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Real Property - Perpetuities - Suspension of Absolute Power of Alienation through Business Trusts

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This theory, which has been adopted by the Restatement of the Law of Restitution⁸ and warmly applauded by some scholars,⁹ has, unfortunately, been applied by but few jurisdictions.¹⁰

North Dakota has a statute which prohibits any person convicted of feloniously causing the death of another from receiving any property by succession, will, or otherwise by reason of the death of that person.¹¹ The property would pass as though the wrongdoer had predeceased the victim.¹²

It is at once apparent that the statute is inadequate in at least two respects. First, the requirement of conviction renders the statute inapplicable in the event of the self-destruction of the perpetrator of the crime.¹³ Second, the use of the term "feloniously" would require application of the statute not only when murder, but also when first and second degree manslaughter are involved.¹⁴ This would seem to be a harsh result when compared with decisions in other states.¹⁵ These inadequacies could easily be remedied by minor legislative changes.

ROBERT L. ECKERT

REAL PROPERTY — PERPETUITIES — SUSPENSION OF ABSOLUTE POWER OF ALIENATION THROUGH BUSINESS TRUSTS — By the terms of a trust set up to pool oil and gas interests, a one-half interest in the oil and gas in one quarter section of land was transferred by each of forty parties to the trustee for the benefit of the trust. The defendant trustee, in return, transferred to each of the forty parties twenty shares of beneficial interest which entitled the holders to a share of revenue obtained by the trust, and retained, as compensation for managing the trust income, two hundred such shares. The trust was to last for ten years unless oil and gas was struck in which case it was to last so long as oil or gas was produced. The North Dakota court held that the trust was void because it suspended the absolute power of alienation for a period longer than that permitted by statute. *Carlson v. Tioga Holding Co.*, 72 N.W.2d 236 (N.D. 1955).

The statute in effect at the time of the execution of the instrument provided that the absolute power of alienation could not be suspended for a longer period than, "(1) During the continuance of the lives of persons in being at the creation of the limitation or conditions; or (2) For a period not to exceed twenty-five years from the time of creation of the suspension."¹ By statute, the absolute power of alienation is suspended when there are no persons in

8. RESTATEMENT, RESTITUTION §187 (2) (1936).

9. 1 Page, WILLS §232 (3d ed. 1941); 3 Scott, TRUSTS §492 (1st ed. 1939).

10. In re Duncan's Estate, 40 Wash.2d 850, 246 P.2d 445 (1952).

11. N.D. Rev. Code, §56-0423 (1943): "No person . . . feloniously causing the death of another shall . . . receive any property or benefit by succession, will or otherwise . . . by reason of the death of such person . . . , but all property shall vest . . . as if the person convicted were dead when the testator died."

12. *Ibid.*

13. See *Harrison v. Hillegas*, 1 Ohio Supp. 160 (1939); *Winters National Bank and Trust Co. v. Shields*, 3 Ohio Supp. 134 (1939).

14. N.D. Rev. Code, §12-0107, 12-2718, 12-2720 (1943).

15. *Hatcher v. Aetna Life Ins. Co.*, 105 F. Supp. 808 (D. Ore. 1952).

1. N.D. Rev. Code § 47-0227 (1943). Now amended to read ". . . the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition and twenty-one years." N.D. Rev. Code § 47-0227 (1953 Supp.).

being by whom an absolute interest in possession can be conveyed.² The test of whether the absolute power of alienation has been suspended beyond the statutory limit is whether there is any possibility that the suspension may continue beyond it.³ In the instant case the suspension of the power of alienation is clearly indefinite, therefore, this trust is void unless it forms a type of organization which falls outside the statute.⁴

According to commonly accepted definitions, the trust under consideration is a business trust,⁵ and a business trust does not violate the common law rule against perpetuities.⁶ This is, however, of little value as precedent, for the common law rule, which is concerned with when an interest will vest,⁷ differs sharply from North Dakota's rule, which is concerned only with whether the power of alienation is suspended.⁸

In the eleven jurisdictions which, in addition to North Dakota, have "perpetuity" statutes stated in terms of the suspension of the power of alienation,⁹ apparently only one case has held that a business trust did not violate the statute.¹⁰ The decision in this case was based on the premise that there were persons in being who could unitedly convey an absolute interest in possession.¹¹

The instant case holds that the business trust did violate the statute because there were no persons in being who could convey an absolute interest in possession. The court indicated that it was compelled to adopt this view because North Dakota statutes provide that cestuis take no estate or interest in the trust corpus and that every transfer by a trustee in contravention of the trust is absolutely void.¹² This is undoubtedly correct, for if the beneficiaries take no estate or interest, they obviously have nothing to convey. Hence, the only person who could possibly convey the trust property is the trustee who

2. N.D. Rev. Code § 47-0231 (1943): "Every future interest which, by any possibility, may suspend the absolute power alienation for a longer period than is prescribed in this chapter is void in its creation. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

3. *Ford v. Yost*, 299 Ky. 682, 186 S.W.2d 896 (1944); *In re Hartwig's Estate*, 119 Mont. 359, 175 P.2d 178 (1946); *In re Carlson's Will*, 111 N.Y.S.2d 591 (Surr. ct. 1952).

4. N.D. Rev. Code § 47-0227 (1943) (now amended).

5. *Hecht v. Malley*, 265 U.S. 144 (1923); *Goldwater v. Oltman*, 210 Cal. 408, 292 Pac. 624 (1930); *Bernesen v. Fish*, 135 Cal.App. 588, 28 P.2d 67 (1933).

