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FUTURE INTERESTS-COMMON LAW RULE AGAINST PERPETUITIES NOT IN FORCE IN IDAHO-APPLICABILITY OF STATUTE AGAINST SUSPENSION OF POWER OF ALIENATION TO OPTION CONTRACT

Howard W. Haftel S.Ed.
University of Michigan Law School

FUTURE INTERESTS—COMMON LAW RULE AGAINST PERPETUITIES NOT IN FORCE IN IDAHO—APPLICABILITY OF STATUTE AGAINST SUSPENSION OF POWER OF ALIENATION TO OPTION CONTRACT—Seller contracted to give purchaser sixty days notice of his intention to sell certain real property, purchaser to have power, in that event, to buy the property for a stated price within the sixty days. If the purchaser failed to exercise the option, seller was then free to convey the property to anyone. Alleging that seller had conveyed the land to others without notice to him, purchaser sued to have this conveyance set aside and the option specifically enforced. The lower court sustained a general demurrer to the complaint. On appeal, *held,* reversed. The statutory rule against restraints on alienation[1] has replaced the common law rule against perpetuities in Idaho. The option contract in this case does not violate the statutory rule. *Locklear v. Tucker,* (Idaho 1949) 203 P. (2d) 380.

Since Idaho adopted its statutory rule against restraints on alienation from California,[2] it is not surprising that both court and counsel in the principal case look to California law for an indication whether the statutory rule eliminates the common law rule against perpetuities. Although there was early dicta by the California courts that the common law rule was displaced by the statutes,[3] recent intermediate appellate court decisions hold that the common law rule is in force in California.[4] The court in the principal case relies heavily upon the early California dicta, apparently unaware of the later decisions. The holding in the principal case that the statutory rule supplants the common law rule against perpetuities is, nevertheless, in accord with the overwhelming weight of authority.[5] Where the rule against perpetuities is in force, an option to purchase land must conform to the allowable period of the rule.[6] Because the purchaser and seller of

[1] Idaho Code (1948) §55-111. This provision was adopted in 1887 from California, which had borrowed it from New York in 1872. See 4 PROPERTY RESTATEMENT, Appx., c. B, ¶39 (1944).

[2] Ibid. The California statute remains substantially the same, though the allowable period was changed in 1917. See Cal. Civil Code (Deering, 1941) §715.

[3] Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919); Blakeman v. Miller, 136 Cal. 138, 68 P. 587 (1902); cases cited in Re Sahlender's Estate, (Cal. App. 1948) 201 P. (2d) 69 at 75.

[4] Dallapi v. Campbell, 45 Cal. App. (2d) 541, 114 P. (2d) 646 (1941); In re Sahlender's Estate, (Cal. App. 1948) 201 P. (2d) 69, 47 MICH. L.REV. 1020 (1949). The above decisions are grounded in part on the California constitutional prohibition of perpetuities. There is no such provision in the Idaho constitution. See 4 PROPERTY RESTATEMENT, Appx., c. B, ¶39 (1944). Cf. In re Micheletti's Estate, 24 Cal. (2d) 904, 151 P. (2d) 833 (1944), where the court stated that California law on this point is uncertain.

[5] Rodey v. Stotz, 280 Mich. 90, 273 N.W. 404 (1937); Buck v. Walker, 115 Minn. 239, 132 N.W. 205 (1911). In both Michigan and Minnesota the common law rule against perpetuities is applicable to future interests in personalty, since the statutes pertain only to realty. See Palms v. Palms, 68 Mich. 355, 36 N.W. 419 at 434 (1888); In re Tower's Estate, 49 Minn. 371, 52 N.W. 27 (1892). See also 4 PROPERTY RESTATEMENT, Appx., c. B, ¶¶3, 39, 50, 59 (1944).

[6] 2 SIMES, FUTURE INTERESTS §512 (1936); 4 PROPERTY RESTATEMENT, §§393 et seq. (1944); GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §330 (1942).

an option can unite and convey an absolute fee, however, these devices have generally been held to be outside the scope of statutory rules against restraints on alienation.[7] An additional feature of the principal case is the court's failure to distinguish the option here involved (frequently termed a preemptive option), from ordinary purchase options. A preemptive option differs markedly from ordinary options[8] because it effects a more substantial curtailment of alienability.[9] Such an option could logically be invalidated, regardless of duration, as a direct restraint on alienation.[10] Nevertheless, courts have ordinarily classed preemptive options with ordinary options as indirect restraints on alienation.[11]

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[7] Buck v. Walker, 115 Minn. 239, 132 N.W. 205 (1911); Blakeman v. Miller, 136 Cal. 138, 68 P. 587 (1902); Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926). Cf. Bay Shore Motors v. Baker, (Cal. App. 1949) 202 P. (2d) 865. See also 2 SIMES, FUTURE INTERESTS §§564, 565 (1936). Nor have such options been required to comply with the New York statutory rule against remoteness of vesting. N.Y. Real Property Law (McKinney, 1945) §50. In re City of New York, 246 N.Y. 1 at 26, 157 N.E. 911 (1927); In re Hauser's Will, 50 N.Y.S. (2d) 709 (1944).

[8] An ordinary option gives the optionee the unqualified privilege to purchase whenever he chooses for a fixed price or market price. A preemptive option is qualified by the condition that it may be exercised only if the owner wishes to sell. See 4 PROPERTY RESTATEMENT §§393f, 413(2) (1944); 2 SIMES, FUTURE INTERESTS §462 (1936).

[9] A preemptive option to buy at a fixed price will always deter sale of the land when that price is below market value. The seller will not wish to sell below market value, and the purchaser's option is conditioned on seller's wish to sell. See In re Rosher, 26 Ch. D. 801 (1884); 4 PROPERTY RESTATEMENT §413f (1944).

[10] 4 PROPERTY RESTATEMENT §413f, illustr. 2 (1944), seems to take the view that a preemptive option to purchase for a fixed price (such as that in the principal case) is invalid as a direct restraint on alienation. See also In re Rosher, 26 Ch. D. 801 (1884); 2 SIMES, FUTURE INTERESTS §462 (1936); Maynard v. Polhemus, 74 Cal. 141, 15 P. 451 (1887).

[11] Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926); Maddox v. Keeler, 296 Ky. 440, 177 S.W. (2d) 568 (1944); Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421 (1879).