CHAPTER 8

Equitable Interests and Interests Subject Thereto

A. THE ORIGIN OF EQUITABLE ESTATES

In the Middle Ages a conveyance of land to a monastic corporation resulted in a serious loss of income to the feudal overlord. As such corporations never died, the overlord ceased to receive the reliefs payable on the death of a tenant and to enjoy the feudal incidents of wardship and marriage of minor heirs. Monks could not be compelled to perform military services, and it was difficult or impossible to compel a monastery to perform other services incident to tenure. The twelfth and thirteenth centuries saw great expansion in monastic land holdings and consequent loss to the king and other overlords in income and military strength. A statute was enacted in 1279 to put an end to conveyances to monastic corporations without the consent of the injured overlords. It provided that, when such a conveyance was made, the overlord might enter within the year and forfeit the tenant’s estate. 525

The great Benedictine and Cistercian orders, which specialized in agriculture, already owned many estates and probably were not greatly hurt by the new statute. 526

525 Statute of Mortmain, 7 Edw. I, stat. 2 (1279).
526 The Cistercians, for example, reached England in 1127, built a hundred monasteries in the century which followed, and added only one between 1227 and the dissolution of the monasteries under Henry VIII. Butler, “Cistercians,” Encyclopaedia Britannica, 11th ed. (1910). It would seem from this that the order had reached its full development some fifty years before the Statute of Mortmain.
Their corporate wealth enabled them to pay for licenses from the overlords to purchase land. The newer Dominican and Franciscan orders of friars, who preached and ministered unto the poor, the sick, and the aged in towns, much like the modern Salvation Army, were, however, hampered in their efforts to acquire sites for hospitals and homes for the poor and aged. To avoid the statute they resorted to the device of having land conveyed to the municipal corporation, which agreed informally to allow them to use it. 527 That this palpable evasion of the statute of 1279 was tolerated for over a century was probably due to the facts that the friars usually acquired only relatively small parcels in towns, rather than large tracts of agricultural land, and that their activities were of recognized public benefit. The friars' device was deprived of its efficacy by a statute of 1391, which attacked it from two directions by providing that conveyances to municipal corporations should be within the statute of 1279 and that conveyances to anyone to the use of religious persons should also be within that statute. 528

Long before 1391, the advantage of the use device to lay landowners was seen, and it was adopted by their conveyancers. An elderly landowner whose heir was a minor daughter could avoid the onerous feudal burdens of relief, wardship, and marriage which would otherwise arise upon his death by conveying to several young friends as joint tenants to hold to the use of himself and his heirs. The feudal dues incident to death would not then arise until the death of the last joint tenant and even this could be avoided by adding new tenants as the original ones

527 Maitland, Equity, 2d ed., 24-25 (1936). The use device seems to have been known before the statute. See Quency v. Prior of Barnwell, Bract., N.B., pl. 999 (1224).
died. The rule prohibiting devise of freehold estates could be avoided by a conveyance to the use of the conveyor for life and thereafter to such uses as he might by will appoint. The Wars of the Roses, with their frequent changes of dynasty and numerous prosecutions for treason, gave every politically active landowner a strong motive for placing the title to his land in the names of persons who were unlikely to be attainted of treason, since attainder involved forfeiture of all lands to the Crown. Conveyances to the use of laymen were not interfered with by legislation for some two centuries, except to the extent that they were used to defraud creditors or to defeat a reversioner's action for waste. It would seem that most of the land in England was conveyed to uses during this period.

The common-law courts would not enforce the rights of the cestui que use or beneficiary against the feoffee to uses, who held the legal title. From the end of the fourteenth century, however, the lord high chancellors, who were nearly always bishops, did so. After some hesitation, the chancellors undertook to enforce the use

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529 Pollock & Maitland, History of English Law Before the Time of Edward I, 312-328 (1895); note 8 supra.
530 Bacon thought that this was the chief reason for the rise of the use device. Reading Upon the Statutes of Uses 20-21 (ed. 1804). See Maitland, Equity, 2d ed., 25-26 (1936); Jenks, Short History of English Law, new ed., 104 (1934); Sullivan, Historical Treatise on the Feudal Law 166-167 (1772); Stat. 4 Hen. VII, c. 4 (1487); 7 Hen. VII, c. 3 (1490); 3 Hen. VIII, c. 4 (1511).
531 Sanders, Uses and Trusts, 5th ed., 16-17 (1844).
532 Stat. 50 Edw. III, c. 6, §2 (1376); 1 Ric. II, c. 9 (1377); 4 Hen. IV, c. 7 (1402); 11 Hen. VI, cc. 3, 5 (1433).
533 1 Coke, Institutes *272a; Sanders, Uses and Trusts, 5th ed., 17 (1844).
534 Anonymous, Y.B. 4 Edw. IV, Pasch., pl. 9 (1464).
against the heir of the feoffee to uses \(^{536}\) and against persons to whom the feoffee conveyed the legal title, if they had notice of the use or had not paid a valuable consideration.\(^{537}\) As the *cestui que use* was nearly always in actual possession of the land, it followed as a practical matter that the feoffee to uses could not convey the legal title free of the use.

The use device was intended to give the *cestui que use* all the advantages of full ownership of the land, less some of the burdens of ownership, and with the additional power of devising his interest. In its enforcement of uses, the High Court of Chancery brought this intention to full realization. It enforced estates in uses, in fee simple, in fee tail, for life and for years, which corresponded to the legal estates in land.\(^{538}\) Estates in expectancy by way of reversion, remainder, and springing and shifting use were possible. The estate of the *cestui que use* was devisable by will \(^{539}\) and alienable inter vivos.\(^{540}\) By a statute of 1483 he was empowered to convey the legal title without the consent of its holder.\(^{541}\) Thus the *cestui que use* had greater powers of alienation than a legal owner.

Then, in 1535, the Statute of Uses converted the equitable estate of the *cestui que use* into a legal estate of like


\(^{538}\) *Turner*, *The Equity of Redemption* 7-8 (1931).

\(^{539}\) Rothanhale v. Wychingham, 2 Cal. Proc. Ch. iii (1413-1422); Williamson v. Cook, Sel. Cas. in Chan. (S.S.), pl. 118 (1417-1424); note 530 *supra*.

