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Future Interests - Restraints on Alienation - Option to Repurchase at a Fixed Price

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FUTURE INTERESTS—RESTRAINTS ON ALIENATION—OPTION TO REPURCHASE AT A FIXED PRICE—Shortly after his second marriage in 1925, plaintiff deeded a house and two lots to the parents of his first wife. The grantees, along with the plaintiff, had occupied the premises since the first wife's

death. The deed contained a provision that "if the second parties do not wish at any time to use the property as a home, the first parties shall have the first privilege to purchase the above described property at any future time at the price stated in this deed, viz., $4,000." In 1952, after the death of both grantees and when the property was worth $12,000, plaintiff tendered the purchase price to the heirs of the grantees and demanded a deed. Upon their refusal to convey, he brought suit for specific performance, which was granted by the lower court. On appeal, *held,* affirmed, two justices dissenting. *Lantis v. Cook,* 342 Mich. 347, 69 N.W. (2d) 849 (1955).

The majority opinion is based upon two alternative grounds: first, that the provision does not suspend the power of alienation under the Michigan statute that was effective at the date of the deed; and second, that the provision is not pre-emptive but creates an option to arise upon a condition precedent. Much confusion can be avoided by carefully distinguishing between the three "rules" referred to in the principal case: the Michigan "two lives" rule prohibiting the suspension of the power of alienation;[1] the common law rule against perpetuities dealing with the limitation of remotely vesting future interests;[2] and the common law rules which prohibit direct restraints on alienation.[3] The Michigan "two lives" rule prohibits the suspension of the absolute power of alienation for a period longer than two lives in being at the creation of the estate.[4] Because of the desirability of the option as a business device[5] and because this rule allows no period in gross[6] and would, therefore, invalidate any option which was not measured in terms of human lives, the Michigan court has followed the extreme view that was originated in New York under similar legislation.[7] It holds that an option does not suspend the power of alienation at all because there are at all times persons in being who can convey the fee.[8] Thus, neither this nor any other option can possibly violate the

1 Mich. Comp. Laws (1948) §§554.14, 554.15. This statute applied only to real property and was repealed in 1949. Mich. Comp. Laws (Supp. 1952) §§554.51 to 554.53. It is applicable in the principal case since the deed was executed in 1926.

2 GRAY, RULE AGAINST PERPETUITIES, 3d ed., §201 (1915).

3 COKE ON LITTLETON, 19th ed., §360 (1832); 5 TIFFANY, REAL PROPERTY, 3d ed., §§1343-1344 (1939).

4 Note 1 supra.

5 Though every option may have some restrictive effect upon freedom of alienation, it is unrealistic to think that the courts would strike down a device which has come to be used so widely. It has been said that the primary purpose of an option contract "is to enable a particular person to buy, not to prevent any one from selling." 2 SIMES, FUTURE INTERESTS §462 (1936). The court in the principal case (at 357) quotes this language as referring to pre-emptive provisions, but a careful inspection of the text shows that the author may have been referring to option contracts only.

6 6 AMERICAN LAW OF PROPERTY §25.18 (1952).

7 Epstein v. Werbelovsky, 233 N.Y. 525, 135 N.E. 902 (1922); In the Matter of City of New York, 246 N.Y. 1, 157 N.E. 911 (1927); 6 AMERICAN LAW OF PROPERTY §24.56 (1952).

8 Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926); Windiate v. Leland, 246 Mich. 659, 225 N.W. 620 (1929); FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 401 (1954).

"two lives" rule. Under this line of decisions the result in the principal case is clearly correct. However, the court goes on to say that even if this were not the case the provision could be sustained[9] because it is not pre-emptive at all, but an option to arise upon a condition precedent.[10] The option is to arise when the grantees do not wish to use the property as a home. This is clearly valid under the common law rule against perpetuities[11] because, interpreting this as a negative rather than a positive act,[12] the option must arise, if at all, within the lives of the two grantees.

Both the common law rule against perpetuities and the Michigan "two lives" rule were designed to cope only with "indirect" restraints on alienation. The validity of the provision in the principal case also depends upon the effect of the common law rules prohibiting "direct" restraints on alienation.[13] The majority of the court argues that this provision is not a direct restraint because it is analogous to an option to arise upon a condition precedent, while the dissent asserts that it is a pre-emptive provision reserving to the grantor the right to purchase at a fixed price and therefore is a direct restraint.[14] The dilemma is in the condition itself.[15] If the

9 This facet of the opinion is of more importance than the reiteration of the doctrine set forth in the Windiate cases, note 8 supra, since they were decided under the since repealed "two lives" rule.

