Washington Law Review

Volume 26 | Issue 2

5-1-1951

Future Interests—Rule Against a Remainder to the Grantor's Heirs; Insurance—Interpretation of Standard Provisions; Spendthrift Trusts—Validity of Restraining Both Principal and Income; Easements—Platted Land—Adverse Possession

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RECENT CASES

Future Interests—Rule Against a Remainder to the Grantor's Heirs. *S* transferred $6,300 to *T* in 1921, with instructions to purchase certain realty and hold it in trust for *X* and *Y* during their lives, and then to convey it back to *S* "in case he shall then be alive; or in case he shall have died prior to the death of the survivor . . . to the legal heirs of *S*." In 1924 the interest of *S* in the trust property was sold to *P* in satisfaction of a judgment by *P* against *S*. *S* died, *X* and *Y* dying thereafter. Action by *T* to determine to whom the property should be conveyed, and by *P* to quiet title as against the heirs of *S*. The trial court found for *P*. The heirs appeal, claiming a remainder interest in the property. *Held*: affirmed. The court applied the ancient rule against a remainder to the grantor's heirs—that a limitation to the legal heirs of the grantor is ineffective as a remainder, but creates instead a reversion in the grantor. *McKenna v. Seattle-First National Bank*, 35 Wn.(2d) 662, 214 P.(2d) 664 (1950).

The rule, though originating in the feudal system, is in effect today in most American jurisdictions. See note, 125 A.L.R. 548. Some courts still consider it as a rule of property, to be applied regardless of intent, *Brolasky's Estate*, 302 Pa. 439, 153 Atl. 739 (1931), but the majority favor its application as a rule of construction, to be disregarded where there is a clear showing of intent to create a remainder. *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919); *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E.(2d) 113 (1944); In re *Burchell's Estate*, 299 N.Y. 351, 87 N.E.(2d) 293 (1949).

A result in accordance with the grantor's intention will probably be reached more often by applying the rule as one of construction than by discarding it altogether. The grantor seldom intends to create an indefeasible interest in his heirs, whom he may not even know. When he provides that the property is to go to his legal heirs in the event of his death prior to the end of the life estate, he is merely satisfying a natural desire to have the complete scheme of distribution worked out on paper. Since disregarding the rule would prevent the grantor from later disposing of his reversion, the courts are reluctant to do so in the absence of a clear showing of intent.

The instant case represents the first formal recognition of the rule in Washington. The only earlier mention of the rule is to be found in *Fowler v. Lanpher*, 193 Wash. 308, 75 P.(2d) 132 (1938). For an excellent discussion of that case, see Cross, *The Rule in Shelley's Case in Washington*, 15 WASH. L. REV. 99 (1940). The court in that case quoted with approval from *Burton v. Boren*, 308 Ill. 440, 139 N.E. 868 (1923), language concerning the rule against a remainder to the grantor's heirs, and then went on to discuss and apply the rule in Shelley's case to a fact pattern not properly within either rule.

Whatever confusion may have resulted from the *Fowler* case has been cleared up by the instant case. The court examined the history and application of the rule in other jurisdictions, together with the reasons for retaining it, and declared that the rule against a remainder to the grantor's heirs will be applied in Washington as a rule of construction. This is in line with the general rule in other jurisdictions, and with REM. REV. STAT. § 143 [P.P.C. § 18-1] (providing that the common law is a part of the law of this state).

The rule as adopted by the Washington court is clearly sound. Its application to the facts of the *McKenna* case is open to question. In most of the cases applying the rule,

the provision is "to the heirs of *S*" or "to *S* or his heirs." It is at least arguable that the grantor here intended to create a remainder when he used the language "to *S* in case he shall then be alive, or in case he shall have died . . . then to his heirs." It is difficult to see why such precise wording was used if such was not his intention. In view of the fact that the court nevertheless applies the rule, it would seem, as a practical matter, that the only way to avoid its application would be by express statement that the heirs are to take by purchase and not by descent.

P.A.K.

Insurance—Interpretation of Standard Provisions. *P,* an insured under an executive's policy issued by *D,* was injured while filling in for his absent employee, whose more hazardous job was essential to the continued operation of *P*'s lime plant. After listing *P*'s occupation as "Manager . . . not superintending, duties office and selling, not delivering," the policy stated as required by REM. REV. STAT. § 7235 [P.P.C. § 666-19] that indemnity would be reduced *pro rata,* were injury to be received in an occupation classified as more hazardous, "or while doing any act or thing pertaining to any occupation so classified." The trial court awarded *P* full indemnity. Appeal. *Held*: affirmed. If an act is within the scope of the insured duties, indemnity will not be reduced although the same act pertains to a more hazardous occupation. The temporary performance of this hazardous job was incidental to management. *Bryan v. Travelers Ins. Co.,* 32 Wn. (2d) 289, 201 P.(2d) 502 (1949).

