (1923); *M'Cullough's Heirs v. Gilmore*, 11 Pa. 370 (1849); *McIntyre v. McIntyre*, 123 Pa. 329, 16 Atl. 783 (1889); *cf. Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707 (1909).

267. *Gischell v. Ballman*, 131 Md. 260, 101 Atl. 698 (1917); *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651 (1887); *Walker v. Vincent*, 19 Pa. 369 (1852); *Re Winstanley*, 6 Ont. Rep. 315 (Ch. 1884).

268. *Hill v. Gray*, 160 Ala. 273, 49 So. 676 (1909); *Walker v. Shepard*, 210 Ill. 109, 71 N. E. 422 (1904); *Little v. Bowman*, 276 Ill. 125, 114 N. E. 519 (1916); *Morse v. Blood*, 68 Minn. 442, 71 N. W. 682 (1897); *M'Cullough's Heirs v. Gilmore*, 11 Pa. 370 (1849); *McIntyre v. McIntyre*, 123 Pa. 329, 16 Atl. 783 (1889). In the above cases the restraint was for the life of the conveyee. A fortiori, the result is the same where the restraint is for a different period: *Muhlke v. Tiedeman*, 177 Ill. 606, 52 N. E. 843 (1899); *Watkins v. Minor*, 214 Mich. 380, 183 N. W. 186 (1921); *Empson v. Empson*, 123 Misc. 1, 204 N. Y. Supp. 118 (Sup. Ct. 1924). The result is the same also where no words of inheritance appear, but where there is a future interest capable of being construed as an executory limitation divesting a fee; *Goldsmith v. Peterson*, 159 Iowa 692, 141 N. W. 60 (1913); *Bing v. Burrus*, 106 Va. 478, 56 S. E. 222 (1907). See also note 265, *supra*.

phatic reiteration of intent.²⁶⁹ This type of case is well illustrated by *Grim's Appeal*,²⁷⁰ where a will provided that, after the death of a certain person, land should "become the property of Joshua Logan; the said property not to be subject to sale or mortgage, but to descend to his children free and unencumbered." The question was, what estate Joshua Logan took by the devise. It was held that he took a life estate only. While the decision could have been rested on the ground that, at the date of the case, words of inheritance, or their equivalent, were necessary to create a fee, the court declared that affirmative evidence of the intent to give only a life estate was found in the language restraining alienation, and in the gift over upon the death of Joshua Logan. This is a sound decision; there is other authority to the same effect,²⁷¹ but also authority contrary.²⁷²

Probably no definite rule can be laid down as to what language is sufficient to express a gift of the remainder, where the intent to create a life estate is suggested by the language of restraint.²⁷³ It seems clear to the writer that in the *Grim* case, *supra*, the inference of a gift of the re-

269. Note 263, *supra*.

270. 1 Grant 209 (Pa. 1855).

271. *Hubbird v. Goin*, 137 Fed. 822 (C. C. A. 8th, 1905); *Best v. Conn*, 73 Ky. 36 (1873); *Robson v. Gray*, 29 Ky. L. Rep. 1296, 97 S. W. 347 (1906); *Pratt v. Saline Valley Ry. Co.*, 130 Mo. App. 175, 108 S. W. 1099 (1908); *Reuter v. Reuter*, 116 Neb. 428, 218 N. W. 86 (1928); *Fox's Appeal*, 99 Pa. 382 (1882); *McWhite v. Roseman*, 114 S. C. 177, 103 S. E. 586 (1920). In all of the foregoing cases, some emphasis was placed upon the language of restraint as indicative of the intent to create only a life estate. Cf. *In re Groth's Will*, 128 Misc. 905, 220 N. Y. Supp. 505 (Surr. 1927). *Best v. Conn* is particularly significant in that the gift of the remainder seems to have been implied from a gift over in default of issue; *Pratt v. Railroad*, in that the limitation to the first taker included the words "heirs."

272. In the following cases the limitation to the conveyee included the word "heirs," and there was language fully adequate to express a gift in remainder. It was held, however, that a fee simple had been created with an invalid restraint upon alienation. *McDowell v. Brown*, 21 Mo. 57 (1855); *Foster v. Lee*, 150 N. C. 688, 64 S. E. 761 (1909); *Sanford v. Sanford*, 106 S. C. 304, 91 S. E. 294 (1916). It is hard to comprehend why the future limitation should be ignored, notwithstanding the use of the word "heirs." The same result was reached in *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707 (1909), although no words of inheritance were used in the limitation to the conveyee.

273. A remainder is often introduced by a statement that at the death of the first taker (life tenant), the property shall "go," or "pass" to another, or "become the property" of another. *City of Little Rock v. Lenon*, 186 Ark. 460, 54 S. W. (2d) 287 (1932); *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603 (1906); *McCleary v. Ellis*, 54 Iowa 311, 6 N. W. 571 (1880); *Merrill v. Pardun*, 125 Neb. 701, 251 N. W. 834 (1933); *In re Groth's Will*, 128 Misc. 905, 220 N. Y. Supp. 505 (Surr. 1927); *Fox's Appeal*, 99 Pa. 382 (1882); *McWhite v. Roseman*, 114 S. C. 177, 103 S. E. 586 (1920); *Kerns v. Carr*, 82 W. Va. 78, 95 S. E. 606 (1918). A provision that at the death of the first taker, the property "shall be divided" among other persons, is also a frequent mode of stating a gift in remainder. *Ehrisman v. Sener*, 162 Pa. 577, 29 Atl. 719 (1894); *Bramley v. White*, 281 Mass. 343, 183 N. E. 761 (1933); *Simonton v. White*, 93 Tex. 50, 53 S. W. 339 (1899).

mainder is possible even though the testator declared that the land should "descend" to the children of Joshua Logan. Certainly the word "descend" was not used in a technical sense to mean that they should take as heirs of Logan.²⁷⁴ A provision that the conveyee shall divide the land among her heirs has been regarded as expressive of a gift in remainder;²⁷⁵ also a declaration that the conveyee shall retain the land for the use of herself and her children.²⁷⁶

Where it is provided that the property shall descend or pass to the "heirs" of the conveyee, it is more difficult to infer the intent to limit a remainder than where it is stipulated that the land shall descend or pass to named individuals, or to such a class as "children." Where the word "heirs" is used, it is possible to contend that the intent is to create a fee simple, which shall descend in the technical sense of the term to the heirs of the conveyee.²⁷⁷ If the language be construed, however,

274. In *Reuter v. Reuter*, 116 Neb. 428, 218 N. W. 86 (1928), no words of inheritance were used in the gift to the first taker; the limitations were construed to create a life estate despite the word "descend" in the limitation of the future interest. In *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707 (1909), however, a provision that the property should be "handed down" to the children of the first taker was held not to express a gift in remainder.

Where words of inheritance are employed in the gift to the conveyee, with a provision that the property shall "descend," there is more difficulty in inferring the intent to create only a life estate. It was held on this state of facts in *Foster v. Lee*, 150 N. C. 638, 64 S. E. 761 (1909), that a fee was created. Cf. *Gischell v. Ballman*, 131 Md. 260, 101 Atl. 698 (1917).

275. *Pratt v. Saline Valley Ry. Co.*, 130 Mo. App. 175, 108 S. W. 1099 (1903).

276. *Hubbird v. Goin*, 137 Fed. 822 (C. C. A. 8th, 1905).

277. In the following cases, the limitation to the conveyee contained the word "heirs," or its equivalent; there was also a provision that, upon death of the conveyee, the land should "descend" or should "pass," to his heirs, or words of similar import. It was held that a fee simple had been created in the conveyee, without discussion of the Rule in *Shelley's Case*: *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668 (1893); *Reifsnnyder v. Hunter*, 19 Pa. 41 (1852); *Brown v. Bonnell*, 4 Walk 271 (Pa. 1880); *Kaufman v. Burgett*, 195 Pa. 274, 45 Atl. 725 (1900); *Re Thomas and Shannon*, 30 Ont. Rep. 49 (1893). But cf. *Urich v. Merkel*, 81 Pa. 332 (1876). These decisions were doubtless influenced by the presence of the word "heirs" in the initial limitation to the conveyee. The same result was reached, however, in *Burr v. Tierney*, 99 Conn. 647, 122 Atl. 454 (1923), where the word "heirs" did not appear in the limitation to the conveyee. See also notes 272, 274, *supra*. Cf. *Stamey v. McGinnis*, 145 Ga. 226 88 S. E. 935 (1916) (limitation to A, "her own bodily heirs and assigns," the land to "remain hers and her children, hers and their natural lives," construed to create a fee tail).

In the following cases, the word "heirs" was construed to mean children, and it was held that a valid remainder had been limited: *Robson v. Gray*, 29 Ky. L. Rep. 1296, 97 S. W. 347 (1906); *Pratt v. Saline Valley Ry. Co.*, 130 Mo. App. 175, 103 S. W. 1099 (1903); *McWhite v. Roseman*, 114 S. C. 177, 103 S. E. 586 (1920); *Simonton v. White*, 93 Tex. 50, 53 S. W. 339 (1899).

A provision that the conveyee shall "keep" the property for his "heirs," together with language restraining alienation, has been construed to create a fee simple: *White v. Dadmon*, 57 S. W. 870 (Tex. Civ. App. 1900) ("heirs" also appeared in initial limitations); *Re*

to create a life estate with remainder, the Rule in *Shelley's* case may apply. If it does apply, then a fee results, however clear the intent may be to create a life estate only.²⁷⁸

Where the restraint is limited to some period other than the life of the conveyee, it is more difficult to infer the intent to give him a life estate only. Especially is this true if the restraint be for a period possibly shorter than his life.²⁷⁹

It has been stated heretofore that a life tenant may be given power to appoint the remainder in fee either by deed or by will.²⁸⁰ The fact, therefore, that language in terms restraining alienation is qualified so as to allow transfer in a particular manner, or under specified conditions, does not necessarily militate against its construction as expressive of the intent to limit the conveyee to a life estate.²⁸¹ It may be conceded that the grant to the conveyee of a power to transfer in fee is suggestive of the intent to convey a fee rather than a life estate, if the latter has not been definitely specified. The force of the suggestion increases in proportion to the scope of the power of alienation conferred. In this type of case, it becomes extremely difficult to determine whether the intent is to create a life estate with a remainder subject to divestiture by the exercise of a power in the life tenant, or to create a fee simple with a gift over upon failure of the first taker to transfer in the manner

Watson and Woods, 14 Ont. Rep. 48 (Ch. 1887). A devise to A "in trust and for the use of his heirs," he to have the same "during his natural life," was held to create a fee in *Kepple's Appeal*, 53 Pa. 211 (1866); cf. *Teany v. Mains*, 113 Iowa 53, 84 N. W. 953 (1901).