\(^{540}\) *Bacon*, *Reading Upon the Statutes of Uses* 16 (1642); *Cruise*, *Essay on Uses* §36 (1795); *Gilbert*, *Law of Uses and Trusts*, 2d ed., 26 (1741); *Holmes*, *Common Law* 408 (1881); *Sanders*, *Essay on Uses and Trusts*, 4th ed., 65 (1823).

\(^{541}\) Stat. 1 Ric. III, c. 1 (1483).
This put an end to uses as such. Nevertheless, in the two centuries which followed, the High Court of Chancery developed three types of equitable estates which resembled the old use in many respects and had most of its characteristics, the trust, the equity of redemption, and the vendee's interest under an executory land contract. These three have much in common, but the latter two differ from the former in that the legal title of the mortgagee and the vendor is, in part, beneficial to him, whereas that of the trustee is not. Hence separate treatment is desirable.

B. TRUSTS IN THE ABSENCE OF STATUTE

The Statute of Uses in terms deprived the High Court of Chancery of all jurisdiction over uses created on freehold estates in land. It had no application to estates for years and uses in chattels. Soon after the enactment of the statute, it was held that it did not apply, even though the feoffee to uses had an estate of freehold, if the conveyance imposed active duties upon him. A century after the statute, the High Court of Chancery began to enforce as an equitable estate, the use on a use. In these four situations, namely, those of estates for years, chattels personal, active trusts, and the use on a use, re-

542 Stat. 27 Hen. VIII, c. 10 (1535).
543 It should be noted that it is the freehold or non-freehold character of the legal estate of the feoffee to uses or trustee which governs the applicability of the statute, not the character of the estate of the cestui que use or cestui que trust. See Bacon, Reading Upon the Statute of Uses 42 (1642); Sanders, Uses and Trusts, 4th ed., 87 (1823).
545 Tyrrel's Case, 2 Dyer 155a, 73 Eng. Rep. 336 (1557) (common-law decision that use on a use is not within the statute); Sambach v. Dalston, Tothill 188, 21 Eng. Rep. 164 (1634) (chancery decision that use on a use is enforceable in Chancery); Ames, "Origin of Uses and Trusts," 21 Harv. L. Rev. 261 at 270-274 (1908).
relationships much like that of the old use were treated in Chancery as trusts. The holder of the legal title was a trustee and the equitable beneficiary a *cestui que trust*. The High Court of Chancery developed and enforced the rights of the *cestui que trust* by analogy to those of the old *cestui que use*. In the law of trusts the development of equitable estates and interests corresponding to legal estates and interests has been more full and elaborate than that of estates in uses. As Lord Mansfield said in a Chancery case,

"The *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates), as the ownership or legal estate, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. . . . the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by limitation. . . . *cestuy que trust* is actually and absolutely seised of the freehold in consideration of this court; and therefore . . . the legal consequences of an actual seisin of a freehold, shall, in this court, follow. . . ."  

The rules as to alienation by a trustee were the same as those which applied to conveyances by a feoffee to uses. If the trustee conveyed the trust property to a purchaser who had notice of the trust or who had not paid value, the purchaser took subject to the trust. Moreover, unless, under the terms of the trust, the

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547 Note 537 supra.
trustee had power to make such a sale or power to ap­point his own successor, the aliencee would be compelled to reconvey or to convey to a new trustee appointed by the High Court of Chancery. 549 The heir, devisee, and levying creditor of the trustee likewise took subject to the trust. 550 A bona fide purchaser for value of the legal estate of the trustee took free of the trust, 551 but the trustee who conveyed to a bona fide purchaser for value in breach of trust would be compelled to make restitution to the trust estate by repurchasing the property or purchasing property of like type and value. 552 Thus the trust became a very effective means of restraining aliena­tion of the legal title to interests in land or chattels. The trustee, however, does not hold his title beneficially. It is beneficial ownership, the actual right to use and enjoy land and goods, which is the primary concern of the law of restraints on alienation.

The *cestui que use* was usually in possession of the land; the *cestui que trust* normally is not in possession of the trust property. The rights of the *cestui que use* were established by custom as a property interest before the High Court of Chancery began to enforce them; the rights of the *cestui que trust* were a creation of that court and so appeared more like a chose in action than a prop-

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Property interest. Choses in action were generally inalienable.553 In consequence of these differences between the estate of the *cestui que use* and the interest of the *cestui que trust*, the early decisions treated the interest of the beneficiary of a trust as a chose in action which could be transmitted by will but was not transferable inter vivos.554 By the seventeenth century, however, the property analogy prevailed, and a *cestui que trust* could transfer his interest inter vivos as freely as he could an equivalent legal estate.555

It having been determined that equitable estates and interests correspond to legal estates and interests of the same duration and that, like legal estates and interests, they have an incident of alienability, it would seem to follow that the rules which govern restraints on alienation of legal estates and interests apply as well to equitable estates and interests of the same types. Such, with an exception which is more apparent than real, was the English law. It will be recalled that restraints on alienation assume two forms, the prohibition, which, if valid, would make a conveyance by the owner or a levy by his creditors wholly ineffective, leaving the ownership in him, and the penalty restraint, designed to penalize alienation by forfeiture of the interest or otherwise. As has been seen, prohibitions on alienation of legal interests in property are always void, whether the property is land or chattels and whether the interest is perpetual, for life, or for a term. In England the same rule of null-

ity was applied to prohibitions on alienation of the interest of a *cestui que trust*. The rule had one exception in that an effective prohibition could be imposed on alienation by a married woman of her separate equitable estate. As Professor Gray has observed, this exception was not really in conflict with the rule as to legal interests, since a married woman could not hold legal title to chattels at common law and could not convey her legal title to land by ordinary means. As to penalty restraints, the English equity rules likewise follow the rules at law. A provision for forfeiture on any alienation of an equitable estate in fee simple or an equivalent interest in chattels is void. A provision for forfeiture on alienation of an equitable life estate is valid, whether the


557 Jackson v. Hobhouse, 2 Mer. 483, 35 Eng. Rep. 1025 (1817); Tullett v. Armstrong, 4 My. & Cr. 377, 41 Eng. Rep. 147 (1840); Baggett v. Meux, 1 Ph. 627, 41 Eng. Rep. 771 (1846). The restraint was effective, however, only while the woman was married, ceasing upon her husband's death. Jones v. Salter; Barton v. Briscoe, note 556 supra. The Married Women (Restraint Upon Anticipation) Act. 1949, 12, 13 & 14 Geo. VI, c. 78, §1 (1), provides, "No restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act." This statute replaced a similar enactment which applied only to restraints imposed after 1935. The Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. V, c. 30. §2.