Although the quoted statutory clause has appeared by legislative fiat in every casualty insurance policy issued in the state since 1921, Wash. Laws 1921, C. 31, § 1, the principal case represents the first opportunity for its judicial examination. Other cases arising before REM. REV. STAT. § 7235 [P.P.C. § 666-19] but containing similar provisions have been resolved either on a basis of fraud, *Bothell v. National Casualty Co.,* 59 Wash. 209, 109 Pac. 590 (1910), or a distinct change of occupation. *Green v. National Casualty Co.,* 87 Wash. 237, 151 Pac. 509 (1915). Despite recent revisions of our insurance code, the particular *proviso* remains. REM. REV. STAT. (1947 Supp.) § 45.20.05. In applying a provision phrased in language similar to the statute, the court reduced indemnity where the act performed at the time of the injury was *obviously* outside the scope of insured activities. *Green v. National Casualty Co.,* 87 Wash. 237, 151 Pac. 509 (1915). In the instant case, however, the literal language of the statute was judicially qualified; the court conceding that the act pertained to a more dangerous occupation, but permitting full recovery upon finding the act to be within the covered capacity as well. Compelling as the facts may have been, this result leaves to the courts the familiar problem of determining scope. While the pertinent factors in resolving that problem must attend the particulars of each case, much was made in the instant decision of the exceptional nature of the more hazardous act as contrasted with a more protracted or habitual exposure to increased risk.

In resolving this language against the insurer our court stated that the policy by its terms excluded only superintending and delivering, implying what other courts have said, *i.e.,* that by more exactness of expression, the insurer might have protected itself. *Elkins v. Aetna Life Ins. Co.,* 26 F.(2d) 277 (S.D. Tex. 1928); *Fidelity Health & Acc. Co. v. Holbrook,* 96 Ind. 457, 169 N.E. 57 (1929).

Such logic loses some of its luster when we recall that the provision in point is a standard clause, required by statute and not entering the contract at the option of the insurer. *Funk v. Aetna Ins. Co.* 95 F.(2d) 38 (C.C.A. 9th 1938), 3 WILLISTON CONTRACTS § 621 (2d ed. 1938).

It is submitted that the principal case, while appealing on its facts and aligned with a respectable weight of authority, *Indemnity Co. of North America v. Sloan,* 68 F.(2d)

222 (C.C.A. 4th 1934); *Smith v. Massachusetts Bonding Ins. Co.*, 179 N.C. 489, 102 S.E. 887 (1920); *Thorn v. Casualty Co.*, 106 Me. 274, 76 Atl. 1106 (1909); 45 C.J.S. § 761, does not lend itself to a lessening, but rather compels the complication of insurance policy drafting. And if such is the consequence, has there not been to some degree a depreciation of the result intended by the act?

A.A.McD.

Spendthrift Trusts—Validity of Restraining Both Principal and Income. *P* took from *D*, the beneficiary of a trust, an assignment of all *D*'s interest in the trust as security for a loan. The trust provided that "no share or interest in either the principal or income shall be assignable or subject to anticipation in whole or in part by any of the beneficiaries thereof," and that the corpus was to be given to the beneficiary when he reached the age of thirty-five years. *P* garnished the trustee bank, which set up the defense of a spendthrift trust. The trial court decreed a lien on the corpus of the trust, and enjoined the trustee from transferring any part of the corpus to *D*, the beneficiary. *Held*: reversed. The restraint on both the principal and income is valid, and "the intention of the settlor that the beneficiary should receive the trust property free and clear of liens and other charges should be given effect." *Milner v. Outcalt*, 136 Wash. Dec. 668, 219 P. (2d) 982 (1950).