278. *Turner v. Hallowell Savings Institution*, 76 Me. 527 (1884); *Doebler's Appeal*, 64 Pa. 9 (1869); *Lawrence v. Singleton*, 17 S. W. 265 (Tenn. 1875); *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160 (1909). Where land is devised to A with a restraint upon alienation, and he takes any possible future interest as heir, a fee is created, irrespective of what meaning the language restraining alienation may have been intended to express. *Grant v. Carpenter*, 8 R. I. 36 (1864). Cf. *Gleason v. Fayerweather*, 70 Mass. 348 (1855).

279. The inference of an intent to create a fee which arises from the absence of a future interest is corroborated by the fact that the restraint is not coextensive in duration with the life of the conveyee. See note 268 *supra*. If there be a gift of a future interest in unequivocal terms, a life estate may be inferred, even though the restraint is not thus coextensive: *Reuter v. Reuter*, 116 Neb. 428, 218 N. W. 86 (1928); *In re Groth's Will*, 128 Misc. 905, 220 N. Y. Supp. 505 (Surr. 1927). In *Berry v. Spivey*, 44 Tex. Civ. App. 18, 97 S. W. 511 (1906), a limitation to A "in fee simple," habendum to her and "the heirs of her body" by H, "without the power" to alienate until her youngest child should have attained the age of twenty-one, was seemingly held to create a life estate in A with remainder to her children, despite the absence of language which could reasonably be regarded as expressly limiting a remainder.

280. See text, *supra*, at note 228.

281. If it is stipulated that the conveyee shall not alienate without the consent of another, it is implied that he may transfer with such consent. *Burnet v. Piercy*, 149 Cal. 178, 86 Pac. 603 (1906). Conversely, the declaration that he shall have power to alienate under particular circumstances, or in a certain manner, impliedly denies the power to alienate under other circumstances, or in a different manner. *Urich v. Merkel*, 81 Pa. 332 (1876).

permitted. The validity of such a gift over has been discussed previously.²⁸² But for the rules which have been developed in respect to gifts over on failure to alienate, it would rarely be important to differentiate between the two constructions mentioned. In the case of an inexpertly drafted instrument, it is hopeless to base a construction upon supposed intent. Since the draftsman probably never heard of the sophistical distinction, he naturally had no intent on the point.²⁸³

So long as the rule which invalidates a gift over upon failure to alienate persists, every limitation containing language which can be interpreted to express a remainder ought to be construed to create only a life estate in the first conveyee, with such power to transfer as the language may require. Especially would this be true where the limitation to the first conveyee does not include words of inheritance or their equivalent.

While the language of restraint, where not employed actually to express an intended restraint, is typically meant to declare or emphasize the creation of a life estate, it may be used for other purposes. Thus, it may express the intent to create a fee tail;²⁸⁴ a condition, precedent²⁸⁵ or subsequent;²⁸⁶ or some other qualification of the estate conveyed to the first taker.²⁸⁷

282. *Supra*, subtitle II, D.

283. See note 230, *supra*, on the situation in which there is language adequate to create a remainder, and in which words of inheritance are not used in the gift to the first taker. Cf. Fox's Appeal, 99 Pa. 382 (1882). See note 231, *supra*, on the situation in which words of inheritance appear in the limitation to the first taker. Cf. Urich v. Merkel, 81 Pa. 332 (1876). Where there is no language capable of construction as the gift of a remainder, the inference of a fee (see text *supra* at notes 264-268) is corroborated by the grant to the conveyee of a power to alienate: Goldsmith v. Petersen, 159 Iowa 692, 141 N. W. 60 (1913); Muhlke v. Tiedemann, 177 Ill. 606, 52 N. E. 843 (1899); Bowen v. John, 201 Ill. 292, 66 N. E. 357 (1903); McIntyre v. McIntyre, 123 Pa. 329, 16 Atl. 783 (1889); Bing v. Burrus, 106 Va. 478, 56 S. E. 222 (1907); cf. Kaufman v. Burgert, 195 Pa. 274, 45 Atl. 725 (1900).

A fee has often been inferred from the grant of a power of disposal where such inference could more reasonably have been based upon other language in the conveyance: Case v. Dwire, 60 Iowa 442, 15 N. W. 265 (1883); Meyer v. Weiler, 121 Iowa 51, 95 N. W. 254 (1903); Jaureche v. Proctor, 48 Pa. 466 (1865); Skinner v. Skinner's Adm'r, 153 Va. 326, 163 S. E. 90 (1932).

284. Gamble v. Gamble, 200 Ala. 176, 75 So. 924 (1917); cf. Sparr v. Kidder, 265 Pa. 61, 108 Atl. 204 (1919). But cf. also Stamey v. McGinnis, 145 Ga. 226, 88 S. E. 935 (1916).

285. Bassett v. Budlong, 77 Mich. 338, 43 N. W. 984 (1889) (language restraining alienation indicated intent to make conveyee's survival of the conveyor a condition precedent to the vesting of ownership in the former); cf. Watkins v. Minor, 214 Mich. 380, 183 N. W. 186 (1921); Durand v. Higgins, 67 Kan. 110, 72 Pac. 567 (1903) (language in terms restraining alienation for the life of the conveyor seemed actually intended to emphasize the reservation of a power of revocation).

286. Hayes v. Martz, 173 Ind. 279, 89 N. E. 303 (1909) (language of restraint emphasized the creation of an executory limitation after a fee).

287. In Deepwater Railway Co. v. Honaker, 66 W. Va. 136, 66 S. E. 104 (1909), the

If language in terms restraining alienation has been employed for the purpose of expressing the intent to create a life estate with remainder, and for that purpose alone, then clearly no problem in restraints upon alienation is raised. If the language of restraint has been used merely to manifest the intent to create a life estate, it ought not to be construed to impose at the same time a restraint upon the alienation of such estate. It may be contended, however, that the language of restraint serves a dual purpose; that the conveyor, not understanding the precise scope of the power of alienation possessed by a life tenant, prohibits alienation without distinction between transfer of the life estate and transfer of the fee; and that the language must, therefore, be construed, not merely to indicate the intent to convey a life estate, but also the intent to restrain its alienation. The few decisions which are pertinent do not establish any clear rule of law upon this point.²⁸⁸

VI

RESTRAINTS IN SUBSTANCE BUT NOT IN FORM

Any provision the legal effect of which is to restrict the enjoyment of property by depriving the owner of a right, power, privilege or immunity which he would normally have, operates to make that property less marketable. Any such provision has the practical effect in some degree of an impediment to alienation. The degree to which alienation is actually affected, depends upon the extent to which the particular provision restricts enjoyment. It has been remarked that the existence

provision in a conveyance to trustees of a church, that the land should not be alienated to a private individual, could well have been construed to express the intention to create a determinable charitable trust.

288. In most of the cases in which language of restraint has been thought to indicate an intent to limit the conveyee to a life estate, it has not been necessary to decide whether it was intended also to create a restraint upon alienation of such life estate. In the following cases, the courts apparently were inclined to think a restraint on alienation of the life estate was contemplated: *Robson v. Gray*, 29 Ky. L. Rep. 1296, 97 S. W. 347 (1906); *Pratt v. Saline Valley Ry. Co.*, 130 Mo. App. 175, 108 S. W. 1099 (1908); *In re Groth's Will*, 128 Misc. 905, 220 N. Y. Supp. 505 (Surr. 1927). But see *Hubbird v. Goin*, 137 Fed. 822, 825 (C. C. A. 8th, 1905). In *Turner v. Hallowell Savings Institution*, 76 Me. 527 (1884), in holding that a fee had been created, the court remarked that to construe the limitation as creating a life estate would not carry out the intent expressed in the prohibition upon alienation, as such life estate would be alienable. The obvious answer to this objection is, that if the creation of a life estate was *all* that the language restraining alienation meant, then it would be given full force if a life estate should be inferred, even though such estate would be transferable.

Where the life estate is expressed specifically in other language than that restraining alienation, the latter language can be deemed an emphatic reiteration of the same intent. It is easier, however, in this type of case to construe the language of restraint to effect an actual restraint upon alienation of the life interest. The courts have generally taken this view. See cases cited *supra*, note 263.

of any future interest makes transfer of the property more difficult, because it necessitates the joinder of at least two persons to effect a conveyance of all interests in the subject matter. Any condition, with a power of reentry reserved, or a gift over upon breach thereof, and any covenant which imposes either an affirmative or negative duty on the owner of the land, may make that land less attractive to potential buyers. The balance of convenience, nevertheless, has been found to favor the allowance of many types of conditions and covenants.

Conditions and covenants restricting the particular use to which land may be put, are common. Building restrictions prescribing lines in advance of which a structure may not be erected, or prohibiting absolutely certain types of structures, or fixing minimum cost prices, are familiar illustrations.²⁸⁹ Almost equally common are those provisions which forbid the operation of a particular trade or business, or the sale of some particular commodity, on the land.²⁹⁰ These restrictions are generally made for the benefit of other land in the locality. Where a considerable area is thus affected, the restrictions at the outset actually increase marketability, though in the course of time they may come to have exactly the opposite effect. Restrictions of this type are upheld with practical unanimity of judicial opinion, although their possible results as impediments to alienation have been commented upon,²⁹¹ and there appears to be a tendency toward strict construction.²⁹²

Quite often the restriction upon use takes a broader sweep, limiting enjoyment of the land to one particular use.²⁹³ A provision of this class commonly takes the form of a condition, with a gift over upon breach, or

289. *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729 (1911); *Highland Realty Co. v. Grove*, 130 Ky. 374, 113 S. W. 420 (1903); *Jones v. Northwest Realty Co.*, 149 Md. 271, 131 Atl. 446 (1925). The case last cited illustrates well the drastic power of control which a conveyor may retain by means of restrictions of this kind.

