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Restraints on Alienation in Missouri

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RESTRAINTS ON ALIENATION IN MISSOURI

INTRODUCTION

Restraints on alienation are sought to be effected in two ways:

First: No attempt is made to attach any character of inalienability to the estate, but it is given on the condition that it shall not be alienated, or until it is alienated; that is, it is subject either to a condition for the breach of which the grantor may enter, or to a limitation which, upon alienation, puts an end to it without entry. The owner of the estate may assign it as he pleases; he is not compelled to keep it against his will; but on assignment it is forfeited, or liable to forfeiture.

Second: The estate may be declared inalienable. If this declaration is legally valid, then the holder of the estate cannot assign it; any attempted assignment is inoperative; the estate remains with him; he cannot rid himself of it.

The Rule against Perpetuities is sometimes spoken of as aimed at restraints on alienation. In a sense this is true. But as Professor Gray says "speaking strictly, a future interest is not a restraint on the alienation of an estate, unless the contingency upon which the future interest depends is itself the alienation of the estate."

Valid options to purchase, which are properly acknowledged and recorded may, in a certain sense, be considered restraints on alienation. They do not however prevent alienation subject to the option and have been held valid in Missouri[1]. Options will not be here further considered.

Under each of the methods of restraining alienation the decisions may be examined under the divisions, (A) Estates in fee simple, (B) Life Estates, (C) Estates for years. The cases may also be classified into those dealing with legal estates or interests and those dealing with equitable estates or interests.

It is here proposed to examine the Missouri decisions and to set forth the present state of the law on the subject in Missouri. We shall consider the decisions under the divisions (A) Estates in fee simple, (B) Life Estates, (C) Estates for years,—first considering legal estates, so classified. No separate consideration will be undertaken of forfeiture for alienation as distinguished from restraints on alienation, the two subjects being considered together.

We shall then under the same classification, consider equitable estates; and here the discussion will be of (D) Trusts of absolute and indefeasable interests, and (E) Inalienable Life Estates usually referred to as "Spendthrift Trusts."

The condition, conditional limitation or restraint may be either (1) against alienation generally, (2) against alienation within a particular time, (3) against alienation to particular persons or classes, (4) against alienation in a particular manner.

Closely associated with the subject of forfeiture for alienation is the question of (F) the validity of executory limitations attached to a fee simple or absolute interest in personalty where the first taker is given a power of disposition; a forfeitture in default of alienation may somewhat briefly characterize the situation. We shall consider the state of the decisions in Missouri upon this subject.

Finally we shall consider (G) the validity of restraints on alienation of the property of married women.

The condition of the authorities in general is summarized in Gray "Restraints on Alienation" (2nd Ed.).

1. Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494 (1908). This case held valid an option to purchase during the lives of the grantors.

LEGAL ESTATES IN FEE SIMPLE

No case in Missouri has been found in which an absolute condition, or conditional limitation, against alienation of an estate in fee simple has been considered. The decisions on limited restraints presently to be considered however leave no doubt that any such absolute restriction would be held invalid.

In three early cases, (*Dougal v. Fryer*[2], *Collins v. Clamorgan*[3], *and Clamorgan v. Lane*[4]) where the Court was considering a deed which restrained alienation by the grantee (a woman) before the grantee became twenty-five years of age, a restraint limited as to that time was held valid. The Court in subsequent cases has held that these decisions were to be explained by the fact that the grant was made while the Spanish Law was in effect in the territory of Missouri. By that law a woman reached her majority at age twenty-five. So that by the law in force at the time of the grant, the restraint in effect was only a restraint during minority.

In *McDowell v. Brown*[5] an absolute restraint on alienation of an estate in fee simple (but with no provision for forfeiture) was held valid. Notwithstanding some remarks in *Lampert v. Haydel*,[6] (a case involving consideration of a "spendthrift trust", indicating that the grant in *McDowell v. Brown* might have been held to create a life estate in the grantee with remainder to her children), since Kessner *v. Phillips*[7] it must be considered that restraints on alienation of a fee simple, however effected and for whatever length of time, are void.

In *Kessner v. Phillips, supra*, a provision in a deed that the grantee should not alien and that the property should be subject to the grant ee's debts for a period of thirty years and providing for forfeiture in case of alienation or attempt to alienate, was held void.

In *Haeussler v. The Mo. Iron Co.*,[8] it was held that a general perpetual agreement between co-tenants that the land should not be partitioned without the consent of all was void. The Court recognized that the agreement put no restriction on the alienation of the respective undivided interests.

In *Koehler v. Rowland*[9] a condition in a deed providing for a forfeiture of the estate if the premises were rented or sold to negroes within a period of twenty-five years, was held not to be an unlawful restraint on alienation.

In *Pratt v. Saline Valley Ry. Co.*,[10] the Court held that while a restraint on alienation for a period of fifty years was unlawful, such provision could be considered, along with other parts of the deed, as showing the intention of the testator to create a life estate rather than a fee.