In so holding the Washington court has placed this jurisdiction in a decided minority on this particular point. GRISWOLD, SPENDTHRIFT TRUSTS §§ 81-91 (1936); 1 SCOTT, TRUSTS § 153.3 (1939); RESTATEMENT, TRUSTS § 151 (1935). Most of the American cases considering the validity of spendthrift trusts have declared that even though the restraint on the alienation of income from the trust corpus be valid, an attempt to restrain the alienation of the corpus itself is improper, the theory being that a restraint on corpus stretches the policy allowing restraints on income too far. Professor John Chipman Gray is responsible in large part for this attitude. Writing in the early days of the spendthrift trust, Gray argued that giving effect to the direction in a trust prohibiting alienation by the beneficiary was contrary to the well-settled common law rule against restraints on alienation; he also maintained that the "object of spendthrift trusts is to enable the children of rich men to live in debt and in luxury at the same time." GRAY, RESTRAINTS ON ALIENATION § 263 (2d ed. 1895). Whether this be true or not as to income is now moot in most American states since they have allowed that aspect of the spendthrift trust as a measure of policy. 1 SCOTT, TRUSTS § 153 (1939).

The English Court of Chancery was the first to apply the common law rule forbidding restraints on the alienation of property to defeat a spendthrift trust in *Brandon v. Robinson*, 18 Ves. Jr. 429, 134 Eng. Rep. 379 (1811) wherein Lord Eldon stated that property given in trust "must remain subject to the incidents of property," and that consequently the direction that the beneficiary's creditors could not reach the trust property was invalid. American courts have generally refused to invalidate restraints on income-alienation although they follow the English cases with reference to restraining principal-alienation. See *McCreery v. Johnston*, 90 W. Va. 80, 110 S.E. 464 (1922), and *Spann v. Carson*, 123 S.C. 371, 116 S.E. 427 (1923) for the general flavor of these holdings. For the most part these courts state that while an equitable life estate in property may be restrained as a matter of policy, restraining an equitable fee simple violates the common law rule.

A minority of courts, now including Washington, reach a contrary result and allow the restraint on principal as well as income on what seems to be sounder reasoning. In the leading case of *Broadway Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504 (1882), the court said, "the reasons behind the [common law] rule do not

apply in the case of a transfer of property in trust. . . . The trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal or income is at any time inalienable." In *Erickson v. Erickson,* 197 Minn. 71, 266 N.W. 161, 267 N.W. 426 (1936), it was said, "the sounder doctrine upholds the validity of a spendthrift trust impressed upon the corpus of the estate. The legal title to the corpus is in the trustees . . . and they have the full right to transfer the corpus of the estate . . . so there is no restraint upon the transfer of the title. . . ." In *Boston Safe Deposit & Trust Co. v. Collier,* 222 Mass. 390, 111 N.E. 163 (1916), the court approved the restraint on alienation of principal, stating that any distinction was only a matter of degree. In another leading case, *Nichols v. Eaton,* 91 U.S. 716 (1876), the United States Supreme Court remarked that the rule forbidding restraints on principal-alienation in a spendthrift trust was ingrafted on the common law by the English Chancery for the benefit of creditors of the beneficiary; and based its approval, as in the instant case, on the ground that the intent of the settlor or testator should not be defeated.

The instant case is significant not only because it allows a dual restraint, but also because it is the first Washington case which recognizes the spendthrift trust apart from statute. GRISWOLD, SPENDTHRIFT TRUSTS § 230 (1936); 1 SCOTT, TRUSTS § 152.1 (1939). Every previous case involving the restraining of alienation of trust property by a beneficiary has been based on REM. REV. STAT. § 637 [P.P.C. § 53-49] which, though not expressly so stating, has been interpreted to exempt all but accrued income in the hands of the trustee from any legal process by creditors of the beneficiaries. *B. F. Goodrich Co. v. Thrash,* 15 Wn. (2d) 624, 131 P. (2d) 734 (1942). The *Milner* case goes beyond the statute and exempts both the trust *res* and income from creditors even without the benefit of the statute. The decision seems wise in the light of the policy toward carrying out the intentions of a testator or settlor of an inter-vivos trust.

C.P.M.,JR.

Easements—Platted Land—Adverse Possession. Action by *P* to quiet title to a portion of an unopened alley in Block 29. *P* and *D* owned adjacent lots abutting on the same alley. In 1889 the common predecessor in title of *P* and *D* filed a plat of Block 29. *P*'s immediate predecessor in title enclosed his lots and the alley between them with a fence, built a garage extending over part of the proposed alley, and used part as a driveway. The driveway was the only portion of the alley ever opened up, and while it had been used for ingress and egress by *P* and his predecessors in title, the public had never used the driveway. The trial court found that the public had lost all rights in the alley but that *D* had a right to use the alley for private purposes. Appeal. *Held*: affirmed. When land is platted and lots are sold with reference to the plat, a lot owner claiming title to a lot through a common grantor cannot by adverse possession defeat another lot owner's private easement of ingress and egress over the alleys shown on the plat even though the public rights in the alley have been relinquished. *Burkhard v. Bowen,* 32 Wn. (2d) 613, 203 P. (2d) 361 (1949).