Restrictions upon the erection or alteration of structures are valid even when not "building restrictions" in the usual sense of that term, which ordinarily signifies restrictions placed upon several parcels of land in pursuance of a definite scheme. *Gray v. Blanchard*, 25 Mass. 283 (1829).

See 2 TIFFANY, *REAL PROPERTY* (2d ed. 1920) c. 15.

290. *Cowell v. Springs Co.*, 100 U. S. 55 (1879).

291. In *Highland Realty Co. v. Grove*, 130 Ky. 374, 113 S. W. 420, 421 (1903), the court declared that such restrictions are looked upon with disfavor, "inasmuch as they detract from the freest use of the fee simple, and are annoying to owners and intending purchasers, being somewhat at variance, too, with the system in vogue in this country, which regards real estate as an article of commerce." See also *Cowell v. Springs Co.*, 100 U. S. 55, 57 (1879).

292. *Firth v. Marovitch*, 160 Cal. 257, 116 Pac. 729 (1911); *Highland Realty Co. v. Grove*, 130 Ky. 374, 113 S. W. 420 (1903).

293. *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10 (1901) (for a school); *McElvain v. Dorris*, 298 Ill. 377, 131 N. E. 608 (1921) (for mill purposes); *Cornelius v. Ivans*, 26 N. J. L. 376 (1857) (for railroad purposes); *Danforth v. Oshkosh*, 119 Wis. 262, 97 N. W. 258 (1903) (for a library).

with a power of reentry or a possibility of reverter in the conveyor.²⁹⁴ Such provisions are usually found in conveyances for which the conveyor has received no substantial consideration, or in situations where he has a personal interest in the continuance of the particular use specified. These provisions are likewise enforced,²⁹⁵ although they constitute serious impediments to alienation. Quite likely the decisions have been influenced by the fact that the bulk of such provisions are found in conveyances for a public, or semi-public purpose, and often make possible the accomplishment of a public benefit which could not otherwise be secured.

Certain types of restrictions upon enjoyment, which impede alienation in a marked degree, and appear to have small social value, call for particular comment. Such restrictions are: preemptive provisions, which require that before the land may be sold, it must be offered to some particular person; provisions requiring that upon alienation of the land, a specified portion of the purchase price must be paid to a designated individual; provisions which limit the right of occupancy to particular individuals or members of a particular social group; provisions forfeiting one tract of land for alienation of another tract; and provisions which prohibit partition of land among cotenants. These various classes of restrictions will be discussed in the order indicated.

A preemptive provision is usually found in an instrument conveying land, and requires that, before the land conveyed may be sold, it must first be offered to the conveyor or his heirs,²⁹⁶ or some other designated person.²⁹⁷ The method of enforcement for such a provision depends upon its terms. There may be a condition of forfeiture for breach, creating ordinarily a power of termination in the conveyor.²⁹⁸ Or, the

294. In the cases cited *supra* note 293, the decisions were based on the assumption that a power of termination had been created in the conveyor or his heirs, although it would seem equally plausible in most of these cases to construe the limitations as creating determinable fees with possibilities of reverter. See *supra*, notes 27, 95, 96.

295. Cases *supra* note 293.

296. As in *Libby v. Winston*, 207 Ala. 681, 93 So. 631 (1922); *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887); *Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Coley v. Hord*, 250 Ky. 250, 62 S. W. (2d) 792 (1933); *Cornelius v. Ivens*, 26 N. J. L. 376 (1857); *Jackson v. Schutz*, 18 Johns, Ch. 174 (N. Y. 1820); *DePeyster v. Michael*, 6 N. Y. 467 (1852); *Overbagh v. Patrie*, 8 Barb. Ch. 28 (N. Y. 1850) *aff'd*, 6 N. Y. 510 (1852); *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890 (1892). Occasionally a deed conveying land gives the conveyee a preemption as to other land retained by the conveyor. *Henderson v. Bell*, 103 Kan. 422, 173 Pac. 1124 (1918); *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S. E. 89 (1923).

297. As in *Re Rosher*, 26 Ch. D. 801 (1884); *Bing v. Burrus*, 106 Va. 478, 56 S. E. 222 (1907); cf. *Rice v. Hall*, 19 Ky. L. Rep. 814, 42 S. W. 99 (1897).

298. *Libby v. Winston*, 207 Ala. 681, 93 So. 631 (1922); *Jackson v. Schutz*, 18 Johns, Ch. 174 (N. Y. 1820); *Jackson v. Groat*, 7 Cow. 285 (N. Y. 1827). The provisions in *DePeyster v. Michael*; *Overbagh v. Patrie*; and *Hardy v. Galloway*; all *supra* note 296, were intended to be enforced in this manner.

provision may be intended to operate as a covenant specifically enforceable in equity.²⁹⁹ Where no forfeiture has been expressly stipulated, it would seem reasonable to construe the provision as creating a covenant, even though its phraseology be not that customarily employed in covenants.³⁰⁰

The preemptive provision may require offer of the land to the person entitled at a stipulated price.³⁰¹ If no price is specified in the provision, the natural interpretation is that the offeror's price must be paid upon exercise of preemption.³⁰² The offeror cannot, however, demand a price larger than that which he would ask of another purchaser. The effect of a preemption as a practical impediment to alienation hinges upon this matter of price. If the preemptive right requires that the land be offered at much less than its value at the time of proposed sale, there is an obvious check upon alienation, since the land owner will retain the land rather than sell it at a great sacrifice. Any preemption exercisable at a fixed price is likely to involve sacrifice to the person bound to offer, since a fixed price is usually based upon the value of the land when the preemptive provision is executed.³⁰³ It might be held, therefore, that any preemptive provision fixing a price without reference to future increase in value is void as a restraint upon alienation in substance. If the preemptor must pay the offeror's price, however, there is no material impediment to alienation. A preemptive provision of this type might be enforced in so far as the rule against restraints upon alienation is concerned.

That rule, however, is not the only one which has been thought to be

299. See *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887).

300. This construction should be applied to such provisions as are found in *Lewis Oyster Co. v. West*; *Henderson v. Bell*; *Coley v. Hord*; and *Skeen v. Clinchfield Coal Corp.*, all *supra* note 296; *Bing v. Burrus*, 106 Va. 478, 56 S. E. 222 (1907); *In re Rosher*, 26 Ch. D. 801 (1884).

301. As in *Libby v. Winston*; *Maynard v. Polhemus*; *Lewis Oyster Co. v. West*; *Coley v. Hord*; *Henderson v. Bell*, and *Skeen v. Clinchfield Coal Corp.*, all *supra* note 296; *Cornelius v. Ivens*, 26 N. J. L. 376 (1857); *In re Rosher*, 26 Ch. D. 801 (1884); *Rice v. Hall*, 19 Ky. L. Rep. 814, 42 S. W. 99 (1897).

302. No price was fixed by the preemptive provisions in *Jackson v. Schutz*; *Overbagh v. Patrie*, both *supra* note 296; *DePeyster v. Michael*, 6 N. Y. 467 (1852). In *Bing v. Burrus*, 106 Va. 478, 56 S. E. 222 (1907), the price was expressly stipulated to be as much as a stranger would pay. In *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890 (1892), the court declared that the preemptive provision could not constitute a contract to convey because no price had been stipulated. Considering the nature and purpose of such a provision, this decision seems unreasonable.

303. In the case, *In re Rosher*, 26 Ch. D. 801 (1884), the land was worth five times the stipulated preemptive price. In holding the preemptive provision void, the court stressed this fact. The great disparity between the preemptive price and the value of the land doubtless influenced the decisions holding preemptions void in *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 45 (1887), and *Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919).

applicable. There are two angles of approach to the problem of the validity of a preemptive provision. The common law rule against restraints upon alienation holds invalid any provision which, if enforced in the contemplated manner, would constitute a serious impediment to alienation of a vested interest, present or future. It has been pointed out that, by the weight of authority, the duration of the restraint is immaterial when it is imposed upon a fee or other absolute interest. The rule against perpetuities, in recognition of the fact that any future interest constitutes an impediment to alienation, declares invalid any such interest which will not necessarily vest within the prescribed period. If a preemptive provision be considered solely from the point of view of the rule against restraints upon alienation, its validity might be determined according to the test above suggested. The duration of the preemption would not be a factor for consideration. If, however, the solution of the problem be sought in the rule against perpetuities, the duration of the preemption, and not its actual effect as an impediment to alienation, becomes the controlling factor.

The analogy of the option cases is at once suggested. An option to purchase the fee is valid if in duration it does not exceed the period of the rule against perpetuities; it is void if it may be exercised beyond that period,³⁰⁴ except in the case of options in leases.³⁰⁵ As a practical impediment to alienation, the ordinary option is far more objectionable than a preemption. An option usually creates in the optionee a power to compel conveyance of the land at a fixed price; this power the optionee may exercise or not, as he may elect. For the duration of the option, the land cannot be sold to any other person at any price, without a liability on the part of the transferee to divestiture upon subsequent exercise of the option. For its whole duration, therefore, the option continues as a clog upon alienation, unless the optionee can be induced to release it. A preemption differs from the ordinary option in two respects. The preemptor does not have the power to compel a conveyance unless the other party chooses to convey. When his willingness to convey has been manifested, the preemptor must then determine whether or not he will buy; if he elects not to buy, his right is extinguished. If a preemption is to be characterized as an option, it must be noted that it is an option subject to the conditions above set forth. So far as the rule against perpetuities is concerned, therefore, a preemp-

304. *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N. E. 177 (1920); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914). See also: GRAY, *THE RULE AGAINST PERPETUITIES* (3d ed., 1915) § 330 *et seq.*; KALES, *ESTATES, FUTURE INTERESTS*, etc. IN ILLINOIS (2d ed., 1920) § 665; Langeluttig, *Options to Purchase and the Rule against Perpetuities* (1931) 17 VA. L. REV. 461. *Stroman v. S. C. Power Co.*, 168 S. C. 538, 167 S. E. 844 (1933), is seemingly *contra*.

305. *Keogh v. Peck*, 316 Ill. 318, 147 N. E. 266 (1925); *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442 (1908).

tive provision should be as valid as an ordinary option under like circumstances.