It may be safely said that either absolute restraints on alienation or restraints limited as to time, however effected, are void in Missouri. While there are no decisions on the subject, it may be considered that the attempted restraint is void whether it arises in the case of attempted alienation by deed, mortgage or otherwise.

Limited restraints as to time against alienation to a particular class are valid; and while there are no decisions on the subject it may be considered that the same rule would apply to restraints against alienation to particular persons. No cases

2. 3 Mo. 40 (1831).
3. 5 Mo. 272 (1838).
4. 9 Mo. 447 (1845).
5. 21 Mo. 57 (1855).
6. 96 Mo. 439 (1888).
7. 189 Mo. 515, 88 S. W. 66 (1905).
8. 110 Mo. 188, 19 S. W. 75 (1892).
9. 275 Mo. 573, 205 S. W. 217 (1918).
10. 130 Mo. App. 175, 108 S. W. 1099 (1908).

have been found involving a condition or restraint on alienation except to certain specified persons. Their validity is doubtful. They would probably be held invalid if the restriction limited alienation very materially.

LEGAL LIFE ESTATES

According to the weight of authority in England and America a provision for forfeiture for alienation, voluntary or involuntary, of a legal life estate, where there is a limitation over, is valid. A restraint on alienation under the same circumstances is invalid.

No decisions of the Missouri Supreme Court have been found in which either situation was directly in judgment. From some dicta found in the decisions dealing with "spendthrift trusts" it might be inferred that our courts would sustain both a forfeiture for alienation and a restraint on alienation of a legal life estate.[11]

In *Kessner v. Phillips*,[12] however, it is quite clearly indicated (by way of dictum) that a restraint on alienation can be effected only through the means of a "spendthrift trust."[13] This dictum was followed by the Springfield Court of Appeals in *Millard v. Beaumont*[14]. And from the somewhat numerous decisions on "Spendthrift trusts", it would appear that the Bar of Missouri feels that restraints on alienation of life estates may be accomplished with certainty only by means of a "spendthrift trust".

ESTATES FOR YEARS

The rule is well settled that assignment of leases may be absolutely restrained. Such is the rule in Missouri.[15]

The Missouri decisions have dealt not with the question of the validity of restraint on or forfeiture for assignment, but most largely deal with incidental problems. Some illustrative situations may be given.

The Missouri decisions distinguish between an assignment and a sub-letting[16], so that if restrictions on sub-letting are desired, the lease should expressly so provide.

A stipulation against assignment without the consent of the lessor, in a lease not under seal, does not extend beyond the immediate parties and does not therefore include assignment by the assignee[17]. If later assignment by the first assignee is desired to be prohibited, the lease should expressly so provide.

If no penalty or forfeiture is provided for in case of a breach of a stipulation against sub-letting, only damages or an injunction may be had[18].

A breach of stipulation against assignment may be orally waived, notwithstanding the provisions of the Statute of Frauds[19].

The appellate courts of Missouri have not passed upon the question whether bankruptcy operates as a forfeiture, within the meaning of a stipulation for forfeiture upon alienation. Hence bankruptcy (either voluntary or involuntary) should

11. See Lampert v. Haydel, 96 Mo. l. c. 445, 450, 451 (1888); Kessner v. Phillips, 189 Mo. l. c. 523, 524, 88 S. W. 66 (1905).
12. 189 Mo. 515, 88 S. W. 66 (1905).
13. 189 Mo. l. c. 525, 88 S. W. 66 (1905).
14. 194 Mo. App. 69, 185 S. W. 547 (1916).
15. Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo App. 229, 113 S. W. 253 (1908).
16. See Moore v. Guardian Trust Company., 173 Mo. 218, 73 S. W. 143 (1902).
17. See Dougherty v. Matthews, 35 Mo. 520 (1865).
18. Knoepker v. Redel, 116 Mo. App. 62, 92 S. W. 171 (1905).
19. Demeris v. Thompson, 215 Mo. App. 404, 257 S. W. 159 (1924).

expressly be made ground for forfeiture. The decisions have not passed upon the validity of such provisions, but they have however been generally sustained. Such a provision was upheld by Judge Faris of the United States District Court for the Eastern District of Missouri in an oral opinion rendered April 2, 1924, on certain interventions in the bankruptcy proceedings of the Railway Exchange Building Company.[20]

ACTIVE TRUSTS OF ABSOLUTE AND INDEFEASIBLE INTERESTS.

In *Claflin v. Claflin*[21], a case decided by the Supreme Judicial Court of Massachusetts, a testator by will and codicil devised and bequeathed the residue of his estate to trustees to sell and dispose of the same and pay one-third of the proceeds to his wife, one-third of the proceeds to his son Clarence and the remaining one-third to his son Adelbert as follows:

$10,000 when he became of the age of twenty-one years, $10,000 when he became of the age of twenty-five years and the balance when he became of the age of thirty years. There were no contingencies or gifts over in the event Adelbert did not reach any of the respective ages.

Adelbert, upon reaching the age of twenty-one years, was paid the sum of $10,000. Before he became twenty-five years of age, he filed his bill in equity to require the trustees to surrender to him the balance of the fund.