559 Re Dugdale, [1888] 38 Ch. Div. 176; Corbett v. Corbett, [1888] 13 P. Div. 136, 14 P. Div. 7; Gray, RESTRAINTS ON ALIENATION, 2d ed., §20 (1895). As in the case of legal estates in fee simple (as to which see note 128 supra), the rules as to restraints which are limited as to proscribed alienees are confused. Gray, id., §§35-39.
alienation restrained be voluntary or involuntary, if the trust is created by someone other than the life cestui.\footnote{Lockyer v. Savage, 2 Strange 947, 93 Eng. Rep. 959 (1733). Numerous cases in accord are collected in Gray, RESTRAINTS ON ALIENATION, 2d ed., §78 (1895).} If, however, the cestui que trust for life or years is the settlor of the trust, a provision for forfeiture of his estate on involuntary alienation is void.\footnote{Higinbotham v. Holme, 19 Ves. Jr. 88, 34 Eng. Rep. 451 (1812). Other cases are collected in Gray, RESTRAINTS ON ALIENATION, 2d ed., §§91, 93-95. The validity of a restraint on voluntary alienation of the life interest of a cestui que trust who is also the settlor of the trust is doubtful. Id., §§96-100.}

Where it has not been affected by statute, American law follows, in general, the English view as to the effect of a trust in restraining alienation of the legal title to property. That is to say, a transfer by the trustee under power expressly or impliedly granted by the instrument creating the trust conveys the property to the transferee free of trust;\footnote{TRUSTS RESTATEMENT §283 (1935); 2 Scott, LAW OF TRUSTS §283 (1939).} a transfer by the trustee which violates the provisions of the trust conveys the legal title but not necessarily free of the trust. If the transfer is to a purchaser who has notice of the trust,\footnote{TRUSTS RESTATEMENT §288 (1935); 2 Scott, LAW OF TRUSTS §288 (1939). The cases are collected in 1 Perry, LAW OF TRUSTS AND TRUSTEES, 7th ed. §217n (1929).} or to a donee,\footnote{TRUSTS RESTATEMENT §289 (1935); 2 Scott, LAW OF TRUSTS §289 (1939). The cases are collected in Scott and in Perry, note 563 supra.} the transferee takes subject to the trust and may be compelled to reconvey to the trustee or to a successor trustee. If the transfer is to a bona fide purchaser for value, without notice of the trust, the transferee takes free of the trust,\footnote{TRUSTS RESTATEMENT §284 (1935); 2 Scott, LAW OF TRUSTS §284 (1939). The cases are collected in Perry, supra note 563, §§218-221nn. One who purchases in good faith and for value, without notice of the trust, from a transferee of the trustee who had notice or who did not pay value, also takes free of the trust. TRUSTS RESTATEMENT §287 (1935); 2 Scott, LAW OF TRUSTS §287 (1939).} but the trustee may be compelled to make resti-
tution to the trust estate.\textsuperscript{566}

As to penalty restraints on alienation by the \textit{cestui que trust} of his equitable interest, American law likewise tends to follow the English view. That is to say, provisions for forfeiture on alienation are generally void when annexed to an equitable estate in fee simple or an interest in personal property of equivalent duration,\textsuperscript{567} and they are generally valid when annexed to an equitable interest for life or years.\textsuperscript{568} As to restraints on alienation by way of prohibition, however, the American law has diverged widely from the English and from the rules governing restraints on legal interests. Where the only interest of a \textit{cestui que trust} is to receive the income from the trust property for his life, part of his life, or a term of years, most American courts will enforce specifically a provision in the instrument creating the trust prohibiting the \textit{cestui que trust} from transferring his interest and his creditors from reaching it.\textsuperscript{569} This "spendthrift trust" doctrine is an extension of the English enforcement of prohibitions on alienation of the equitable estates of married women, but it is not restricted to married women or incompetents. Moreover, the American decisions treat the interest of the \textit{cestui que trust} under a trust for his support as inalienable even in the absence of an ex-

\textsuperscript{566} TRUSTS RESTATEMENT §§202, 205, 208 (1935); 2 Scott, LAW OF TRUSTS §§202, 205 208 (1939). This is not so, generally, if the \textit{cestui que trust} consented to the transfer at or before the time it was made, even though there are valid prohibitory restraints on alienation by the \textit{cestui} of his own interest. TRUSTS RESTATEMENT §216; Scott, §216.

\textsuperscript{567} TRUSTS RESTATEMENT §150 (1935); 1 Scott, LAW OF TRUSTS §150 (1939); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.92 (1952).

\textsuperscript{568} Ibid.

\textsuperscript{569} TRUSTS RESTATEMENT §152 (1935); 1 Scott, LAW OF TRUSTS §152 (1939); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.94 (1952). The cases are collected and discussed in Scott, §§152.1 to 152.6 and Griswold, SPENDTHRIFT TRUSTS, 2d ed., §§53-60 (1947).
press prohibition on alienation.\textsuperscript{570} As to equitable interests in fee simple, whether in present enjoyment or in expectancy, and interests in personal property of like duration, there is considerable confusion in the American cases.\textsuperscript{571} The \textit{Restatement of Trusts} takes the position that prohibitory restraints on alienation of such interests are invalid except that where, by the terms of the trust, the \textit{cestui que trust} is entitled to have the income paid to him for life or a term of years, and thereafter to have the trust property conveyed to him or to those deriving title through him, a prohibition on voluntary or involuntary alienation of the right to income accruing during his life is valid.\textsuperscript{572} Spendthrift trust prohibitions are generally treated as ineffective against claims for necessaries supplied the \textit{cestui que trust}, for services and supplies which preserve or benefit his interest in the trust, and for support or alimony of his wife and children.\textsuperscript{573} They are considered invalid as to a trust created by the \textit{cestui que trust} himself.\textsuperscript{574}

\textsuperscript{570} \textsc{Trusts Restatement} §154 (1935); 1 Scott, \textsc{Law of Trusts} §154 (1939); Griswold, \textsc{Spendthrift Trusts}, 2d ed., §§430 to 434 (1947). This is not so where the amount to be paid or applied by the trustee is a specified sum or is not limited to what is necessary for the education and support of the cestui que trust, even though the primary purpose of the trust is support. \textsc{Trusts Restatement}, comment d; Griswold, §433.