The writer does not believe that the rule against perpetuities affords a satisfactory solution of the problems involved, either in options or in preemptions. The rule permits rights of either sort which may last for a long period of time, and which during such period may constitute insurmountable barriers to alienation. The application of the rule to option cases has probably been the result of two different processes of reasoning. On the one hand, it has been recognized that the option in effect creates a future interest contingent in character; where the option is unlimited in time, this future interest seems to fall literally within the rule. On the other hand, it has been felt that an option is a useful and necessary device which becomes obnoxious to public policy only when unlimited in time. Application of the rule against perpetuities has appeared to be a reasonable method of balancing the conflicting social interests. It would have been better, however, if the rule against restraints upon alienation had been applied, with suitable adaptations. Everything of value in the option device could have been preserved, and its evils combated more effectively than can be done through the rule against perpetuities. In regard to preemptions, it is even clearer that the solution must lie in the rule against restraints. A preemption at the offeror's price is unobjectionable, though perpetual, since it presents no impediment to alienation. Yet under the rule against perpetuities it would be void.³⁰⁶ A study of the preemption cases suggests a particular difficulty in the application of the rule against perpetuities. If the preemptive provision is in the contract form only, the equitable future interest created can be held within the rule on the authority of

306. The decisions applying the rule against perpetuities to preemptive provisions have generally overlooked the distinctions between options and preemptions which are suggested in the text above. Attention has been concentrated on the fact that a preemption creates a contingent future interest resembling that in an option. In *Skeen v. Clinchfield Coal Corporation*, 137 Va. 397, 119 S. E. 89 (1923), *A* had conveyed land by deed to *B*, with a provision that *B* should have the "exclusive right to purchase" for \$3000 another tract, retained by *A*; and that, if *A* should desire to sell the same, and should so notify *B*, the latter should be under a duty to purchase it for \$3000. It would seem that this provision gave to *A* a power to compel *B* to buy at any time; it also created a duty on the part of *A* not to convey to anyone else without having first offered the land to *B*. It did not create a power in *B* to compel *A* to sell if he should be unwilling. Apparently the court construed the provision in the manner suggested. It declared that the case must be dealt with as if it involved an ordinary option to purchase; since such an option would be void under the rule against perpetuities, this provision was void. This tendency to assimilate the rules governing options and preemptive provisions is unfortunate. The objectionable character of the provision in this case was due solely to the fact that a fixed price had been stipulated; but for that fact the situation would have differed materially from that in an ordinary option. On the distinction between options and preemptions, see further discussion in *Comments* (1918) 28 *YALE L. J.* 65, (1919) 29 *YALE L. J.* 87.

the option cases. If, however, a forfeiture has been stipulated for failure to offer to the preemptor before sale to another, a condition is created; such a condition is not within the rule against perpetuities according to the American authority.³⁰⁷ It is not reasonable that a preemption should be enforceable merely because it is phrased in the form of a condition subsequent with a power of reentry in the grantor, rather than in the form of a contract right.

Since the courts have not followed consistently either the rule against perpetuities or the rule against restraints in dealing with preemptive provisions, it is not possible to determine definitely from the cases what kinds of preemptive provisions are valid. In the majority of cases, preemptions unlimited in time and exercisable at a fixed price have been declared void.³⁰⁸ Some of the decisions so holding are based upon the rule against restraints upon alienation.³⁰⁹ In others, however, the rule against perpetuities has been relied upon chiefly.³¹⁰ A perpetual preemption exercisable at the offeror's price would seem valid, though the authority is scanty.³¹¹ It would be void if the rule against perpetuities were taken to be the sole criterion of validity.

307. *Libby v. Winston*, 207 Ala. 681, 93 So. 631 (1922); GRAY, *op. cit. supra* note 304, § 299 et seq. In *Libby v. Winston*, the conveyance was construed to provide a forfeiture in event of breach of the preemptive provision; the power of reentry created in the conveyer was held valid.

308. *In re Rosher*, 26 Ch. D. 801 (1884); *Hutt v. Hutt*, 24 Ont. L. R. 574 (1911); *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887); *Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Henderson v. Bell*, 103 Kan. 422, 173 Pac. 1124 (1918); *Skeen v. Clinchfield Coal Corporation*, 137 Va. 397, 119 S. E. 89 (1923); see comment on *Overbagh v. Patrie* (N. Y.) *infra* note 311. *Contra*: *Libby v. Winston*, 207 Ala. 681, 93 So. 631 (1922); *Coley v. Hord*, 250 Ky. 250, 62 S. W. (2d) 792 (1933); cf. *Rice v. Hall*, 19 Ky. L. Rep. 814, 42 S. W. 99 (1897); *French v. Old South Society*, 106 Mass. 479 (1871) (pew in a church forfeited for breach of a condition requiring offer to the society at the original purchase price before sale to a stranger); cf. *Hyde v. Woods*, 94 U. S. 523 (1876) (restriction on transfer of seat upon an exchange).

309. *In re Rosher*, 26 Ch. D. 801 (1884); *Hutt v. Hutt*, 24 Ont. L. R. 574 (1911); *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887).

310. *Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Henderson v. Bell*, 103 Kan. 422, 173 Pac. 1124 (1918); *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S. E. 89 (1923).

311. Such a provision, together with other provisions of a different kind, was held valid in *Jackson v. Schutz*, 18 Johns. Ch. 174 (N. Y. 1820), *Spencer, C. J.*, concurring specially upon the ground that the preemptive provision was valid and had been breached. In *Overbagh v. Patrie*, 8 Barb. Ch. 28 (N. Y. 1850), *aff'd* 6 N. Y. 510 (1852), the validity of a preemption exercisable at the offeror's price was recognized, and *Jackson v. Schutz* was declared to have adjudged only the validity of that kind of a provision. In *Overbagh v. Patrie*, the provision required offer to the preemptor at the proposed sale price less one-sixth thereof. This provision was held void as a restraint upon alienation. In *Blng v. Burrus*, 106 Va. 478, 56 S. E. 222 (1907), the court seemingly regarded as valid a preemption at the offeror's price. Unless the preemption was here regarded as limited to a period within the rule against perpetuities, this decision is difficult to reconcile with

A preemptive provision, by a proper construction, may be applicable only to the first alienation of the land;³¹² it may be intended to bind only the original conveyee and not his heirs or assigns.³¹³ These problems of construction, as well as the allied problem, under what circumstances such a provision may create a covenant running with the land, are beyond the scope of the present discussion.

Closely allied historically to preemptions are "quarter-sales," "tenth-sales," etc. These are provisions requiring the conveyee of land to pay to the conveyor, or to some other person, a portion of the sale price upon a transfer of the land. Such a provision is a serious deterrent to alienation, especially if payment be required upon each and every alienation. Every transferee of the land must anticipate a certain loss if he should subsequently desire to sell; a considerable portion of the total loss sustainable over a period of time will in fact be cast upon the original conveyee, at the time of his transfer to a purchaser. Any such provision is invalid, whether applicable to every transfer,³¹⁴ or only to the first.³¹⁵ Usually these provisions require payment to the conveyor or his heirs, and are intended to be enforced by forfeiture for breach of the condition to pay.³¹⁶ Occasionally, however, they require payment to a third person, and do not contain an express clause of forfeiture.³¹⁷ In this type of case, they should be construed to create, either covenants to pay, or conditional equitable charges upon the land.³¹⁸ Considering such a provision as creating an equitable charge, conditioned upon alienation of the land, the actual nature and effect thereof becomes more apparent.

Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 S. E. 89 (1923). There is seemingly an intimation in *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890 (1892), that any preemptive provision is void.

A preemptive provision is valid in respect to a life estate. Since a forfeiture restraint upon alienation of a life estate is usually valid, the effect of the preemption as a restraint upon alienation is immaterial. *Jackson v. Groat*, 7 Cow. 285 (N. Y. 1827); see *DePeyster v. Michael*, 6 N. Y. 467, 490 (1852); *Overbagh v. Patrie*, 8 Barb. Ch. 28, 36, *aff'd*, 6 N. Y. 510 (1852).

312. This would appear a reasonable construction in many of the cases. In some instances, however, it is clear that the preemption is intended to be exercisable upon the occasion of each and every alienation: *Overbagh v. Patrie*, *DePeyster v. Michael*, both *supra* note 311.

313. *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887).

314. An early decision in New York held such a provision valid. *Jackson v. Schutz*, 13 Johns. Ch. 174 (N. Y. 1820). The rule is now *contra*: *DePeyster v. Michael*; *Overbagh v. Patrie*, both *supra* note 311. Such a provision is valid in respect to a life estate. *Jackson v. Groat*, 7 Cow. 285 (N. Y. 1827).

315. *In re Elliott* [1896] 2 Ch. 353; *Weiting v. Billinger*, 50 Hun. 324, 3 N. Y. Supp. 361 (1888); *Dunlop v. Dunlop's Ex'rs*, 144 Va. 297, 132 S. E. 351 (1926).

316. As in cases, *supra* note 314.

317. As in cases, *supra* note 315.

318. See opinion in *re Elliott* (1896) 2 Ch. 353; also, *Dunlop v. Dunlop's Ex'rs*, 144 Va. 297, 132 S. E. 351 (1926).

It amounts virtually to a gift over of a partial interest in the land upon alienation; it differs only in degree from a complete gift over upon alienation, and should, therefore, be void.³¹⁹ If land has been conveyed with reservation of a rent charge, any provision increasing the rent upon alienation of the land is void,³²⁰ since it has the same effect as a provision requiring payment of a portion of the sale price upon transfer.

Conditions that stipulate a forfeiture for failure of the conveyee of land to occupy it himself are found occasionally. They constitute a great obstacle to alienation, if valid. They make the land practically unmarketable for the life of the conveyee at least, since he is not likely to attempt a transfer which will normally necessitate his removal from the land, and thus cause forfeiture of his estate; and certainly no purchaser will knowingly risk the loss of that for which he has paid. Since a life estate may usually be subjected to a forfeiture restraint, a provision of this kind is valid in respect to such an estate.³²¹ Where the condition of occupancy is imposed upon a fee, it should be void, and this view apparently has been approved in the few cases in which the problem has arisen.³²²

Restrictions upon occupancy of land by members of a particular social group are pertinent at this point. For convenience, however,

319. In *Weiting v. Billinger*, 50 Hun. 324, 3 N. Y. Supp. 361 (1888), the provision required payment of \$1500 to third parties if the land should be sold at sheriff's sale for a debt of the conveyee. The obnoxious effect of such provisions becomes strikingly clear in this situation; if valid, they operate to deprive a creditor in substantial degree of resort to the property of his debtor, even though he may actually have taken a mortgage upon the same.