The Court held the trust an active one and the interest of the beneficiary vested and absolute and no other person interested in it. The Court refused to order the balance of the fund to be surrendered to the plaintiff. The Court did not hold that the beneficiary of the equitable fee could not alienate his equitable interest or that his equitable interest would not be subjected to the payment of his debts.

In a subsequent case[22] the Supreme Judicial Court of Massachusetts held valid a restraint upon the alienation of an equitable fee.

The Claflin case does not of course directly restrain alienation of the equitable fee, but it, to some exent, must necessarily make alienation more difficult, and for that reason the rule may be properly considered in our discussion of restraints on alienation.

We now propose to determine whether the doctrines of either or both of these cases is recognized in Missouri.

The situation is not one of a mere dry trust uniformly held to be executed by the statute of uses[23]. Nor is it a trust impossible of execution or a trust whose purpose has been accomplished.[24] Cases where there appears no good reason for the continuance of the trust and where all beneficiaries, being sui juris, join with the trustee in terminating the trust or in petitioning a Court of Equity for a termination, are, of course, to be distinguished.

The situation is different from that where the trustee himself is a beneficiary or has an interest[25], and from that where the interest of the beneficiary is contingent upon his reaching a certain age with a gift over if he does not. Likewise decisions like those in *Maxwell v. Growney*[26], and *Easton v. Demuth*,[27] where the trustee takes the

20. In re Railway Exchange Bldg. Co., bankrupt, No. 3820.
21. 149 Mass. 19, 20 N. E. 454 (1889).
22. Boston Safe Deposit and Trust Co. v. Collier, 222 Mass. 390, 111 N. E. 163 (1916).
23. Jones v. Jones, 223 Mo. 424, 123 S. W. 29 (1909).
24. See Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151 (1904).
25. See Whiteley v. Babcock, 249 S. W. 930 (Mo.) (1923).
26. 279 Mo. 113, 213 S. W. 427 (1919).
27. 179 Mo. App. 722, 162 S. W. 294 (1913).

property merely for support of the beneficiary and there is no provision in the trust instrument in terms giving the beneficiary an equitable fee, involve questions different from that now under discussion.

We are concerned with the case of an active trust sought to be terminated at the instance of the sole beneficiary of the absolute equitable interest without the consent of the trustee and against the expressed desire of the settlor.

The Kansas City Court of Appeals, in *Rector v. Dalby*[28], expressly refused to follow the doctrine of the Claflin case. In an early case,[29] the St. Louis Court of Appeals without, however, referring to the Claflin case, decided contrary to its doctrine. By way of dictim in a later case, [30] the St. Louis Court of Appeals cited *Claflin v. Claflin* as authority for the proposition that an active trust was not to be terminated at the will of the *cestui que trust.* Such proposition was not involved in the case, as the Court construed the will to vest no absolute interest in the *cestui que trust.*

In *Owen v. Gilchrist*[31] the trust was created by quit-claim deed of a corporation to one of its stockholders upon his declaration of trust that he took for the purposes of selling the lands and distributing the proceeds to the stockholders according to their interests. While the Court perhaps too broadly states the rule of law applicable the case was well ruled because the trust was not only an active one, but the trustee himself had a beneficial interest and was opposed to the termination of the trust, so that the case is one where the entire equitable interest in fee is not desirous of a termination.

In *Jones v. Jones*,[32] the testator, after stating the tendency of his sons to become dissipated and wild spendthrifts, gave to each of his two sons (by separate devises in identical language except as to the property described) a term of twenty years, with the further provision that if at the end of the term the sons (or either of them) should be capable of prudent control and ownership of the property and no further danger should exist or be apprehended on account of their wild and spendthrift tendencies, then they should be seized of the fee, and if not, then their estates to continue for life with gifts over. By another clause of the will the testator gave, to the sons jointly, other real estate to be held by them on the same conditions. The testator put his entire estate in the hands of trustees to hold for his sons on the terms mentioned. The Court was mainly concerned with the question whether the conditions were precedent or subsequent, and with the question of their validity, and held them subsequent and invalid and therefore the equitable fee to the lands in the separate devises and in the joint devise was vested in the sons. (In so holding the Court overlooked the contrary decision of *Jarboe v. Hey.*[33] In *Kerens v. St. Louis Trust Co.*,[34] the Court *en banc*, without however referring to *Jones v. Jones*, held such conditions to be precedent.)