\textsuperscript{571} 1 Scott, \textsc{Law of Trusts} §§153-153.3 (1939); Griswold, \textsc{Spendthrift Trusts}, 2d ed., §§81-97, 102-106 (1947); Schnebly, “Restraints Upon the Alienation of Property,” 6 \textsc{American Law of Property}, §26.96 (1952).

\textsuperscript{572} Sections 151, 153 (1935).

\textsuperscript{573} \textsc{Trusts Restatement} §157 (1935); 1 Scott, \textsc{Law of Trusts} §§157-157.3 (1939); Griswold, \textsc{Spendthrift Trusts}, 2d ed., c. 6 (1947). Section 157 of the \textit{Restatement of Trusts} was amended by the 1948 Supplement to add claims by the United States or a state or subdivision thereof, to the list of claims against which spendthrift provisions are ineffective.

\textsuperscript{574} \textsc{Trusts Restatement} §156 (1935); 1 Scott, \textsc{Law of Trusts} §§156-156.3 (1939); Griswold, \textsc{Spendthrift Trusts}, 2d ed., c. 8, §282.1 (1947); Schnebly, “Restraints Upon the Alienation of Property,” 6 \textsc{American Law of Property}, §26.122 (1952).
During the years 1825 through 1828, a commission of three eminent lawyers prepared a revision of the statutes of the State of New York which, with some changes, was adopted by the legislature and published as the Revised Statutes of 1829, effective January 1, 1830. According to tradition, the plan of the revision was drafted by Judge Henry Wheaton, a lifelong admirer of France who had studied civil law at Poitiers and translated the Code Napoléon into English. The revisers' notes, which discuss the history of uses and trusts in England, reflect this influence. They admit that uses had utility in relieving the burdens of the feudal system and introducing flexibility in conveyancing, but they compare unfavorably the complexity of the English law caused by divided titles, legal and equitable, with the simple property provisions of the Code Napoléon and deplore the extent to which the High Court of Chancery nullified the Statute of Uses. The revisers thought that, if all feudal tenures and their incidents were abolished and a simple system of conveying legal title was provided, there would be no need for uses or trusts, except those for the benefit of creditors and for the protection of incompetents. They accordingly proposed a "modified abolition of uses and trusts," saying,

575 Preface, R.S.N.Y. 1829; 3 R.S.N.Y. 1829, 409 (ed. 1836); Butler, The Revision of the Statutes of the State of New York and the Revisers (1889). The original commission consisted of John Duer, Benjamin F. Butler and Henry Wheaton. Judge Wheaton accepted a diplomatic appointment in 1827 and was replaced by John C. Spencer. Butler later served as Attorney General under Jackson. Wheaton was reporter of the United States Supreme Court, had a long career as a diplomat, and became an authority on international law. Duer later became a New York judge. Spencer was Secretary of War and of the Treasury under Tyler.

"As the creation of trusts is always in a greater or less degree the source of inconvenience and expense, by embarrassing the title, and requiring the frequent aid of a court of equity, it is desirable that express trusts should be limited as far as possible, and the purposes for which they may be created, strictly defined. The object of the Revisers in this section is to allow the creation of express trusts, in those cases and in those cases only where the purposes of the trust require that the legal estate should pass to the trustees. An assignment for the benefit of creditors, would in most cases be entirely defeated, if the title were to remain in the debtor, and where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift, (the general objects of trusts of this description) the utility of vesting the title and possession in the trustees, is sufficiently apparent. After much reflection, the Revisers have not been able to satisfy themselves that there are any cases not enumerated in this section, in which, in order to secure the execution of the trust, it is necessary that the title or possession should vest in the trustees. . . ."

As enacted in 1828, the New York Revised Statutes provided,

"S. 45. Uses and trusts, except as authorized and modified in this Article, are abolished; and every estate and interest in lands, shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this Chapter.

"S. 47. Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

577 Id. at 585.
“S. 55. Express trusts may be created, for any or either of the following purposes:

1. To sell lands for the benefit of creditors:

2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:

3. To receive the rents and profits of lands, and apply them to the education and support, or either,\textsuperscript{578} of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this Title:

4. To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first Article of this Title.\textsuperscript{579}

“57. Where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable, in equity, to the claims of the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution at law.

“60. Every express trust, valid, as such, in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created, shall take no estate or interest in the lands, but may enforce performance of the trust in equity.

“63. No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

\textsuperscript{578} Emphasis supplied.

\textsuperscript{579} Part II, c. 1, tit. II, art. First, §37, limits accumulations to those for the benefit of minors during minority. Chapter 16, infra.
“64. Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute, as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration.

“65. Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust shall be absolutely void.

“68. Upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the court of chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court.”

In 1830, upon advice of the revisers, Subsection 3 of Section 55 was amended by striking out the words “education and support, or either,” and substituting the word “use.”