320. *Billing v. Welch*, 6 Ir. R. C. L. 88 (1871); cf. *Mahony v. Tynte*, 1 Ir. Ch. R. 577 (1851).

321. *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351 (1908); *Lewis v. Lewis*, 74 Conn. 630, 51 Atl. 854 (1902), considered on the merits in 76 Conn. 586, 57 Atl. 735 (1904); *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889 (1890); *Lariverre v. Rains*, 112 Mich. 276, 70 N. W. 583 (1897). See comment on *Scruggs v. Murray*, 70 Tenn. 44 (1878) note 238 *supra*; cf. *Thompson v. Baxter*, 107 Minn. 122, 119 N. W. 797 (1909); *Gilmore v. Hamilton*, 83 Ind. 196 (1882). It would seem that in an assignment of a term of years, a gift over upon cessation of occupancy by the assignee is valid. *Doe d. Norfolk v. Hawke*, 2 East 481 (K. B. 1802).

322. *Newkerk v. Newkerk*, 2 Caines 346 (N. Y. 1805) (devise to children conditioned upon their continuing to inhabit a certain town); *Pardue v. Givens*, 54 N. C. 306 (1854) (devise to children containing a provision that was probably intended to restrain partition, and that limited the land over on cessation of occupancy).

In *Stansbury v. Hubner*, 73 Md. 228, 20 Atl. 904 (1890), land was devised to a grandson, X, "and the heirs of his body, so long as they hold and till the same; should he die without heirs of his body, my will and desire is that my grandson . . . (Y) . . . should have it, him, his heirs, forever." The court declared that there was no devise over to take effect upon a failure to hold and till the land; that there was a condition subsequent, which was void as a restraint upon alienation, since it forbade transfer of the land, the word "hold" requiring retention of title. Since the decision seems to turn in large measure upon the construction of the word "hold" to require retention of title, the case is not a clear precedent upon the point of forfeiture for failure to occupy.

the problem here involved has been discussed previously in connection with restraints upon alienation to members of such a group.³²³

Somewhat similar in effect to a requirement of personal occupancy, is a provision prohibiting the alienation of one tract separately from another. In *Camp v. Cleary*,³²⁴ two lots, *A* and *B*, were conveyed with a gift over of both if the conveyee should ever alienate lot *A*. In this situation, there is no restraint in form upon the alienation of lot *B*, which the conveyee may transfer at any time. Any purchaser of lot *B*, however, must take it subject to the risk of divestiture if his grantor should subsequently alienate lot *A*. In fact, such a provision constitutes a serious impediment to alienation of lot *B*, and should be void. Otherwise, a practically effective restraint may be accomplished by conveying a tract in parcels, with a provision that alienation of one particular parcel shall cause forfeiture of all parcels. While the problem has seldom arisen, the trend of judicial opinion seems to regard as void all restraints prohibiting the alienation of one tract separately from another.³²⁵

A restraint upon partition is not technically a restraint upon alienation, since it does not forbid transfer of a cotenant's undivided share.³²⁶ If, however, the assignee of the undivided share does not have the power to compel partition, the restraint is a marked obstacle to alienation, since the great majority of prospective buyers desire to own in severalty, and not as cotenants. The absence of such a power in the assignee, moreover, makes it more difficult for creditors of a cotenant to satisfy their claims by execution upon his undivided interest. If the assignee does have a power to compel partition, evasion of the restriction against it is simple, since a cotenant could assign his undivided share to a nominal assignee and obtain partition in his name. In view of the favorable attitude of the courts toward these restrictions, it may safely be assumed that the assignee does not have this power, although there is little direct authority.³²⁷ Since a restraint upon partition permits transfer of the

323. See *supra*, subtitle II, C; notes 182-184.

324. 76 Va. 140 (1882).

325. *Smith v. Clark*, 10 Md. 186 (1856); *Estate of Robert Lunham*, 5 Ir. R. Eq. 170 (1871). See also the discussion of restraints qualified to permit alienation to all but a few designated persons, in text, *supra* note 163 et seq.; GRAY, *RESTRAINTS UPON THE ALIENATION OF PROPERTY* (2d ed. 1895) § 29b.

The decision in *Camp v. Cleary*, 76 Va. 140 (1882), held the restraint valid upon other grounds, and did not discuss the problem here considered. See text *supra*, at notes 93 and 236.

326. This point is doubtless assumed in all the decisions upholding restrictions upon partition. It was emphasized in *Porter v. Tracy*, 179 Iowa 1295, 162 N. W. 809 (1917); *Doubleday v. Newton*, 27 Barb. Ch. 431 (N. Y. 1855); *Hunt v. Wright*, 47 N. H. 396 (1867); cf. *Kepley v. Overton*, 74 Ind. 448 (1881). The undivided interest of a cotenant is subject to levy of execution: *Sewell v. Taylor*, 224 S. W. 530 (Tex. Civ. App. 1920).

327. Partition was denied an assignee in *Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1 (1909). The problem was stated, but not decided, in *Sewell v. Taylor*, *supra* note 326.

undivided shares, it does not prevent a voluntary partition by execution of deeds conveying the undivided interests of the cotenants in particular portions of the land. The restraint is extinguished by a conveyance of all the undivided shares to a single person, whether he be a cotenant or a stranger.

A restraint upon partition may originate in either of two ways. It may be imposed by the creator of the cotenancy at the time of its creation,³²⁸ or it may arise out of an agreement among cotenants.³²⁹ There are various methods for enforcement of such a restriction. Where it has been imposed by the creator of the cotenancy, a forfeiture may have been stipulated for an attempt to procure partition in breach of the restriction. Such a provision, however, is unusual.³³⁰ In its absence, the restriction is construed as a disabling restraint which operates to bar a suit for partition.³³¹ Its effect is analogous to that of a disabling restraint upon alienation, which deprives the person subject thereto of the legal power to transfer. Where the restriction against partition is the result of an agreement among cotenants, it usually takes the form of a covenant; if valid, it is enforced by appropriate remedies. Since partition is now usually an equitable proceeding, the covenant operates in equity as a bar to the suit.³³²

Restraints upon partition have usually been held valid when limited in duration to a period measured by lives in being and twenty-one years,³³³

328. *Cox v. Johnson*, 242 Ill. 159, 89 N. E. 697 (1909); *Kepley v. Overton*, 74 Ind. 448 (1881); *Porter v. Tracy*, 179 Iowa 1295, 162 N. W. 800 (1917); *Highfill v. Konnerman*, 241 Ky. 282, 43 S. W. (2d) 657 (1931); *Hill v. Hill*, 261 Mo. 55, 168 S. W. 1165 (1914); *Freeland v. Anderson*, 114 Neb. 822, 211 N. W. 167 (1926); *Hunt v. Wright*, 47 N. H. 396 (1867); *Greene v. Stadiem*, 198 N. C. 445, 152 S. E. 398 (1930). One cotenant cannot, upon a conveyance of his interest, create a restraint effective to bar partition at the suit of another cotenant. *Kean v. Tilford*, 81 Ky. 600 (1884).

329. *Arnold v. Arnold*, 308 Ill. 365, 139 N. E. 592 (1923); *Black v. Tyler*, 18 Mass. 150 (1822); *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80 (1884); *Brown v. Coddington*, 72 Hun 147, 25 N. Y. Supp. 649 (Sup. Ct. 1893); *Buschmann v. McDermott*, 154 App. Div. 515, 139 N. Y. Supp. 314 (1st dep't, 1913).

330. There was a forfeiture stipulated in *Greene v. Greene*, 125 N. Y. 506, 26 N. E. 739 (1891). It would seem, however, that in this case the restriction was directed against both voluntary and involuntary partition; it was, therefore, a restraint upon transfer of the undivided interests. Apparently it was so construed by the court.

331. The cases cited *supra* note 328 so hold. There are many other decisions to the same effect.

332. Cases, *supra* note 329. In *Black v. Tyler*, 18 Mass. 150 (1822), it was held that such agreement did not bar an *action at law* for partition, but it was intimated that equity would give relief against its breach.

333. *Dee v. Dee*, 212 Ill. 338, 72 N. E. 429 (1904) (for life of life tenant); *Cox v. Johnson*, 242 Ill. 159, 89 N. E. 697 (1909) (until youngest cotenant should have attained sixteen); *Heininger v. Meissner*, 261 Ill. 105, 103 N. E. 565 (1913) (for life of life tenant); *Arnold v. Arnold*, 308 Ill. 365, 139 N. E. 592 (1923) (for unexpired portion of certain leases); *Daubman v. Daubman*, 353 Ill. 69, 186 N. E. 520 (1933) (for life of survivor of 6 cotenants); *Brown v. Brown*, 43 Ind. 474 (1873) (for minorities of infant cotenants);

that period having been adopted by analogy from the rule against perpetuities. Restraints not thus limited are probably void, although there are few decisions upon the point.³³⁴ In jurisdictions in which the com-

Kepley v. Overton, 74 Ind. 448 (1881) (ibid.); Porter v. Tracy, 179 Iowa 1295, 162 N. W. 800 (1917) (for 5 years); Young v. Young, 49 S. W. 1074 (Ky. 1899) (for minority of youngest cotenant); Highfill v. Konnerman, 241 Ky. 282, 43 S. W. (2d) 657 (1931) (ibid.); Eberts v. Fisher, 54 Mich. 294, 20 N. W. 80 (1884) (for period of a ten-year lease); Stewart v. Jones, 219 Mo. 614, 118 S. W. 1 (1909) (for life of life tenant); Hill v. Hill, 261 Mo. 55, 168 S. W. 1165 (1914) (for lives of 2 life tenants); Shelton v. Bragg, 189 S. W. 1174 (Mo. 1916) (for life of life tenant); Peterson v. Damonde, 98 Neb. 370, 152 N. W. 786 (1915) (for 16 years); Freeland v. Anderson, 114 Neb. 822, 211 N. W. 167 (1926) (for life of life tenant); Ex parte Watts, 130 N. C. 237, 41 S. E. 289 (1902) (for a life and 21 years); Greene v. Stadiem, 198 N. C. 445, 152 S. E. 398 (1930) (until majority of youngest cotenant in remainder); cf. Reid v. Armistead, 151 So. 874 (Ala. 1934). Concerning the effect of a mandatory or discretionary power of partition conferred upon an executor, as a bar to a suit for partition, see Cahill v. Cahill, 62 N. J. Eq. 157, 49 Atl. 809 (1901).