The Court held that by reason of other terms of the will the trust as to the separate devises was dry and that both the legal and equitable title was vested in the sons. As to the property devised jointly to the sons (without any apparent contention on the part of the parties to the suit thereon, and without any discussion or mention of the Claflin doctrine) the Court said that after the end of the twenty

28. 98 Mo. App. 189, 71 S. W. 1078 (1902).
29. Dado v. Maguire, 71 Mo App. 641 (1897).
30. Easton v. Demuth, 179 Mo. App. 722, 162 S. W. 294 (1913).
31. 304 Mo. 330, 263 S. W. 423 (1924).
32. 223 Mo. 424, 123 S. W. 29 (1909).
33. 122 Mo. 341 (1894).
34. 283 Mo. 601, 223 S. W. 645 (1920).

years' term the property (devised jointly) would be discharged of the trust and the sons thenceforward would be the absolute owners in fee.[35]

In *Cornet v. Cornet*[36] the testator giving an equitable fee to a wayward son, probably considered that he was attaching spendthrift provisions thereto. The trustee (another son) being advised that the attempt to raise a spendthrift trust was ineffectual, procured the wayward son to execute a conveyance of his interest to the trustee upon spendthrift provisions (apparently overlooking the doctrine presently to be noted that a person cannot create a spendthrift trust to himself.)

A number of years thereafter the wayward son brought his bill in equity to set aside his conveyance and to remove his brother as trustee of the equitable estate given him by his father's will. The Court was mainly concerned with the construction of the will as to the estate given to the wayward son, and the alleged fraudulent procurement of the deed to the brother (trustee) with spendthrift provisions. The Court held the wayward son took an equitable fee (no consideration was given as to whether it was subject to a valid executory devise); that the deed to his brother was procured by fraud and should be canceled and that the brother should be removed as trustee and a new trustee appointed by the Circuit Court. The Court appears not to have considered whether the wayward son was entitled to receive his estate (no such relief was asked) or whether the doctrine of the Claflin case was applicable, but it did provide for a continuation of the trust. Since the Court did not indicate there was any valid executory devise, it has, as in the case of *Jones v. Jones*, *supra*, without, however, considering the question, followed the doctrine of the Claflin case.

In the Jones case the question of the alienation of the equitable fee was in no way involved. In the Cornett case the Court held that no valid restraint on alienation has been provided by the testator. Therefore, the doctrine of the case of Boston Safe Deposit & Trust Company, was not involved in either of these cases.

In *Dwyer v. St. Louis Union trust Company*,[37] a testator left property to a trustee in trust for his daughter, to pay over the income and profits thereof to his daughter for the support of herself and her family and on the daughter's death the property and any earnings undisposed of to be divided equally among the children of the daughter living at the time of the daughter's death; the trust for the children to continue until the youngest reached the age of twenty-one. The daughter and her five children (all of whom were of age and to whom she had conveyed her interest in the trust property) filed their bill to have the trust terminated. The proof showed that there were several grandchildren of the daughter.

The Court held that there was no vested interest in the daughter's children during her life and therefore properly held that the contingency of their interests alone was sufficient reason for not terminating the trust. All parties interested in the trust had not and by reason of the contingency of the interest could not consent to the termination of the trust.

However, the Court went further (and without referring to the Claflin case) held that the testator's desires were clearly indicated that a trustee of his own choosing should husband the property and see that his daughter got the profits to the day of her death and that (the trust being an active one and not fully accomplished) equity would not interfere with his plainly expressed desire. The Court did not indicate that the daughter might not dispose of her interest. There was (of course) no legal obstacle to the testator restraining such disposition, and the Court might

35. 223 Mo. l. c. 454, 123 S. W. 29 (1909).
36. 248 Mo. 184, 154 S. W. 121 (1912).
37. 286 Mo. 481, 228 S. W. 1068 (1921).

(we do not believe it should) as we shall presently see, find such a restraint implied in the gift.

The decision of the case did not require the application of (and the Court has not applied) the doctrine of the Claflin case. It may, however, be some indication that the Court would, in a case requiring it, apply that doctrine.

In *Shaller v. Mississippi Valley Trust Company*,[38] certain beneficiaries of a testamentary trust, the time for the termination of which had not arrived, asked for a decree ascertaining that they had certain vested interests in the trust estate, and terminating the trust as to their interests.

The Court, after holding the plaintiffs had certain vested interests, refused to terminate the trust, holding the plaintiffs had a vested interest in the entire trust property and that the trust would not be terminated unless all the beneficiaries consent. The Court went further (though it was not necessary to the decision of the issues) and added "and not even then, if the trust be active, and to end it would be to thwart the wish and intention of the testator."

It would seem that so far as authority is concerned, the Supreme Court is free in a case presenting the question either to adopt or reject the doctrine of the Claflin case. In view of the holdings of the Court and the observations of the Court just noted, it is probable that in the case of testamentary trusts, and trusts by deed which constitute gifts to the beneficiaries, by the settlor, the Court would adopt the doctrine of the Claflin case. The Court has, with very few exceptions (for example where the Court has felt the rule applicable was a rule of property) been very diligent in effectuating the intention of testators and settlors. Such has been the case not alone because of the Statute, (R. S. Mo. 1909 Sec. 555), but because the Court has felt that the technical rules of the English cases should not be followed where they would require a decision against the intent of testators or settlors. The Court would seem to be governed by sound policy if it should in these cases adopt the doctrine of the Claflin case. As to active trusts created by or which may be held to be created by the acts of the beneficiary or beneficiaries, or which may result from operation of law, it would seem that the Court should hold that they could be terminated by the sole beneficiary or beneficiaries (all being sui juris) although the time for termination had not yet arrived.