During the years 1844 through 1846, a revision of the statutes of Michigan was prepared by a single commissioner, Judge Sanford M. Green, a former New York lawyer. Judge Green’s draft contained a chapter on uses and trusts which incorporated, without change in

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580 Part II, c. 1, tit. II, art. Second, §§45, 47, 55, 57, 60, 63, 64, 65, 68.
581 3 R.S.N.Y., 579 (ed. 1836). As to this, the revisers said, “The word ‘use’ includes education and support, and each of them. It will also include other purposes, which ought to be provided for.” Ibid. As to the effect of the amendment, see Griswold, SPENDTHRIFT TRUSTS, 2d ed., §§65, 66 (1947).
substance, the provisions of the New York statutes quoted above, as they had been amended in 1830. This was enacted, with two changes, as Chapter 63 of the Michigan Revised Statutes of 1846, which became effective March 1, 1847, and is still in force. The two changes made by the legislature were in the section listing permissible trusts (Sec. 55, New York; Sec. 11, Michigan). Subsection 4 was amended to permit accumulations for married women, not limited to minority, and a new Subsection 5 was added. The section, as enacted and in force in Michigan reads,

"Sec. 11. Express trusts may be created for any or either of the following purposes:

1. To sell lands for the benefit of creditors:

2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:

3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter:

4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married

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583 Comp. Laws (1857) §§2631 to 2657; Comp. Laws (1871) §§4114 to 4140; Comp. Laws (1897) §§8829 to 8855; How. Stat., §§5563 to 5589; Comp. Laws (1915) §§11565 to 11591; Comp. Laws (1929) §§12967 to 12993; Mich. Stat. Ann. §§26.51 to 26.77; Comp. Laws (1948) §§555.1 to 555.27. Sections 1, 3, 11, 13, 16, 19, 20, 21, and 24, Rev. Stat. 1846, c. 63, correspond, respectively, to §§45, 47, 55, 57, 60, 63, 64, 65, and 68, R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second. Rev. Stat. 1846, c. 63, §2, copied from R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §46, provides, "Every estate which is now held as an use, executed under the laws of this state as they formerly existed, is confirmed as a legal estate." As the Statute of Uses was in force in New York prior to the revision of 1829, this section had extensive application there. It having been held in Trask v. Green, 9 Mich. 358 (1861) that the Statute of Uses was repealed in Michigan by the Act of September 16, 1810, note 38 supra, the section's application here is limited to uses created before 1810. 584 Rev. Stat. 1846, p. V.
woman, or for either of the purposes and within the limits prescribed in the preceding chapter: 585

5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title." 586

The addition of Subsection 5 wholly altered the nature of the legislation. As has been seen, the New York revisers intended to abolish all continuing trusts except those for the support and education of minors, married women, and incompetents. Their provisions as to the nature and inalienability of the interest of the cestui que trust were inserted with this in mind. The original New York statute did not carry out this intention perfectly because it failed to define the persons who could be beneficiaries of a trust for education and support. Probably the revisers did not anticipate the creation of spendthrift trusts for the benefit of persons who were not incompetent. The New York amendment of Subsection 3, made in 1830, altered the scheme to some extent by permitting trusts, for the life of any cestui que trust, not limited to education and support. The Michigan addition of Subsection 5 changed it wholly by permitting trusts for any purpose whatever, so long as the cestui que trust is not in possession. Yet the Michigan statutes retain the provisions which make the interest of the cestui que trust


an inalienable chose in action,\textsuperscript{587} despite their inappropriateness to trusts which are not for the education or support of minors, married women, or incompetents.

Both the New York and Michigan statutes abolish trusts of land under which the \textit{cestui que trust} is entitled to beneficial possession.\textsuperscript{588} This eliminates several types of trust which would have been valid in England after the High Court of Chancery had created the exceptions to the Statute of Uses discussed above.\textsuperscript{589} These are the trust of an estate for years, the use on a use, and the trust under which the trustee has active duties. None of these was executed by the English Statute of Uses, whether or not the \textit{cestui que trust} was entitled to possession. The New York and Michigan statutes execute them, that is, destroy the estate of the trustee and convert the interest of the \textit{cestui que trust} into a legal estate, when the \textit{cestui} is entitled to possession and the receipt of the rents and profits.

**D. PERMISSIBLE DURATION OF TRUSTS OF LAND**

English law imposes no limit on the duration of trusts. If a conveyance is made to A and his heirs upon trust for B and his heirs, A holds a legal fee simple and B an equitable fee simple, both of which are potentially perpetual. Inasmuch as the estates of both are alienable, B can terminate the trust at any time by having A convey to him, by conveying to A, or by joining A in a conveyance to a third party. When the estates of the trustee and the \textit{cestui que trust} are inalienable, however, as they are in New York and Michigan in the case of


\textsuperscript{589} At notes 543-545.
trusts for the receipt of the rents and profits of lands,\textsuperscript{590} the trust is indestructible and some limit on duration is desirable. The language of Subsection 3 of the New York and Michigan statutes defining permissible trusts might have been construed to limit the duration of any trust created thereunder to the life of a single beneficiary. It has not been so construed in either New York of Michigan. However, the preceding article of the New York statutes provided,

"S. 15. The absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section." \textsuperscript{591}

Before the Revised Statutes of 1846 were adopted, the New York courts had held that, because of the inalienability of the interest of the \textit{cestui que trust}, a trust for the receipt of the rents and profits of lands suspended the absolute power of alienation, and, therefore, Section 15 limited the duration of such trusts to two lives in being.\textsuperscript{592}


\textsuperscript{591} R.S.N.Y. 1829, part II, c. 1, tit. II, art. First, §15. Rev. Stat. 1846, c. 62, §15, Comp. Laws (1857) §2599; Comp. Laws (1871) §4082; Comp. Laws (1897) §8797; How. Stat. §5531; Comp. Laws (1915) §11533; Comp. Laws (1929) §12935; Mich. Stat. Ann., §26.15; Comp. Laws (1948) §554.15 was identical. The next section originally provided: "s. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age." The meaning and effect of §16 are discussed in Chapter 21, Section D, \textit{infra}. Sections 554.14 to 554.20 of Mich. Comp. Laws (1948) were repealed by P.A. 38 in 1949. See note 594 \textit{infra}.

\textsuperscript{592} Coster v. Lorillard, 14 Wend. 265 (1835); Hawley v. James, 16 Wend. 61 (1836); \textit{Property Restatement App.}, c. A, ¶¶17 (1944); see Powell and Whiteside, \textit{The Statutes of the State of New York Con-
PERPETUITIES AND OTHER RESTRAINTS

Section 15 was adopted here in 1846, and the decisions under it were to the same effect. A Michigan statute of 1949 repealed Section 15 and reestablished the common-law Rule Against Perpetuities as to interests in land created by wills becoming effective and deeds executed after September 23, 1949. This repeal raises the question of the permissible duration of a trust for receipt of the rents and profits of lands.