6. *Howe v. Morse*, 174 Mass. 491, 55 N.E. 213 (1899); *accord*, *Hart v. Seymour*, 147 Ill. 598, 35 N.E. 246 (1893); *Bogert, Trusts* § 304 (1935); *Whiteside, Restrictions on the Duration of Business Trusts*, 9 Cornell L.Q. 422 (1924).

7. *McClary v. McClary*, 134 F.2d 455, (10th Cir. 1943); *Bank of California v. Ager*, 7 Wash.2d 179, 109 P.2d 548 (1941); 6 *American Law of Property* § 24.3 (Casner ed. 1952); *Simes, Future Interests* § 109 (1951); *Gray, Perpetuities* § 205 (3d ed. 1915).

8. N.D. Rev. Code § 47-0227 (1943) (now amended).

9. *Ariz. Rev. Code* § 71-106 (1939); *Cal. Civ. Code* § 715.1 (1953 Pocket Supplement, *Deering*, 1949); *D.C. Code* § 45-102 (1940); *Idaho Code* § 55-111 (1948); *Ky. Rev. Stat.* § 381.220 (1953); *Minn. Stat.* 500.13 (1949); *Mont. Rev. Code* § 6705 (1935) *N.Y. Real Property Law* § 42; *Oklahoma Stats., Tit. 60, § 175.47* (1951); *S.D. Comp. Laws* § 51-0231 (1939); *Wis.Stat.* § 230.14 (1949).

10. *Baker v. Stern*, 194 Wis. 233, 216 N.W. 147 (1927). The statutes interpreted by the court, *Wis. Stat.* §§ 230.14-.15 (1949), provide that the absolute power of alienation shall not be suspended for longer than lives in being plus thirty years.

11. Wisconsin has no statute comparable to either N.D. Rev. Code § 59-0314 or § 59-0319 (1943).

12. N.D. Rev. Code § 59-0314 (1943) provides: ". . . every express trust in real property, valid as such in its creation, vests the whole estate in the trustee, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust." N.D. Rev. Code § 59-0319 (1943) provides: "If a trust in relation to real property is expressed in an instrument creating the estate, every transfer or other act of the trustee in contravention of the trust is absolutely void."

is prevented by statute¹³ from so conveying except in accordance with the express terms of the trust agreement.

It is submitted that the decision in the instant case places a desirable limitation upon business trusts which, if not so limited, could perpetuate with impunity the evils which our statutes were designed to prevent.¹⁴

SHERMAN W. SWENSON

REAL PROPERTY — RECORDATION — EFFECT OF AN UNRECORDED JUDGMENT AS CONSTRUCTIVE NOTICE TO BONA FIDE PURCHASERS — In 1932 the defendant Corwin acquired title to land in Burleigh County, North Dakota, by an unrecorded deed from the county. In 1933 he brought an action to quiet title to the property and was awarded a favorable judgment. This judgment was likewise not recorded, nor was it docketed. Thereafter Burleigh County made a second conveyance of the property to Casey, a bona fide purchaser for value, who placed his deed of record immediately. Corwin then recorded both his deed and his judgment. Learning of Corwin's interest, Casey brought suit to establish his title to the property, contending that as a bona fide purchaser for value who recorded his conveyance without notice of prior unrecorded rights he was entitled to prevail over Corwin. It was *held* that Corwin prevailed. His unrecorded, undocketed judgment quieting title constituted constructive notice of his interest in the land to subsequent purchasers. *Casey v. Corwin*, 71 N.W.2d 553 (N.D. 1955).

The decision is supported by the opinions cited by the court,¹ and is certainly in accord with the common law rule that the bringing of an action in court, without more, furnished notice to the entire world of the action's subject matter.² It is submitted, however, that in some respects the holding is inconsistent with the policy underlying the North Dakota statutes and that it may very well be in contravention of specific language in the code. Difficulty is experienced, for instance, in reconciling the result with the statutes regarding:

A. *Lis pendens*. Under § 28-0507 of the North Dakota Revised Code of 1943, the pendency of an action affecting title to real property is not effective as notice to an innocent purchaser unless a statutory notice is placed in the registry of deeds.³ Thus the common law doctrine that actions in court automatically give constructive notice of the proceedings to the entire world has, in this state, been abolished with respect to real property by specific statute.⁴ The decision of the court in *Casey v. Corwin*, while technically consistent with this statute, nevertheless appears inconsistent with its underlying theory. It

13. N.D. Rev. Code § 59-0319 (1943).

14. See Scott, *Trusts* § 62.10 (1939); Whiteside, *Restrictions on the Duration of Business Trusts*, 9 Cornell L.Q. 422 (1924).

1. *Sheridan v. Andrews*, 49 N.Y. 478 (1872); *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S.E. 684 (1917); 1 Freeman, *Judgments* §439 (5th ed. 1925).

2. *Ibid.*

3. N.D. Rev. Code §28-0507 (1943) "In a civil action . . . affecting the title to real property, the plaintiff at the time of filing the complaint . . . or the defendant when he sets up in his answer an affirmative cause of action affecting the title to real property . . . may file for record with the register of deeds of each county in which the real property is situated a notice of the pendency of the action . . . From the time of filing only shall the pendency of action be constructive notice to a purchaser or encumbrancer of the property affected thereby . . .".

4. *Ibid.*; Patton *Titles* §§324, 986 (1938).