The adoption of the doctrine of the Claflin case, does not necessitate the holding that the equitable fee of the beneficiary may be made inalienable. Here the intent of the testator or settlor comes in conflict with the public policy (which has been recognized by our Supreme Court) that declares that where a fee is given, its alienation may not be restrained. No case upon the point has been found in our appellate decisions, but from the decisions on "spendthrift trusts" (presently to be noted) it might be inferred that the Supreme Court would hold that the alienation of an equitable fee could not be restrained. Such was the holding of Judges Dillon and Kreckel of the United States Circuit Court for the District of Missouri, in *Sanford v. Lackland*.[39]

SPENDTHRIFT TRUSTS (INALIENABLE EQUITABLE LIFE ESTATES).

While the English and some American Courts have held valid a provision for forfeiture of an equitable life estate on alienation or attempted alienation (voluntary or involuntary), the English Courts (uniformly) and some American Courts have

38. 3 S. W. (2d) 726 (1928).
39. 2 Dill. 6; Fed. Cas. No. 12312 (1871).

declared invalid restraints upon alienation of equitable life estates. (The English decisions hold that where property is given in trust for the benefit of a person, but there is no right which he can enforce against the trustee and the trustee has an absolute discretion as to the use of the property for the benefit of such person, he has no estate which he can alienate or which is subject to the rights of his creditors. *Easton v. Demuth*,[40] *Maxwell v. Growney*[41] and *Jarboe v. Hey*,[42] supra, are probably Missouri decisions of this type. This sort of a trust is to be distinguished from a "spendthrift trust".)

Equitable life estates with restraints (as distinguished from forfeiture) on alienation are properly referred to as "spendthrift trusts."

In *McIlvaine v. Smith*[43] our Supreme Court, by way of dictum, indicated that in Missouri a "spendthrift trust" was invalid. (The actual decision as we shall presently note was correct. In *Montague v. Crane*,[44] a memorandum opinion of the St. Louis Court of Appeals, a restraint on alienation was held valid. It was not shown whether there was an equitable fee or an equitable life estate.)

Some twenty years later in two cases decided at the same term, *Lampert v. Haydel*[45] and *Partridge v. Cavender*,[46] the Court (after a comprehensive review of the authorities) upheld the validity of "spendthrift trusts."

Since these decisions the validity of "spendthrift trusts" has been considered well establishedand the adjudicated cases have dealt with the problem of whether the language of the instrument was sufficient to create a "spendthrift trust."

In *Lampert v. Haydel, supra*, the devise was in trust for the testator's sons, to enjoy the rents, issues and profits during their lives (held by the Court to be an equitable life estate) and the testator's object was expressed as follows:—"to secure to his children a certain annual income beyond the accident of fortune and bad management on their part and to take from them the power of disposing of the same or of creating a lien thereon or of making the same liable, in any way for their debts."

In *Partridge v. Cavender, supra*, the restraint was expressed as follows, "without the said Robert having any power to sell, assign or pledge the same previous to the payment thereof to him, as aforesaid, by way of anticipation."

In *Kingman v. Winchell*[47] there was a bequest to a trustee in trust for testator's son (with power of sale, investment, etc.) and once each year to pay the whole income to the son during life and thereafter to his children. The Court held no "spendthrift trust" had been created. The case would seem to have been well decided.

In *Schoeneich v. Field*[48] there appears to be neither expressed or implied restraint on alienation. However, the Court held that the trust being an active one the income was not subject to the claims of creditors. This holding was expressly overruled in *Heaton v. Dickson, infra*.

In *Kessner v. Phillips*[49] the Court correctly held that no "spendthrift trust" had been created by a conveyance by deed with provision for forfeiture on and restraint of alienation for a period of twenty years. Judge Marshall, recognizing

40. See note 27.
41. See note 26.
42. See note 33.
43. 42 Mo. 45 (1867).
44. 12 Mo. App. 582 (1882).
45. 96 Mo. 439 (1888).
46. 96 Mo. 452 (1888).
47. 20 S. W. 296 (Mo.) (1892).
48. 73 Mo. App. 452 (1897).
49. 189 Mo. 515, 88 S. W. 66 (1905).

the validity of "spendthrift trusts" and speaking of the elements necessary to their creation, fails to appreciate the distinction of the English cases (where no interest at all is given to the object of the trust and in consequence there is nothing for creditors to reach) from the true "spendthrift trust" recognized in *Lampert v. Haydel.* The requirements necessary for the creation of a "spendthrift trust" are thus stated to be more stringent than the Court, both before and since *Kessner v. Phillips*, has required. In *Graham v. More*,[50] the Supreme Court in holding the will in question to have created a "spendthrift trust" applied the test of *Kessner v. Phillips.*

In *Heaton v. Dickson*,[51] the Court recognized the validity of "spendthrift trusts" and held that while such restraints on alienation are valid, alienation was not restrained unless express words to that effect are set forth or a clear and undoubted intention to the same end is manifested in the will. The Court quite correctly held that creditors of a cestui que trust are not prevented from proceeding against the income from the trust estate merely because the trust was an active one. (Overruling, expressly, *Schoeneich v. Field, supra.*)

In *Higbee v. Brockenbrough*[52] there was no express restraint on the alienation of the life estate, but the Court held that a restraint on alienation could be implied from the whole language of the will, and that such restraint should be implied from language of the entire will which was in question.