There is little contrary authority. In Clark v. Clark, 99 Md. 356, 58 Atl. 24 (1904), a testator devised land to his children in equal shares, providing that it should not be sold for purposes of division for a period of ten years, and expressing his wish that for such period the children should live together and use the income of the property for their support. In a suit for construction of the will, it was held that this restriction was void. The court declared that practically it restrained alienation of any cotenant's share for ten years. Cf. Lane v. Lane, 90 Mass. 350 (1864).

In Reinders v. Koppelman, 68 Mo. 482 (1878), a partition by sale was permitted despite a clearly expressed restraint against "sale" for 25 years. There was no discussion of the point. See note 341, *infra*. In Haeussler v. Missouri Iron Co., 110 Mo. 183, 19 S. W. 75 (1892), in holding void a perpetual restraint against partition, the court expressed itself in language which argued strongly against the validity of any and all restraints upon the right to partition. Now, however, the rule is established in Missouri that a restraint upon partition for a limited period is valid. See Missouri cases cited *supra*; see also note 336, *infra*.

The Kentucky doctrine which permits restraints upon alienation for a reasonable period of time has been discussed. Text *supra*, at notes 102-105. According to this doctrine, a restraint for the whole life of the conveyee is void. Note 104 *supra*. In dealing with the problem of restraints against partition, it would not be logically imperative to follow this analogy. In Cammack v. Allen, 199 Ky. 268, 250 S. W. 963 (1923), it was held that a restraint upon "sale for division" during the life of one cotenant was void. It is not clear whether the court viewed the restraint as against alienation, or whether it thought that a restriction against partition should be limited in time in like manner as a restraint upon alienation.

334. Haeussler v. Missouri Iron Co., 110 Mo. 183, 19 S. W. 75 (1892); cf. Lane v. Lane, 90 Mass. 350 (1864); Smith v. Dunwoody, 19 Ga. 237 (1856). In Hunt v. Wright, 47 N. H. 396 (1867), a restriction unlimited in time was held valid. Apparently, however, a majority of the cotenants had the power to extinguish it. This factor may reconcile the decision with the rule that a restraint upon partition must be limited in time. Where the power to extinguish is dependent upon the unanimous consent of the cotenants, the restraint is probably void unless limited in time. See *infra*, subtitle VII. Cf. Martin v. Martin, 170 Ill. 639, 48 N. E. 924 (1897) (agreement not to partition, unlimited in time, held to bar partition during a two-year term granted in pursuance of said agreement).

mon law rule against perpetuities has been modified in respect to the measurement of time, one might expect to find a corresponding difference in the period over which a restraint upon partition can be made operative. If the rule in a particular state forbids the suspension of the power of alienation for a longer period than two lives in being, it might be thought that two lives would be the maximum period for which a restraint upon partition could be made effective, and that no restraint for a gross term of years would be valid. Apparently, however, the analogy has not been followed to its logical conclusion.³³⁵ If it can be said that the time limitation above mentioned has been definitely established in respect to restraints upon partition, that fact implies a recognition of their practical effect as impediments to alienation, and suggests that they ought not to be accorded any especial judicial favor.

In spite of this natural inference, in at least three states there are statutes providing that partition may not be had contrary to the intention of the creator of the cotenancy.³³⁶ The attitude of the courts, too, has been strangely favorable. Where it is reasonably possible to construe language so as to avoid the inference of an intent to restrain partition, one would expect to find that construction adopted. It has been pointed

335. While the New York decisions are not wholly clear upon the point, it would seem that a restriction upon partition is valid though it may be operative for a period longer than two lives. In *Buschmann v. McDermott*, 154 App. Div. 515, 139 N. Y. Supp. 314 (1st Dep't, 1913), an agreement among three cotenants not to partition was held a bar to a suit for that purpose. The court emphasized the fact that the co-owners could convey jointly at any time. This argument, however, proves entirely too much, as it would validate any restriction upon partition, irrespective of a time limitation. See comment on *Hunt v. Wright*, *supra* note 334. In *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814 (1889), it was held in a suit to construe a will that a restriction upon partition for five years was valid. In this case, the executors had power to partition within that period. In *Doubleday v. Newton*, 27 Barb. Ch. 431 (N. Y. 1855), there was a provision which may have been intended to restrain partition until the youngest of several cotenants should have attained 21. The validity of this provision as a restraint upon partition was seemingly not argued, but it was intimated that it would be valid. In *Converse v. Kellogg*, 7 Barb. Ch. 590 (N. Y. 1850), "division" of land was restrained for 10 years. The validity of this restraint was not in issue, but it was intimated that it was valid. Cf. also *Brown v. Coddington*, 72 Hun 147, 25 N. Y. Supp. 649 (Sup. Ct. 1893); *Ogilby v. Hickok*, 144 App. Div. 61, 128 N. Y. Supp. 860 (1st Dep't, 1911), *aff'd.*, 202 N. Y. 614, 96 N. E. 1123 (1911). In *Greene v. Greene*, 125 N. Y. 506, 26 N. E. 739 (1891); *Oxley v. Lane*, 35 N. Y. 340 (1866); and *Adams v. Berger*, 18 N. Y. Supp. 33 (Sup. Ct. 1891), restrictions for gross periods were held invalid. These restrictions, being broad in their terms, were probably viewed as restraints upon alienation as well as upon partition.

336. ARK. DIG. STAT. (Crawford & Moses, 1921) § 8090; IND. STAT. ANN. (Burns, 1926) § 1265; MO. REV. STAT. (1929) § 1557. These statutes prescribe no time limitation for the duration of a restraint upon partition. Probably some limitation would be imposed as a matter of judicial interpretation. *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, 19 S. W. 75 (1892). It may be noted also that these statutes in terms apply only where the cotenancy has been created by a will.

out that language in terms restraining alienation may be employed to express a meaning quite different from its literal import. In like manner, language which suggests a restraint upon partition may be intended to convey a materially different idea. When a testator devises all his property to his widow for life, and then provides that after her death the property "shall be divided" among his children, he probably intends by this language to limit a remainder to the children. To say that the property shall be divided among the children, means merely that they shall take equal undivided shares; "divided" does not refer to physical division of the land, but to division of the ownership into parts. Yet in several decisions the courts have inferred a restraint upon partition during the life of the widow from language of this kind.³³⁷ It is almost inconceivable that such language should have been so interpreted as to raise an impediment to alienation. It certainly does not express a restraint upon partition clearly; it is at least ambiguous, and ought, therefore, to be so construed as to facilitate alienation. It would seem a further misfortune that the *Restatement of the Law of Property*, now being formulated by the American Law Institute, should appear to approve the construction criticised above.³³⁸ A sounder judicial attitude is illustrated in a New Hampshire case,³³⁹ in which a deed contained the

337. This has been held in Illinois: *Dee v. Dee*, 212 Ill. 338, 72 N. E. 429 (1904); *Heininger v. Meissner*, 261 Ill. 105, 103 N. E. 565 (1913); cf. *Daubman v. Daubman*, 353 Ill. 69, 186 N. E. 520 (1933). The same result has been reached in several Missouri decisions: *Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1 (1909); *Hill v. Hill*, 261 Mo. 55, 168 S. W. 1165 (1914); *Shelton v. Bragg*, 189 S. W. 1174 (Mo. 1916). Upon similar reasoning, it was held in *Highfill v. Konnerman*, 241 Ky. 282 43 S. W. (2d) 657 (1931), that partition could not be had prior to the termination of a trust which had been created for children, with a provision that it should terminate when the youngest should have attained 21, and that the property should then be "divided" among said children. Cf. *Brown v. Brown*, 43 Ind. 474 (1873). But cf. *Doubleday v. Newton*, 27 Barb. Ch. 431 (N. Y. 1855).

An illustration of the extent to which this rule can be carried is found in a Nebraska decision, *Freeland v. Anderson*, 114 Neb. 822, 211 N. W. 167 (1926). There *T* had devised all his property to *W* for life, and "at the death" of *W*, to his heirs. It was held that partition during the life of *W* had been validly restrained. *Dee v. Dee*, *supra*, was relied upon, although it was clearly not an authority for such a conclusion. This Nebraska decision would seem to mean that in fact a restraint upon partition will be implied wherever a life estate has been limited, since a conveyor of property will almost inevitably use the words "at the death," or some equivalent expression, in limiting a remainder. In three Missouri cases, language of this sort was apparently not thought to create a restraint upon partition: *Reinders v. Koppelman*, 68 Mo. 482 (1878); *Preston v. Bryant*, 96 Mo. 552, 10 S. W. 78 (1888); *Sikemeier v. Galvin*, 124 Mo. 367, 27 S. W. 551 (1894). But cf. *Hill v. Hill*, 261 Mo. 55, 168 S. W. 1165 (1914).

On the right of owners of future interests to have a partition among themselves, subject to the possessory estate, see Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process* (1928) 42 HARV. L. REV. 30, 47-48.

338. (Tent. Draft No. 5) §214, comment b.

339. *Spaulding v. Woodward*, 53 N. H. 573 (1873).

words, "to remain in common and undivided," immediately after the description of the land and before the habendum. The court declared these words were not intended to express a restraint upon partition, but merely to describe the interests conveyed as undivided shares.

Provisions are often found which in terms restrain "sale" of the land. Doubtless such a provision is ordinarily intended to restrain alienation, and not merely partition. It raises the questions whether every restraint upon alienation involves a restraint upon partition where the conveyance is to two or more persons, and whether such a restraint upon "sale" should be operative to bar a partition. A restraint upon "sale" would doubtless include a sale under order of court in a partition suit, and thus in terms the restriction forbids partition in so far as sale may be necessary. Perhaps partition in specie is not forbidden.³⁴⁰ The Illinois court has held in one case that a restraint upon "sale" is void, and does not constitute a bar to partition.³⁴¹ The writer believes that this position is sound; since a restriction against partition ought not be favored, one should not find it in language clearly employed to express a broader restraint. There is, however, authority to the contrary.³⁴²

Where the restraint is upon "sale or partition," there is no reason why the restraint should not be held valid as to partition, though void as a restraint upon transfer of the undivided interests. While it has

340. *Waln v. Waln*, 84 N. J. Eq. 293, 96 Atl. 891 (1914).

