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Property: Restraints on Alienation

Arthur M. Schaffer

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On what then did the court in the principal case base its decision? The court mentioned nothing about the reasonableness of the officer's actions at the time of the search. It also mentioned nothing about whether the second search was executed under a void warrant. It stated merely that such a search was an unreasonable search and seizure in itself, regardless of the surrounding facts. It therefore may be assumed that the court decided the issue presented on the basis of general policy as the courts do with regard to invalid warrants; thus putting a general limitation on the power of officers to make second searches regardless of what reason such officers may have for so doing.

Herbert Kessler.

PROPERTY: RESTRAINTS ON ALIENATION.—A prohibition in a grant of real property that the land shall not be transferred was declared void in a recent California case.¹ The title in fee simple to the property had been vested in William S. Hart by mesne conveyances from the original owner, who had acquired the property in 1839 by grant from the Provisional Governor of the Department of California, then part of the Republic of Mexico. This grant provided in part: "Neither the grantee nor his heirs shall divide or transfer that which is adjudicated to him, or impose upon it ground rents, entailment, surety, mortgage or any other encumbrances even for a pious cause or transfer it in mortmain."

William S. Hart died in June, 1946, devising said real property to the County of Los Angeles upon condition that the property shall be forever used and maintained by the county as a public park. Decedent's son sought a judgment declaring that this provision in his father's will was prohibited by the clause restraining alienation in the original grant, and therefore void. The son also sought a judgment declaring that the title to said property was now vested in him as sole heir. Neither judgment was granted.

Under the Treaty of Guadalupe Hidalgo,² whereby all property now comprising the State of California was ceded to the United States by the Republic of Mexico, the United States was obligated to respect and protect the land titles of persons who then owned land in the conquered territory. The court held that any question as to the title of property, acquired prior to the conquest of California by the United States, was to be determined by reference to Mexican law. Such a determination had been made in 1875, when in accordance with "An Act to Ascertain and Settle the Private Land Claims in the State of California,"³ a confirmatory patent had been issued by the government of the United States to the heirs of the original grantee. The court, in the principal case, further held that any question as to the validity of restraints or restrictions placed upon the property, acquired prior to the conquest, was, under the decision in *Fremont v. United States*,⁴ to be determined according to American law.

The District Court of Appeals then held the clause restraining alienation in the original grant to be a condition subsequent and void under section 711 of the California Civil Code, which provides that, "Conditions restraining alienation, when repugnant to the interest created, are void." The court, having held the restriction to be a condition subsequent, had no alternative but to rule the condition void, in view of the concise and forceful language of section 711. The result of the decision was both

¹Hart v. Gould, 119 A.C.A. 287, 259 P.2d 49 (1953).

²9 STAT. 922 (1848).

³9 STAT. 631 (1851).

⁴17 How. 542, 15 L.Ed. 241 (U.S. 1854).

correct and desirable. But the same result could have been reached by the court if it had simply held the clause restraining alienation to be a mere disabling restraint and therefore unenforceable.⁵

The distinction between a condition subsequent and a disabling restraint is that in the former a power is retained by the conveyor or his successor in interest to enter and terminate the estate granted upon the occurrence of a stated event,⁶ while a disabling restraint is an attempt by an otherwise effective conveyance to cause a later conveyance to be void.⁷

Is there any form of limitation by which a grantor of an estate in fee can prevent its alienation as the original grantor here attempted to do? Suppose that the grantor had used the specific language necessary to create a fee simple upon condition subsequent:⁸ "I hereby grant Blackacre to B and his heirs upon the express condition that it not be sold or transferred, and if it be sold or transferred, the grantor, his heirs or assigns shall have the right to re-enter and terminate the grantee's estate." Or suppose that the grantor had used the specific language necessary to create a fee simple determinable:⁹ "I hereby grant Blackacre to B and his heirs so long as it is not sold or transferred and if it be sold or transferred, Blackacre shall immediately revert to the grantor, his heirs or assigns." The restrictions in both of these limitations would be void as any absolute restraint on the alienation of an estate in fee simple is invalid if such estate would be infeasible but for such restraint.¹⁰

Theoretically neither of the above limitations falls squarely within the provisions of Civil Code Section 711, which by its terms applies only to "conditions restraining alienation, when repugnant to the interest created." Such conditions are not repugnant to, but are integral parts of, the estate granted.¹¹

If repugnancy were the reason for holding conditions restraining alienation void, then logically section 711 should apply with equal force to such conditions when attached to grants of all types of estates, whether in fee, for life or for years. But life estates or estates for years, either legal or equitable, in real or personal property, may be created subject to conditions against alienation, and have been held valid and enforceable.¹²

Logically, a more sound basis on which to rest the California decisions and the interpretation of Civil Code Section 711 is public policy and convenience to facilitate the exchange of property, to simplify the incidents attached to its ownership and to free it from restrictions which are not only injurious to the possessor, but to the public at large.¹³

The principal case is another illustration of the fact that under the existing public policy as manifested by the laws of property there is no way in which a valid unqualified restraint on alienation can be imposed on an estate in fee.

ARTHUR M. SCHAFFER.

⁵McCormick Harvesting Machine Co. v. Gates, 75 Iowa 343, 39 N.W. 657 (1888); RESTATEMENT, PROPERTY § 405 (1944).

⁶RESTATEMENT, PROPERTY § 45 (1944).

⁷*Id.* § 404.

⁸*Id.* § 45, illustration 1.

⁹*Id.* § 44, illustration 1.

¹⁰Title Guarantee & Trust Co. v. Garrott, 42 Cal.App. 152, 183 Pac. 470 (1919); Fraser and Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 HAST. L.J. 101 (1953); RESTATEMENT, PROPERTY § 406 (1944).

¹¹Firth v. Marovich, 160 Cal. 257, 116 Pac. 729 (1911).

¹²Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465 (1894); Conger v. Lowe, 124 Ind. 368, 24 N.E. 889, 9 L.R.A. 165 (1890).

¹³Title Guarantee and Trust Co. v. Garrott, *supra* note 10; 9 Cal.Jur., Deeds § 207 (1923).