Having in mind our statute as to effect being given to the intent of the testator and the consistent practice of our Court in always seeking for such intent, the rule announced by Judge Blair would seem to be correct, but it would seem doubtful that the language of the will in question justified the Court in finding an implied restraint on the alienation of the life estate. Three Judges dissented from the opinion.

In *Gibson v. Gibson*[53] the Court recognized the rule of *Higbee v. Brockenbrough* and found an implied restraint on alienation in the will there involved. We fail to find in the Gibson will any language from which a restraint on alienation should be implied.

In *Kerens v. St. Louis Union Trust Company*[54] a trust was sustained which gave one-third of the residue of the testator's property in trust to pay a life income of $500.00 per month to his son (with provision against alienation, anticipation or liability for debts) and if at any time within the son's lifetime he passed five consecutive years of continued sobriety and good behavior and established such fact by proof to the satisfaction of the trustee, it should declare the trust terminated and pay over to the son the trust property, and if the trust was not so terminated, at the death of the son, to pay the trust property to the testator's daughters or their descendants. The condition as to the vesting of the fee in the son was held a condition precedent, and the corporate trustee was held possessed of the power to determine if the condition had been fulfilled.

There is one well recognized exception to the validity of "spendthrift trusts", and that is that a settlor may not establish such a trust for himself. The rule is recognized in Missouri.[55]

Gordon v. Tate[56] is a case that does not fall wholly into the class of cases we have

50. 189 S. W. 1186 (Mo.) (1916).
51. 153 Mo. App. 312, 133 S. W. 159 (1910).
52. 191 S. W. 994 (Mo.) (1917).
53. 280 Mo. 519, 219 S. W. 561 (1920).
54. 283 Mo. 601, 223 S. W. 645 (1920).
55. See Mc Ilvaine v. Smith, 42 Mo. 45 (1867), supra; Jamison v. Mississippi Valley Trust Co., 207 S. W. 788 (Mo.) (1918).
56. 284 S. W. 497 (Mo.) (1926).

considered under Subdivision D, or into the class of cases on "spendthrift trusts" just presently considered.

The defendant, Winifred Tate, under the will of her grandfather was held to have taken an equitable life estate and an equitable contingent remainder. Alienation was restrained and forfeiture provided for attempted alienation prior to the termination of the trust. The trust was to continue for 21 years after the death of the testator. After the death of the testator but before the expiration of the 21 years, plaintiff procured a judgment against defendant Winifred Tate and under execution her interest in the said property coming to her by her grandfather's will was sold to plaintiff. Sheriff's deed had been executed and delivered to plaintiff who brought ejectment. The Court held that restraints on the alienation of both the equitable life estate and the equitable contingent remainder were valid and neither interest could be levied upon or sold during the continuance of the trust. Such a holding was forecast by Professor Gray in the second edition of his "Restraints on Alienation of Property".

It is clear that we are not dealing with a restraint on an equitable fee. And the case is not alone that of an equitable life estate—the strict "spendthrift trust". The will goes further and seeks to establish a "spendthrift trust" in or restrain the alienation of a contingent remainder. The case involved a novel situation. The holding valid of the restraints on the alienation of the life estate is of course sustained by the uniform decisions since *Lampert v. Haydel, supra*, that such restraints violate no public policy recognized by our Courts.

As to the restraint on alienation of the equitable contingent remainder, the court's holding was announced with little statement of the reasons therefor. It seems to be based upon two points, *first* alienability is not a necessary attribute of a contingent remainder, and *second* there is no reason why a settlor of a trust could not provide that such an interest in his property should go to his beneficiary, with its alienation restrained.

The second point is perhaps the Court's expression of the proposition that no sound public policy was contravened by sustaining such restraint. We believe the decision to be sound. It cannot be attacked on the technical ground (sometimes urged as the reason for holding restraints on fee simple estates, either legal or equitable, invalid) that alienability is a necessary incident of a contingent remainder, because, as the court states, such is not the rule. Neither do we believe the restraint contravenes any sound public policy. Both reason and experience convince us that contingent interests, simply because of their contingency, will not sell at an execution sale for any considerable sum. The usual result is that the creditor becomes the purchaser for a nominal sum, so that if the restraints be held invalid, he has acquired the equitable contingent interest, without the discharge of any considerable part of his debt. It is beyond the power of the beneficiary of the contingent interest, (even if alienation were unrestrained) because of its contingent nature, to procure by its sale any substantial sum, wherewith to pay on his debt. If he had an equitable fee or equitable vested remainder the case is much different. An equitable vested fee can be accurately valued and much the same thing is true of an equitable remainder It would seem that there would be no great injustice in requiring the creditor to keep his judgment alive during the period of the restraints and if the equitable contingent remainder finally vests in holding that his judgment was then a valid lien on the property.