341. A stipulation that no cotenant shall "sell" his "share" manifests the intent to impose a restraint upon alienation of the undivided interest. *Askins v. Merritt*, 254 Ill. 92, 98 N. E. 256 (1912). Where land is limited to cotenants, with a provision that the "land" shall not be sold, construction is more difficult. In *Voellinger v. Kirchner*, 314 Ill. 398, 145 N. E. 638 (1924), a testator devised land on trust for his wife for life; subject to the life estate, he devised the land to his children; he further provided that said "real estate" should not be "sold" until the death of the wife, when the trustee should "distribute" among the children. Partition was allowed, the court holding that there was a void restraint upon alienation, but no restraint upon partition. Considering the presence of the word "distribute," one feels that the line of demarcation between this decision and those cited *supra* note 337 is a nice one. In *Daubman v. Daubman*, 353 Ill. 69, 186 N. E. 520 (1933), there was a prohibition upon "sale" until the death of the survivor of six children, and a provision that until such time the income from the land should be divided equally among the children. It was here held that partition could not be had during the lives of the children. If this decision is to be reconciled with *Voellinger v. Kirchner*, *supra*, it must be upon the ground that the context showed that "sale" was here intended to mean a partition sale. Cf. *Lane v. Lane*, 90 Mass. 350 (1864); *Reinders v. Koppelman*, 68 Mo. 482 (1878).

342. In *Porter v. Tracey*, 179 Iowa 1295, 162 N. W. 800 (1917), a provision against "sale" was interpreted to mean "partition sale," and partition was accordingly denied. This conclusion was based principally upon evidence aliunde the will. And cf. *Reid v. Armistead*, 151 So. 874 (Ala. 1934). In *Young v. Young*, 49 S. W. 1074 (Ky. 1899), a provision that the land should not be "alienated or encumbered" was held to bar partition by sale. This decision was logically justified by the Kentucky rule allowing restraints upon alienation for a reasonable period.

been so held in some cases,³⁴³ in others there is apparently a disposition to hold the restraint void in its entirety.³⁴⁴

A restraint upon "sale for division," or equivalent language, appears ambiguous.³⁴⁵ It might be taken to express a restraint upon partition by sale; or a restraint upon all partition; or even a restraint upon transfer of the undivided interests. The construction last suggested may be thought reasonable in view of the fact that, when a cotenant succeeds in selling his undivided interest, there has been one sort of "division" effected as between him and his cotenants; he now owns in severalty the proceeds of his sale. A provision that the land conveyed in cotenancy shall "remain unencumbered and intact" also presents a difficulty of construction. From the word "intact," one may infer the intent to restrain partition; but the word "encumbered" clearly forbids one kind of alienation of the undivided interests. The provision may well be regarded as a void restraint upon alienation as distinguished from one upon partition.³⁴⁶

A gift over upon failure of cotenants to effect a partition within a given time does not restrain partition; it encourages it. If such a gift over is void, it must be for reasons similar to those suggested previously in connection with the cases of gifts over upon failure to alienate.³⁴⁷

343. *Cox v. Johnson*, 242 Ill. 159, 89 N. E. 697 (1909); *Peterson v. Damonde*, 93 Neb. 370, 152 N. W. 786 (1916).

344. *Oxley v. Lane*, *Greene v. Greene*, *Adams v. Berger*, all *supra* note 335. In all of these New York cases the question arose in a suit for construction of the instrument containing the restriction. In the case, *In re Estate of Schilling*, 102 Mich. 612, 61 N. W. 62 (1894), the court declared a proviso against "sale or division" void, and held that compensation due for a taking by eminent domain was distributable immediately.

345. In *Cammack v. Allen*, 199 Ky. 268, 250 S. W. 963 (1923), and in *Clark v. Clark*, 99 Md. 356, 58 Atl. 24 (1904), restraints in this phraseology were held void, apparently being viewed as restraints upon alienation rather than upon partition.

346. In *Greene v. Greene*, 125 N. Y. 506, 26 N. E. 739 (1891), such a restriction was apparently regarded as a restraint upon alienation, despite the fact that there was a further provision against "partition or division." In *Perry v. Metcalf*, 216 Ky. 755, 233 S. W. 694 (1926), a provision that the land should remain "intact and unsold" was held to be a restraint upon alienation. In *Kepley v. Overton*, 74 Ind. 448 (1881), a provision that the land should be "kept together" until a future date, and then "equally divided" was held to be a valid restriction against partition. In *Ex parte Watts*, 130 N. C. 237, 41 S. E. 289 (1902), a devise provided: "They shall own said house and lot as a common home for themselves and with equal rights to and in the same, until twenty-one years after the death of both their parents, then the said . . . and their heirs, shall own the said house and lot in fee simple." This provision was held to bar partition by sale. Cf. *Daubman v. Daubman*, 353 Ill. 69, 186 N. E. 520 (1933); *Brown v. Brown*, 43 Ind. 474 (1873); *Wilson v. Barnes*, 169 Atl. 791 (Md. 1934).

347. Such a gift was held void in *Shaw v. Ford*, 7 Ch. D. 669 (1877).

VII

THE CONSENT QUALIFICATION IN RESTRAINTS UPON ALIENATION
OR PARTITION

A restraint upon alienation, whether in the forfeiture or the disabling form, may be qualified to allow transfer with the consent of one or more designated persons. This qualification of the restraint may make it slightly less obnoxious to public policy than it otherwise would be, for it makes alienation possible provided the necessary consent can be secured. If the consent of a single person is required, it might be thought probable that it could be obtained. If the consent of several persons is necessary, the likelihood of all assenting is more remote.

Where the restraint is cast in the forfeiture form, it may be observed that the consent qualification can be a material factor only if the consent required is that of some person other than the owner of the future interest created by the forfeiture provision. The owner of such interest may always release it; a provision for alienation with his consent, therefore, does not increase the possibility of alienation in any degree.

While there has been comparatively little specific discussion of the point, the decisions, apparently without exception, ignore the consent qualification. Thus, a perpetual restraint is void, although alienation with consent is permitted,³⁴⁸ and a restraint for a period measured in lives or years is likewise void, despite the consent qualification.³⁴⁹ It is immaterial whether the person whose consent must be obtained is conveyer,³⁵⁰ a cotenant of the conveyee,³⁵¹ or some other person.³⁵² It is

348. *Nashville Ry. v. Bell*, 162 Tenn. 661, 39 S. W. (2d) 1026 (1931) (disabling restraint); majority opinions in *McRae v. McRae*, 30 Ont. Rep. 54 (1898), commented upon *supra* note 113; cf. *Cronk v. Shoup*, 70 Colo. 71, 197 Pac. 756 (1921).

349. Restraints disabling in form: *Murray v. Green*, 64 Cal. 363, 28 Pac. 118 (1883); *Muhlke v. Tiedemann*, 177 Ill. 606, 52 N. E. 843 (1899); *Miller v. Denny*, 99 Ky. 53, 34 S. W. 1079 (1896); *Clark v. Clark*, 99 Md. 356, 58 Atl. 24 (1904); *Northwest Realty Co. v. Serio*, 156 Md. 229, 144 Atl. 245 (1929); *Lane v. Lane*, 90 Mass. 350 (1864); *Schwren v. Falls*, 170 N. C. 251, 87 S. E. 49 (1915); cf. *Armstrong v. McAlpine*, 4 Ont. App. 250 (1879) (commented upon note 113 *supra*); *Hill v. Gray*, 160 Ala. 273, 49 So. 676 (1909).

Restraint in forfeiture form: *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507 (1911). Covenants not to alienate without consent were held void in *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908 (1895); *Windsor v. Mills*, 157 Mass. 362, 32 N. E. 352 (1892).

350. *Murray v. Green*; *Miller v. Denny*; *Northwest Realty Co. v. Serio*, all *supra* note 349; *Nashville Ry. v. Bell*, 162 Tenn. 661, 39 S. W. (2d) 1026 (1931); *McRae v. McRae*, 30 Ont. Rep. 54 (1898); cf. *Cronk v. Shoup*, 70 Colo. 71, 197 Pac. 756 (1921).

351. *Clark v. Clark*, 99 Md. 356, 58 Atl. 24 (1904); *Lane v. Lane*, 90 Mass. 350 (1864); *Windsor v. Mills*, 157 Mass. 362, 32 N. E. 352 (1892).

352. *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908 (1895); *Muhlke v. Tiedemann*, 177 Ill. 606, 52 N. E. 843 (1899); *Schwren v. Falls*, 170 N. C. 251, 87 S. E. 49 (1915); *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507 (1911); cf. *Armstrong v. McAlpine*, 4 Ont. App. 250 (1879); *Hill v. Gray*, 160 Ala. 273, 49 So. 676 (1909).

also immaterial whether a single consent is required,³⁵³ or more.³⁵⁴

Restraints upon partition are sometimes similarly qualified to permit partition with the consent of all the cotenants.³⁵⁵ It is not clear that this qualification subtracts anything from the effect that the restriction would otherwise have as an impediment to alienation. A restraint upon partition, as previously suggested, does not prevent a voluntary division. A partition consented to by all the cotenants is no more than a voluntary one, even though it may be carried out in the form of a suit in equity. A restraint upon partition arising out of an agreement among cotenants may always be abrogated by the joint action of all the contracting parties. Such a restriction, therefore, necessarily includes the effect of a consent provision.³⁵⁶

VIII

SOME CONSEQUENCES OF THE VALIDITY OR INVALIDITY OF A RESTRAINT

Certain consequences of the validity or invalidity of a restraint may be noted briefly. If a restraint is void, the interest subject thereto is, nevertheless, valid. While there has been an occasional expression of judicial opinion to the contrary,³⁵⁷ this rule is now established every-

353. *Murray v. Green*, 64 Cal. 363, 28 Pac. 118 (1883); *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908 (1895); *Windsor v. Mills*, 157 Mass. 362, 32 N. E. 352 (1892); *Northwest Realty Co. v. Serio*, 156 Md. 229, 144 Atl. 245 (1929); *Nashville Ry. v. Bell*, 162 Tenn. 661, 39 S. W. (2d) 1026 (1931); *McRae v. McRae*, 30 Ont. Rep. 54 (1898); cf. *Hill v. Gray*, 160 Ala. 273, 49 So. 676 (1909); *Cronk v. Shoup*, 70 Colo. 71, 197 Pac. 756 (1921); *Armstrong v. McAlpine*, 4 Ont. App. 250 (1879).