Subsection 3 permits only trusts, "to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term." Although, as has been noted, this does not limit the duration of trusts, it does limit in quantity the equitable interest of any one beneficiary to a life interest. This being so, there can be no such thing as an equitable

CERNING PERPETUITIES AND RELATED MATTERS 63-73 [New York Legislative Document (1936) No. 65 (H)].


fee simple under Subsection 3. There can be a succession of equitable life interests followed by a legal remainder in fee, but each life interest and the remainder must vest within the period of the common-law Rule Against Perpetuities which is, generally speaking, lives in being and twenty-one years. Thus the Rule Against Perpetuities, although not itself a rule limiting the duration of trusts, operates in conjunction with the language of Subsection 3 to impose what amounts to a limitation on the duration of trusts created under that subsection.

Subsection 5, which is peculiar to Michigan, permits trusts for "the beneficial interest of any person or persons . . . subject to the limitations as to time prescribed in this title." The reference was to Section 15, now repealed, so it would seem that there is now no limitation on the duration of trusts created under this subsection; that is, the interest of the *cestui que trust* may be an equitable fee simple. As the interest of the *cestui que trust* under a trust for the receipt of the rents and profits of lands is inalienable, it becomes material to inquire whether it is permissible to create a trust for the receipt of the rents and profits of lands under Subsection 5. If so, it may now be possible to set up a perpetual trust of land under which the interest of the *cestui que trust*, although in fee simple, will always be inalienable, except to the extent that the statutes permit his creditors to reach the surplus of income beyond that necessary for his education and support. 595 Such a trust would have

595 Rev. Stat. (1846) c. 63, §§13, 19, note 583 supra. These sections correspond to sections 57 and 63 of the New York statute, quoted in the text at note 580 supra. The Restatement of Trusts takes the position that a trust may not be made indestructible beyond the period of the common-law Rule Against Perpetuities. Section 62, comment k (1935). Professor Scott agrees with this position but cites no authority for it. LAW OF TRUSTS §62.10 (1939). This problem is discussed further in Chapter 15, Section B (4), infra. As England has not made trusts
the undesirable characteristics of the perpetually unbarrable entail, which the English courts abolished in 1472. 596

Two types of trusts for the receipt of the rents and profits of land may possibly be sustainable under Subsection 5. Subsection 3 permits only trusts to “apply” the rents and profits of land to the use of any person. It could be argued that when the trust is to receive the rents and profits and pay them over to the cestui que trust, the trust falls under Subsection 5 rather than Subsection 3. The New York courts have decided that a trust to receive the rents and profits and pay them over to the beneficiary falls under Subsection 3, 597 but these decisions might not be followed in Michigan because they were rendered after 1846 and because, as New York has no Subsection 5, the only alternative there to sustaining such trusts under Subsection 3 would be to hold them void. Subsection 3 permits trusts to apply the rents and profits of lands to the use of any person only “during the life of such person, or for any shorter term.” It could be argued that, if the trust is to apply the rents and profits to the use of B and his heirs, it cannot be sustained under Subsection 3 but can be under Subsection 5. To maintain this argument it is necessary to assert that Subsection 3 does not prohibit the creation of any trust to apply the rents and profits of land to the use of beneficiaries so long as it is not created under that subsection. In view of the undesirability of permitting perpetual trusts under which the interest of the cestui que trust is inalienable, the

indestructible by statute and does not permit them to be made indestructible by restraints on alienation, the question cannot arise there.

596 Taltarum’s Case, Y.B. 12 Edw. IV, Mich., pl. 25 (1472), note 67 supra.
597 Leggett v. Perkins, 2 N.Y. 297 (1849); Cochrane v. Schell, 140 N.Y. 516 (1894); Property Restatement App., c. A, ¶18 (1944).
Michigan Supreme Court may hold that Subsections 3 and 4 are the only authority for the creation of trusts for the receipt of the rents and profits of lands. If so, the menace of perpetually inalienable equitable estates in fee simple will be averted.

E. STATUTORY INALIENABILITY OF INTERESTS UNDER TRUSTS OF LAND

As to alienation by the trustee, the New York and Michigan statutes introduce three changes in the English law. First, when the trust is not contained or declared in the conveyance to the trustees, subsequent creditors of the trustee without notice of the trust may levy on the trust property free of the trust. The English rule was otherwise. Second, the legal estate of the trustee is not devisable and does not pass to the trustee's heir upon intestacy. As to this, also, the English rule was otherwise. Third, when the trust is contained or declared in the conveyance to the trustee, a transfer by the trustee in breach of trust is absolutely void. In England such a transfer effectively conveyed the legal title to the transferee, who took it subject to the trust.

This provision that the trustee's transfer in breach of trust is a complete nullity, even when the cestui que trust requests a transfer, can cause seriously undesirable situa-
tions where the trust property is salable but is deteriorating, requires repairs which the trustee cannot finance, or will produce no income without improvements which the trustee cannot finance or is not empowered to make. Under the English law, a conveyance by the trustee would carry the legal title and the concurrence of the cestui que trust would bar his interest. A statute enacted in 1887 was designed to ameliorate the situation by empowering the circuit court in chancery to authorize testamentary trustees without power of sale to sell the trust property free of trust and hold the proceeds in trust. The 1887 act provides however, that,

"No sale or conveyance of any kind shall be made of any property contrary to any specific provision in regard thereto contained in the deed of conveyance, or in the will under which the petitioner holds the said property."