If restraint on alienation of an equitable life estate violates no sound public policy, and our courts have so held, we see no sound reason for a different holding

as to an equitable contingent interest. The restraint should and probably would be held valid only so long as the interest remained contingent.

It should be pointed out that there is nothing in the opinion that indicates the Court would hold valid, restraints upon the alienation of an equitable fee or an equitable vested remainder in fee.

By statute (R. S. Mo. 1919, Sec. 557) enacted in 1913, all restraints upon alienation and anticipation, whether by deed or will, in the nature of "spendthrift trusts" are declared invalid, as against the claims of any wife or children of the cestui que trust for support and against the claim of any wife for alimony.

VALIDITY OF EXECUTORY LIMITATIONS AFTER A FEE SIMPLE WHERE FIRST TAKER IS GIVEN A POWER OF DISPOSITION

This subject was considered in 1916 by Professor Hudson (University of Missouri Bulletin—Law Series 11). Professor Hudson's review of the cases indicates that they are conflicting, although the last decision (*Roth v. Rauschenbusch*)[57] is against the validity of such executory limitations. Professor Hudson criticises severely the decisions against the validity of such limitations and indicates that following the doctrine leads to an effort to find a means of construing the intention of the testator or settlor to give only a life estate to the first taker, which of course, if found, results in the validity of the executory limitation.

We shall consider the decisions subsequent to Professor Hudson's discussion.

In Middleton v. Dudding[58] there was a devise by will to the testator's wife as her absolute property, of "all of my real estate and personal property." By a later codicil the testator provided for gifts over if his wife should die "without a will or having disposed of the above property". The limitations over were held void without any consideration of the rule. Both the opinion of the Court and the dissenting opinion of Judge Woodson and the original opinion of Commissioner Railey (not adopted by the Court) seemed to assume that the executory limitations were void if the wife took a fee, and the question considered was whether the language of the codicil would cut down the absolute devise of the will to a life estate.

In *Hull v. Calvert*[59] the Court held that the power of disposition incident to a fee would not render void an executory devise on the death of the first taker without issue, but such effect would only follow from an absolute power of disposition given in express terms, or by necessary implication independent of the power of disposition merely incident to a fee. It would seem clear that the Court assumed the executory limitation would have been invalid, if there had been given an absolute power of disposition (to the first taker) either expressly or by implication.

In *Payne v. Reece*[60] the Court held that the will read as a whole gave a life estate in the first taker with power *to use and enjoy*, so that the question of the validity of an executory devise after a power of disposition was not considered. The Court expressly stated that its rule of decision was not in conflict with *Roth v. Rauschenbush, supra*. It also stated that the language of the will was different from that in Middleton *v. Dudding, supra*.

57. 173 Mo. 582, 73 S. W. 664 (1903).
58. 183 S. W. 443 (Mo.) (1916).
59. 286 Mo. 163, 226 S. W. 553 (1920).
60. 297 Mo. 54, 247 S. W. 1006 (1923).

In re: McClelland's Estate[61] involved a consideration of whether the gift to the first taker was a fee or a life estate and the Court held a fee was given. In considering the question the Court said: "The absolute power of disposition of the property of the testator which the will gives to the wife, standing alone, vests a fee in her which cannot be cut down by subsequent words or words not as clear and strong as those which would operate to devise a fee." This might be taken to be an indication that a clearly expressed executory limitation, following a fee with power of disposal, would be valid. If such was the intention of the learned justice, it should be remarked that such language was dicta and that a majority of the Court concurred in the result only of the opinion. The case cannot be considered as an authority on our problem.

It will thus be seen that our Supreme Court has shown no recent disposition to hold valid an executory devise following the giving of a fee with added power of disposition (either expressly given or implied from the language of the will). The Court has continued to consider in such cases whether a life estate only was given to the first taker, in which event, the devise over (there having been no disposition of the property) is of course valid. Each case is said to be dependent on the language of the will under consideration and it may be difficult to predict in any given case what the conclusion of the Court would be. Slight differences of phraseology have resulted in different decisions, although the Court, in all cases, has been applying the same rules of law.

PROPERTY OF MARRIED WOMEN.

The validity of "spendthrift trusts" being recognized, *a fortiori*, the alienation of an equitable life estate as the separate property of a married woman may be restrained.

It was settled in England by the case of *Tullet v. Armstrong*[62] that the separate estate of a married woman might be made inalienable during coverture. The inalienability expressed, as a gift for her sole and separate use, without more, would not restrain her power of alienation.

No Missouri decision has been found where restraints on the alienation of a married woman's separate estate were directly in judgment. There are a number of Missouri decisions (*Whitesides v. Cannon*;[63] *Kimm v. Weippert*;[64] *Ryland v. Banks*[65]) wherein the Court has indicated that express restraints on the alienation of a married woman's separate estate are valid.