10 In the ordinary option contract to purchase land, *A*, the owner, usually gives *B*, a third party, the right to purchase the land for a limited period of time and at a predetermined price. Thus, the initiative is in *B* since he can force *A* to sell. What *B* has can probably best be described as a "power" or "legal privilege." 1 CORBIN, CONTRACTS §259 (1950). The fact that an option is outstanding does not prevent the sale of the land, but since the option holder can normally get specific performance of his contract he has an "equitable interest" in the land and any buyer takes subject to his option or interest. In the pre-emption contract, *A*, the owner, promises that he will not sell his land until he first offers it to *B*. Here the initiative is with *A*, because *B* has no power to compel a sale. *A* merely promises that should he desire to sell his land he will first offer it to *B*. Thus *B* has a "right" to buy if *A* desires to sell, and *A* is under a "duty" to offer his land to *B* should he decide to sell. Only upon the initiative of *A* does the option or power in *B* arise.

11 The "right to buy at $4,000" must vest in the grantor either before or at the death of the survivor of the two grantees. Thus the interest is limited to lives in being at its creation and is within the scope of the common law rule against perpetuities.

12 The appellants argued that the provision in the deed should be interpreted as requiring a positive act on the part of the grantees, "wishing not to use the property as a home"; thus, the provision would lapse at their deaths. However, the court construed the provision as a negative one so that the death of the grantees automatically gave the grantor the right to repurchase.

13 Note 3 supra.

14 It is question begging to say that a pre-emptive provision is governed by the common law rules prohibiting restraints on alienation because it is a "direct" restraint. A much more logical approach is to ask whether, in practice, a pre-emptive provision at a fixed price does tend to restrain alienation seriously. It has been so held. In re Rosher, 26 Ch. D. 801 (1884); De Peyster v. Michael, 6 N.Y. 467 (1852); 4 PROPERTY RESTATEMENT §413, comment *f* (1944). It has also been said that this is not the law in Michigan. Fratcher, "Restraints on Alienation of Legal Interests in Michigan Property," 50 MICH. L. REV. 675 at 735 (1952). The Michigan Supreme Court has held that a pre-emptive provision is not a direct restraint on alienation, but these decisions were handed down while the "two lives" statute was in effect. Windiate v. Lorman, supra note 8; Windiate

grantees were required to give the grantor the right to purchase for $4,000 whenever they should decide to sell, and if the market price were more than $4,000, this would certainly be a restraint on alienation because it would prevent the owners from selling at a profit.[16] In the principal case, the option arises not on the decision to sell, but on the decision of the owners not to use the property as a home. This, says the majority, is not pre-emption at all.[17] It is difficult for the writer to see that these two conditions are not identical in practical operation. The only possible case in which the decision not to use the property as a home would not coincide with the decision to sell, would be if the grantees sold to a third party and then leased back from him. To say that this is an option to arise on a condition precedent and not a pre-emptive provision rests on this difference.

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v. Leland, supra note 8. That a pre-emptive provision is a very real restraint on alienation is indicated by the attempted use of such provisions to prevent alienation to Negroes. McDermott, "The Effects of the Rule in the Modern Shelley's Case," 13 UNIV. PITT. L. REV. 647 at 661 (1952).

[15] It is true that an option may arise only upon the happening of a condition precedent, and that it is good if this event must occur within the period of the rule against perpetuities. In one sense it could also be said that a pre-emptive provision arises only upon the happening of a condition precedent, i.e., the decision of the owner to sell. However, one normally thinks in terms of a condition which is independent or beyond the control of the parties involved. This is not the case here, for the "event" or condition is completely within the control of one party.

[16] This is the English view set forth by Pearson, J., in In re Rosher, 26 Ch. D. 801 (1884), and followed by the *Restatement*. 4 PROPERTY RESTATEMENT §413, comment *f* (1944). See also Kershner v. Hurlburt, (Mo. 1955) 277 S.W. (2d) 619.

[17] Principal case at 357.