Young v. Young was a suit by trustees for permission to sell land in fee. The land was devised to the plaintiffs in trust to pay the rents and profits to named persons for ten years, if either of two children of the

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605 See note 566 supra.
607 Act. 233, P.A. 1887, §9; Act 314, P.A. 1915, c. 19, §70; Comp. Laws (1915) §12724; Comp. Laws (1929) §14412; Mich. Stat. Ann. §27.1196; Comp. Laws (1948) §619.70. The term "deed of conveyance" is explicable by the fact that the statute permits legal life tenants holding under deed or will to petition for sale of the fee, although it applies only to trustees under wills.
testator should so long live, legal remainder to the two children for their lives, legal remainder in fee to their issue or the issue of the survivor of them. The will expressly denied the trustees power to sell and directed them to hold the property intact during the term of the trust. It also provided that the children should not have power to sell or mortgage during their lives. Before the ten years expired, a hotel building on the land burned and the trustees could not finance construction of any building which would produce income or pay the taxes without income. A decree directing sale and the substitution of the proceeds for the original trust property was affirmed after the expiration of the ten years. The court held that courts of equity have inherent power, independent of statute, to permit devia-
tion from terms of trusts restricting alienation and that the quoted section of the 1887 act did not restrict this non-statutory power. The opinion does not refer to the section of the Revised Statutes which makes "absolutely void" every sale or conveyance by trustees in contraven-
tion of the trust and does not discuss the validity of the provisions of the will imposing a prohibition on alienation of the legal life estate of the children. The result reached in Young v. Young is clearly desirable and in harmony with the general Anglo-American law of trusts. Nevertheless, it flatly contravenes the Michi-
gan statutes. The decision amounts to a partial judicial repeal of the arbitrary and virtually unworkable system set up by the New York revisers and a return to the

609 Rev. Stat. 1846, c. 68, §21, note 583 supra, adopting R.S.N.Y. 1829, part II, c. 1, art. Second, §65, note 580 supra. The New York statute has been amended to permit the result reached in Young v. Young. N.Y. Real Property Law §105.

610 TRUSTS RESTATEMENT §167 (1935); Scott, LAW OF TRUSTS §167 (1939).
principles of the English law of trusts, which those revisers sought to abolish.

*Bennett v. Chapin* 611 was a suit to construe a will. The testatrix devised two lots and other property to her executors upon trust to provide for the education and support of her daughter during minority, then to pay her a thousand dollars a year until she reached the age of thirty-five, when the property was to be transferred to her. If the daughter died before reaching thirty-five, her issue were to succeed to her rights and, if she was not survived by issue, the property was to be conveyed to testatrix’s husband. The will provided that the lots should not be sold for less than $16,500. After the death of the testatrix’s husband, the daughter, aged thirty-one and without issue, sued for a determination that she had power to terminate the trust and sell the two lots for $10,000. A decree dismissing her bill was reversed. The court held that the daughter had an indefeasibly vested

611 77 Mich. 526, 43 N.W. 893 (1889). See Part Two, note 466, *infra.* The case is not followed when there are non-consenting contingent beneficiaries. *Ward v. Ward,* 163 Mich. 570, 128 N.W. 761 (1910); *In re Dingler’s Estate,* 319 Mich. 189, 29 N.W. (2d) 108 (1947). In *Blossom v. Anketell,* (D.C. Mich. 1921) 275 F. 947, the sole beneficiary was not allowed to terminate a trust, the terms of which did not entitle him to the principal during his life-time unless the trustees, in their discretion, chose to convey it to him. The decision seems inconsistent, in principle, with *Bennett v. Chapin.* In *Hunt v. Hunt,* 124 Mich. 502, 88 N.W. 871 (1900), land was devised to trustees to convert into personalty and pay the income to a son for life, then to pay over to the heirs, devisees or legatees of the son. It was held that the son was not entitled to terminate the trust. In *Conover v. Hewitt,* 125 Mich. 34, 83 N.W. 1009 (1900), land was conveyed to a trustee to apply the rents and profits to the use of William Fitzhugh during his life and after his death to apply them to the use of his wife and children during the life of the wife, remainder at her death to the children. After the death of William his widow released her interest to the other beneficiaries. They sued to compel immediate termination of the trust and were granted the relief sought. This decision goes further than *Bennett v. Chapin* by holding not only that the beneficiaries of a trust for receipt of the rents and profits of land may compel its termination but that one such beneficiary may transfer his interest to another.
estate in fee simple and that the restraint on alienation was void, citing *Mandlebaum v. McDonell* 612 and a passage in Gray's *Rule Against Perpetuities* stating the English rule that when property is given to trustees to transfer to a beneficiary upon his reaching a certain age and there is no one else beneficially interested, the beneficiary may compel the trustees to convey to him before he reaches the specified age, despite the fact that termination will defeat a material purpose of the trust. 613 The opinion does not mention the Michigan statutes relative to trusts of land. That the decision is in conflict with those statutes is abundantly clear from the New York decisions on the point. 614 It is also in conflict with the rule generally followed in this country in the absence of statute. 615 In this case, as in *Young v. Young*, the result reached is desirable and in harmony with the English law of trusts.

*Fredericks v. Near* 616 was an action of assumpsit. The defendants conveyed land owned by them by the entirety to the plaintiff. The plaintiff and defendants entered into a substantially contemporaneous agreement providing that the plaintiff held as trustee for the purpose of selling the land and paying a debt owed by the defendant husband, and that the defendants jointly and severally agreed to pay any deficiency. Being unable

612 29 Mich. 78 (1874), note 138 supra.
613 The passage quoted by the court is in §120, 8d ed. (1915). It collects the English cases and follows the English view that all prohibitions on alienation, on legal or equitable interests, are void, except on the separate equitable estate of a married woman.
615 *Trusts Restatement* §337, comments j, k (1935); 3 Scott, *Law of Trusts* §337.3 (1939); Griswold, *Spendthrift Trusts*, 2d ed., §513 (1947). This is known as the Rule in *Claflin v. Claflin* [149 Mass. 19, 20 N.E. 454 (1899)].
to effect a sale, the plaintiff, with the consent of the creditor, reconveyed the land to the defendants. The defendant husband was later discharged in bankruptcy. The plaintiff sought to hold the defendant wife liable personally on the assumption of liability in the trust agreement. A judgment for the defendants was affirmed, the court saying,

"We recognize the rule that a trustee, without the consent or acquiescence of the beneficiary, cannot surrender the trust estate, but, in the case at bar, the trustee, the cestui que trust, and settlors were all sui juris, and could, by mutual consent, terminate the trust and restore the status quo." 617