354. *Muhlke v. Tiedemann*, 177 Ill. 606, 52 N. E. 843 (1899); *Miller v. Denny*, 99 Ky. 53, 34 S. W. 1079 (1896); *Lane v. Lane*, 90 Mass. 350 (1864); *Clark v. Clark*, 99 Md. 356, 58 Atl. 24 (1904); *Schwren v. Falls*, 170 N. C. 251, 87 S. E. 49 (1915); *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507 (1911).

355. As in *Porter v. Tracey*, 179 Iowa 1295, 162 N. W. 800 (1917); *Haeussler v. Missouri Iron Co.*, 110 Mo. 88, 19 S. W. 75 (1892); *Buschmann v. McDermott*, 154 App. Div. 515, 139 N. Y. Supp. 314 (1st Dep't, 1913); cf. *Clark v. Clark*, 99 Md. 356, 58 Atl. 24 (1904); *Lane v. Lane*, 90 Mass. 350 (1864).

356. No case has been found in which a court has clearly and definitely attached importance to the consent qualification. In *Hunt v. Wright*, 47 N. H. 396 (1867), a restraint upon partition, unlimited in time, was held valid. It appeared that a majority of the cotenants had power to dissolve the restraint. See note 334 *supra*. In *Haeussler v. Missouri Iron Co.*, 110 Mo. 88, 19 S. W. 75 (1892), a perpetual restraint upon partition was not saved by a consent provision. Cf. *Buschmann v. McDermott*, 154 App. Div. 515, 139 N. Y. Supp. 314 (1st Dep't, 1913).

357. The decision of the New York Supreme Court in *Hacker v. Hacker*, 75 Misc. 380, 133 N. Y. Supp. 266 (Sup. Ct. 1912), holding that an unlawful restraint on alienation invalidated the gift subject thereto, was reversed in the Appellate Division, 153 App. Div. 270, 138 N. Y. Supp. 194 (2d Dep't, 1912).

where.³⁵⁸ In the very great majority of the cases, the point has been assumed without comment.

If a restraint upon alienation is valid, the possibility of making title to the land affected depends upon the form of the restraint. If a restraint cast in the disabling form be held valid and effective according to its terms, by no means can the estate subject to the restraint be so conveyed as to create in the transferee an immediately valid and unimpeachable title. A disabling restraint creates in the conveyor who has declared it no future interest capable of release by him or his heirs. The validity of a transfer in violation of the restraint can be questioned only by the person who has conveyed in violation thereof, or persons claiming under him.³⁵⁹ If the disabling restraint is limited in duration, and the person subject thereto should survive the period of restraint, it would seem that he could not thereafter question the validity of a conveyance by warranty deed made during the period of restraint. The doctrine of estoppel by deed would vest the title in his grantee at the expiration of the period of restraint, or would at least create an equity in the grantee to call for a conveyance.³⁶⁰

Where the restraint is in the forfeiture form, a future interest is created in the conveyor or his heirs, or in some other person by a gift over. Though this restraint be valid, by the joinder of the conveyee upon whom it has been imposed and the owner of this future interest, a perfect title can be made.³⁶¹ Where the restraint is created in a will, and no gift over is expressly limited, the future interest resulting must accrue to the residuary devisee or the heirs of the testator. It may happen that the person subject to the restraint is himself the heir. In such case he can transfer a perfect title.³⁶² In like manner, where land

358. *Bradley v. Peixoto*, 3 Ves. 324 (Ch. 1797); *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276 (1906); *Ogle v. Burmister*, 146 Iowa 33, 124 N. W. 758 (1910); *McNamara v. McNamara*, 293 Ill. 54, 127 N. E. 130 (1920); *Reeder v. Antrim*, 64 Ind. App. 83, 110 N. E. 568 (1915); *McDowell v. Brown*, 21 Mo. 57 (1855); *Schermerhorn v. Negus*, 1 Denio 448 (N. Y. 1845); *Oxley v. Lane*, 35 N. Y. 340 (1866); *Greene v. Greene*, 125 N. Y. 506, 26 N. E. 739 (1891); *Booker v. Booker*, 119 App. Div. 482, 104 N. Y. Supp. 21 (2d Dep't, 1907); *Walker v. Vincent*, 19 Pa. 369 (1852); *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507 (1911); *Re Goodhue Trusts*, 47 Ont. L. R. 178 (1920). The Louisiana Code, art. 1519, expressly provides that conditions "contrary to the laws" are "reputed not written." *Succession of Feitel*, 176 La. 543, 146 So. 145 (1933).

359. See *supra*, subtitle I.

360. *M'Williams v. Nisly*, 2 S. & R. 507 (Pa. 1816); *Peters v. N. W. Mutual Life Ins. Co.*, 119 Neb. 161, 227 N. W. 917 (1929).

361. *Francis v. Big Sandy Co.*, 171 Ky. 209, 188 S. W. 345 (1916). If the restraint in *Watkins v. Minor*, 214 Mich. 380, 183 N. W. 186 (1921), can be construed as a forfeiture restraint, that case is another illustration of the possibility of making title in this manner.

362. In *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755 (1920), land had been devised to A for life, with a contingent remainder. A was sole heir. It was provided that A should not convey or encumber his life estate. If this provision could be construed to create

has been devised to two or more persons as tenants in common, subject to a forfeiture restraint, and such persons succeed to the future interest by descent, they can convey an absolute title by joinder.³⁶³

A contract to convey land upon the expiration of a valid restraint is enforceable. In *Voris v. Renshaw*,³⁶⁴ the restraint expressly permitted a lease for years. The conveyee leased for ninety-nine years, and bound himself to convey the title at the expiration of the period of restraint. It was held that, assuming the restraint to be valid, the execution of the lease did not constitute a breach thereof, and the contract to convey was specifically enforceable. To grant specific performance of such a contract nullifies in large degree the effect of the restraint which initially has been assumed to be valid.

A valid restraint upon alienation is effective to preclude a sale under a statute providing for judicial sale of land in which certain future interests have been limited.³⁶⁵ It has been held in one state, however, that a restraint upon alienation does not bar a judicial sale when it is necessary to provide for the support of infant owners.³⁶⁶ Indeed, it would seem unlikely that a court would permit even a valid restraint to preclude a judicial sale where unforeseen contingencies have arisen which render such a sale highly desirable for all persons concerned.³⁶⁷

a forfeiture restraint, then A as heir succeeded to the future interest resulting, and was able to make good title, since the contingent remainder was destructible. If the future interest created by a forfeiture restraint be transferred to the conveyee, the latter is then in a position to make title. Cf. *West Tenn. Co. v. Townes*, 52 F. (2d) 764 (N. D. Miss. 1931).

If the devisee subject to restraint is but one of several heirs, he inherits a proportionate part of the future interest created by a restraint in the forfeiture form. Any transfer by him will be effectual, therefore, to pass an indefeasible title to a fractional interest in the land. *Pennyman v. McGrogan*, 18 U. C. C. P. 132 (1868).

363. *Newkerk v. Newkerk*, 2 Caines 346 (N. Y. 1805). It would seem that *Walker v. Walker*, 139 Ga. 547, 77 S. E. 795 (1913) might be supported upon this ground. See also *Anderson v. Cary*, 36 Ohio St. 515 (1881).

364. 49 Ill. 425 (1867).

365. *Morton's Guardian v. Morton*, 120 Ky. 251, 85 S. W. 1188 (1905); *Gaines v. Sullivan*, 117 S. C. 475, 109 S. E. 276 (1921). Cf. *Chenault v. Burgess*, 29 Ky. L. Rep. 569, 93 S. W. 664 (1906), in which the restraint was limited to prohibition upon sale for purpose of reinvestment. The Kentucky statute expressly provided that no such sale should be ordered if forbidden by the deed, will or contract under which the property was held. While no sale could be ordered in a suit based upon this statute, it was conceded that the person affected by the restraint could sell his interest. Cf. *Walker v. Walker*, 139 Ga. 547, 77 S. E. 795 (1913) in which the restraint was expressly qualified to allow a judicial sale for purpose of reinvestment. Cf. also *Stewart v. Brady*, 66 Ky. 623 (1868).

366. *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940 (1894).

367. In trust cases, courts of equity have often ordered sale although it appeared clearly by implication that the settlor did not intend the trustee to have such a power. *Curtiss v. Brown*, 29 Ill. 201 (1862); *Johns v. Montgomery*, 265 Ill. 21, 106 N. E. 497 (1914); cf. *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 153 S. W. 840 (1912). In

Where land upon which a restraint is imposed has been condemned in eminent domain proceedings, it would seem that the restraint, if valid initially, should be regarded as terminated. Otherwise, it would be necessary to place the compensation money in a trust fund for the period of the restraint. In the cases in which the problem has arisen, the restraint was regarded as void; upon this ground, the compensation money was held to be distributable immediately.³⁶⁸

some instances, sale has been ordered where expressly prohibited by the terms of the trust. *Gillespie v. Winston's Trustee*, 170 Ky. 667, 186 S. W. 517 (1916); cf. *Colonial Trust Co. v. Brown*, 105 Conn. 261, 135 Atl. 555 (1926). Compare also the equitable doctrine whereby land in which certain *legal* future interests have been limited may be ordered sold when contingencies probably not foreseen by the creator of such interests render a sale necessary for the protection of all parties concerned. Schnebly, *supra* note 337 at 54-62.

368. *In re Machu*, 21 Ch. D. 838 (1882); *Dept. of Public Works v. Porter*, 327 Ill. 28, 158 N. E. 366 (1927); *In re Estate of Schilling*, 102 Mich. 612, 61 N. W. 62 (1894).