In *Whitesides v. Cannon*, the wife's separate estate had been created by conveyance "for her sole and separate use" and "for the sole, separate and exclusive use of the wife, apart from any control whatever of her husband". Judge Leonard extensively reviewed the English and the early American cases, and held that "if the trust be for the wife's separate use, without more, she has an alienable estate independent of her husband, which she may dispose of as a femme sole owner; and that she has also the other power incident to property in general, the power of contracting debts to be paid out of it, and that, as creditors have no means at law of compelling the payment of these debts, equity will subject her separate property to that purpose"[66]. The court then continued as follows:

61. 257 S. W. 808 (Mo.) (1924).
62. 1 Beavan 1, 4 Mylne and Craig 377.
63. 23 Mo. 457 (1856).
64. 46 Mo. 532 (1870).
65. 151 Mo. 1, 51 S. W. 720 (1899).
66. 23 Mo. l. c. 470-471.

"The wife's separate estate being allowed, the question here is as to the meaning of the instrument creating the interest; and this does not touch the policy of the law, or the social institutions of the country, since it is admitted on all sides that the parties may confer or restrain the disposing power of the wife during coverture *** and it is enough, we think, to restrain the owner in the exercise of the undoubted rights of property when the donor declares such to be his intention.[67]

In *Kimm v. Weippert*, the separate estate of the wife had been created by a conveyance "to have and to hold, together with all the rights, etc. to the same belonging, unto the said E. W., for her sole and separate use and benefit and behoof, separate and apart from her said husband, and for her heirs and assigns forever, with full power, by her deed duly executed and joined in by her husband, to encumber, to sell and convey the same conditionally or absolutely, etc."

Judge Wagner held that the wife was *femme sole* with respect to her separate estate, when she is not specifically restrained by the instrument under which she acts to some particular mode of disposition, and although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode pointed out. He held the wife might, if she so intended, charge her separate estate for her debts.

In *Ryland v. Banks*, the wife's separate estate was conveyed in trust to G for the sole and separate use of the wife, the instrument of conveyance containing the following "and the said party of the second part (the trustee) shall at any and all times, hereafter at the request and direction of the said party of the third part (the wife) expressed in writing, bargain, sell, mortgage, convey, lease, rent, convey by deed of trust, or otherwise dispose of said premises, or any part thereof, to do which full power is hereby given, and shall pay over the rents, issues, profits and the proceeds thereof to said party of the third part, etc."

The Court held that the wife might convey her equitable estate, and that her grantee could compel the trustee to convey the legal title to him. Judge Marshall, in the opinion said "The right of a *femme sole* to alienate her separate estate by deed or other writing will not be hindered in equity, unless specially limited by the instrument creating her estate, because the trustee fails or refuses or has not been asked to join in the deed or writing, etc."

While in neither of these cases were there any restraints on alienation expressed, it is probable from the very manifest approval of the English decisions, that such restraints if made in an instrument creating the separate estate, would be held valid.

67. 23 Mo l. c. 471.

SUMMARY

A. *Estates in fee simple (legal).*

1. *General restraints on Forfeiture for alienation.*
   There are no decisions but would undoubtedly be held void.
2. *Limited Restraints on or Forfeiture for alienation (as to time) are held to be void.*
3. *Limited Restraints on or Forfeiture for alienation (as to time and to particular classes or persons) are held to be void.*
4. Restraints on or Forfeiture for alienation in a particular manner. There are no decisions, but the restraint would probably be held void, whether it arises by attempted alienation by deed, mortgage or otherwise.

B. *Life Estates (legal).*
   There are no decisions and in view of the language of some of the cases on "spendthrift trusts" it is doubtful that restraint on or forfeiture for alienation of legal life estates would be held valid.

C. *Estates for years.*
   Forfeiture for alienation and restraints on alienation are held to be valid.

D. *Active trusts of absolute and indefeasible interests.*

1. May the sole beneficiary or all the beneficiaries (being sui juris) compel a conveyance of the trust estate? The question, where discussed, has been so only by way of dicta. In two cases where a trust was continued by the Court in its directions for a decree, the question was not under consideration and there was no contest on it. *It is probable the Court will hold, when the question is definitely presented, that the trust cannot be terminated by the sole beneficial interest.*
2. May the equitable fee be forfeited for alienation or its alienation restrained? There are no decisions, but it is probable that the Court would hold such provisions void.

E. *"Spendthrift Trusts" (Inalienable Equitable Life Estates).*

1. Such restraints are held to be valid.
2. The restraint need not be expressed but may be implied from the language of the instrument creating the trust.
3. A "spendthrift trust" created by the settlor for himself is void.
4. "Spendthrift Trusts", by statute, are void against claims of wife and children for support and claim of wife for alimony.
5. Restraint on alienation of an equitable contingent remainder is held to be valid.

F. *Executory limitations after a fee simple, where the first taker is given a power of disposition.*
   These limitations are held to be void.

G. *Property of married women.*
   There are no direct decisions on the restraint of the alienation of property of a married woman. It is probable that restraints (during coverture) would be held to be valid as to her separate estate.

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