The few reported decisions in other jurisdictions on the precise issue in the instant case have reached a contrary result, holding that the owner of a lot in a platted area may by adverse possession or user for the statutory period destroy the private easement of other lot owners in the streets and alley in the platted area when the easements were created by a sale of the lots with reference to a plat.

Eidelbach v. Davis, 99 S.W. (2d) 1067 (Tex. Civ. App. 1936). In an Illinois case the court on facts similar to those of the instant case refused to enjoin the obstruction of an alley, holding: "The easement which was appurtenant to each lot by reason of the existence of the plat and sales with reference to it was private property. . . . But a complete nonuser for twenty years, with possession in another that is inconsistent with or adverse to the right of such easement, will bar the easement." *Swedish Evangelist Lutheran Church v. Jackson,* 229 Ill. 506, 82 N.E. 348 (1907). Also the general rules in respect to termination of easements allow all easements to be terminated by adverse user. 3 TIFFANY, REAL PROPERTY 395 (3d ed. 1939).

In the instant case the court relied on *Van Buren v. Trumbull,* 92 Wash. 691, 159 Pac. 891 (1916), as being similar enough to be controlling. The facts of the two cases are similar in that in both cases there was a sale with reference to a plat, an unopened street fenced in and under the exclusive control of the grantor or those claiming title through him for a long period of time, and by the terms of Wash. Laws 1903, c. 90 § 1 abandonment of the public rights in the streets because they were not opened within five years after dedication to the public. However, the similarity ceases at this point because the contentions of the parties in the two cases are not the same. In the instant case the party claiming title through the common grantor contends that another common-grantee's private right of easement has been destroyed by adverse possession. The *Van Buren* case is different in this respect in that the bar of the statute of limitations was set up to defeat only the *public* rights in the street. It was not contended that the *common-grantee's* easement had been destroyed but rather that one had never existed because the common-grantee knew that a street had never been opened and so was not misled to his injury; therefore, the grantor or those claiming title through him are not estopped to deny the existence of the easement. In answering this contention the court in the *Van Buren* case held that the common-grantee had been misled to his injury because he bought with reference to the plat and no doubt paid more for his lot than he otherwise would have paid. The court said that, therefore, the grantor, his heirs and assigns, are "ever restrained by the bar of estoppel from denying the right of easement to his grantees." 92 Wash. 691, 695, 159 Pac. 891, 893 (1916).

This broad statement must be qualified by the fact that the only question in the *Van Buren* case was whether an easement had been created. Thus the holding was that the grantor, his heirs and assigns, are estopped to deny that an easement was created. A contrary result in the instant case would not have been inconsistent with this, because an assertion, as in the instant case, that an easement has been terminated, not only does not deny, but tacitly admits, that one was created. In holding for *D* in the instant case the court has apparently failed to notice this distinction between the questions of creation and termination.

Recent dictum would indicate that easements in such situations could be lost by adverse possession. *Howell v. King County,* 16 Wn. (2d) 557, 559, 134 P. (2d) 80, 82 (1943). The court held that after public vacation the area shown on the plat was subject to a private easement in favor of the common-grantee, but that the exent of the easement was cut down to the area used as a road in the past by the common-grantee. Necessarily the theory of this holding is that the extent of the easement was cut down from the area shown on the plat either by nonuser coupled with adverse possession or that an easement was never created by virtue of the sale with reference to the plat except to the extent actually used. Under either theory the case is inconsistent with the instant case since, if part of an easement can be lost by adverse possession, then all can be lost by the same method, or if

it takes actual use to create the easement, then there was no easement created in the instant case because the common-grantee had never used the alley for ingress and egress.

The writer submits that on the basis of the above cases, the decision in the instant case should have been for *P*, and that the court in finding for *D* is unduly extending the *Van Buren* case. Adoption of the rule set out in *Swedish Evangelist Lutheran Church v. Jackson, supra,* would avoid the anomalous result of the instant case that the easement is more inviolate than the land which it benefits, in that *D* could lose the title to part of his lot by the adverse possession of a common-grantee, *Naher v. Farmer,* 60 Wash. 600, 111 Pac. 768 (1910), but by this case he could never lose the easement appurtenant to that lot by the same common-grantee's use of the servient estate in a manner inconsistent with the existence of the easement.

R.C.S.