This language appears to be a statement of the rule, which is well settled in England and in states where it has not been altered by statute, that the settlor and cestui que trust may always terminate a trust, even though termination will defeat a material purpose of the trust, provided the cestui que trust is fully competent and there are no other beneficiaries affected. 618 In New York this rule is not applicable to trusts for receipt of the rents and profits of land created under Subsections 3 and 4 because the statutes make the interests of both trustee and cestui que trust inalienable. 619 It would seem that the New York rule should apply in Michigan to trusts created under Subsections 3, 4, and 5, and that, if the opinion in Fredericks v. Near holds otherwise, it is wrong. The trust involved in the case was, however, created under Subsection 1 of the statute, and the right of the beneficiary was to receive a sum in gross. Conse-

617 Id. at 631.
618 TRUSTS RESTATEMENT §338 (1935); Scott, LAW OF TRUSTS §338 (1939). In England the consent of the settlor is not required.
619 Note 614 supra.
quently the interest of the beneficiary was alienable by the express provisions of the statute, and the decision is sound on its facts.\textsuperscript{620}

The statutory prohibition on voluntary alienation of the \textit{cestui}'s interest under a trust for the receipt of the rents and the profits of land has no express exceptions. It reads, "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest."\textsuperscript{621} The decision in \textit{Bennett v. Chapin} \textsuperscript{622} makes an exception to the statute, permitting a \textit{cestui que trust}, who is entitled to a conveyance of the trust property in fee upon reaching a stipulated age, to terminate prematurely a trust for the receipt of the rents and profits of lands. The New York courts hold that the statutory prohibition on voluntary alienation does not apply to the interest of a \textit{cestui que trust} who was the settlor of the trust.\textsuperscript{623} The Michigan Supreme Court has given some indication that it may not follow this view.\textsuperscript{624} Apart from these two situations, there appears to be no exception to the statutory rule that the \textit{cestui} of a trust for the receipt of the rents and profits of land cannot voluntarily alienate his interest.\textsuperscript{625}

\textsuperscript{620}Rev. Stat. 1846, c. 63, §19, note 583 \textit{supra}, corresponding to R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §68, quoted at note 580 \textit{supra}.

\textsuperscript{621}Rev. Stat. 1846, c. 63, §19, note 588 \textit{supra}. But see note 611 \textit{supra}.

\textsuperscript{622}Note 611 \textit{supra}.

\textsuperscript{623}Newton v. Hunt, 134 App. Div. 325, 119 N.Y.S. 3 (1909), affd. 201 N.Y. 599, 95 N.E. 1134 (1909); see Schenck v. Barnes, 156 N.Y. 316, 50 N.E. 967 (1898.)


\textsuperscript{625}See Palms v. Palms, 68 Mich. 555 at 380, 36 N.W. 419 (1888); Ward v. Ward, 163 Mich. 570 at 575, 128 N.W. 761 (1910); In re Allen's Estate, 240 Mich. 661 at 664-665, 216 N.W. 446 (1927) (implying that the \textit{cestui}'s interest is not transmissible by will). But see Alberts v. Steiner, 237 Mich. 143, 211 N.W. 46 (1926), where the \textit{cestui que trust} did not contest the validity of her mortgage and the mortgagee was allowed to reach the rents and profits. The opinion does not refer to the statute.
With regard to involuntary alienation, Chapter 63 of the Revised Statutes of 1846 provides,

"Sec. 13. When a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity, to the claims of creditors of such person, in the same manner as other personal property which cannot be reached by an execution at law." \(^{626}\)

As was to be expected, this provision was interpreted to mean that creditors cannot reach the rents and profits to the extent that they are necessary for the education and support of the *cestui que trust*.\(^{627}\) The right of creditors to reach the surplus was complicated by contradictory provisions of Chapter 90 of the Revised Statutes of 1846 which permitted judgment creditors of a *cestui que trust* to reach his interest under the trust, "except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant." \(^{628}\) If the provisions of Chapters 63 and 90 are read literally, it would appear that the interest of a *cestui que trust* under a trust for the receipt of the rents and profits of land could not be reached by his creditors at all if he was not the settlor.

\(^{626}\) Note 583 *supra*.

\(^{627}\) Cummings v. Corey, 58 Mich. 494, 25 N.W. 481 (1885). In this case the life beneficiary, whose interest was in question, was also the trustee. The trust was created by the will of another.

of the trust, and could be reached only as to the surplus income above his needs for education and support if he was the settlor. Such is not the present judicial interpretation. The courts hold that, if the *cestui que trust* was the settlor, Chapter 63 has no application and Chapter 90 has full application, so that the entire income, not merely the surplus above what is necessary for support and education, may be reached by creditors. If the *cestui que trust* was not the settlor, Chapter 90 has no application and Chapter 63 applies, so that the surplus of rents and profits beyond what is necessary for the support and education of the *cestui* is accessible in equity by his creditors. Of course, in no case may his interest be reached by attachment at law.

**F. SPENDTHRIFT TRUSTS OF PERSONALTY**

The New York statute "Of Uses and Trusts" is Article Second of Title II of Chapter I of Part II of the Revised

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629 This was the result reached by the earlier New York cases. They are collected in Griswold, *Spendthrift Trusts*, 2d ed., §70n (1947).


631 Spring v. Randall, 107 Mich. 103, 64 N.W. 1063 (1895). But in Gilkey v. Gilkey, note 630 supra, it was held that no part of the interest of the beneficiary under a trust for support from the rents and profits of land created by another could be reached to satisfy a decree for alimony. The court made no mention of either statute, saying merely that payment of alimony was not within the uses to which the trustee was authorized to apply the income. See notes 570, 573 supra as to the treatment of trusts for support in states where the law has not been altered by statute. See Sprague v. Moore, 130 Mich. 92, 89 N.W. 712 (1902).

Statutes of 1829. Title II is entitled, “Of the Nature and Qualities of Estates in Real Property, and the Alienation Thereof.” Chapter I is entitled, “Of Real Property, and of the Nature, Qualities and Alienation of Estates Therein.” This gives the impression that the statute was intended to govern only trusts of freehold estates in land. Nevertheless, Article First of Title II contains several provisions relative to estates for years, which it declares shall be chattels real, and the revisers’ notes make it clear that they intended the section abolishing trusts which entitle the cestui que trust to possession to apply to trusts of estates for years. There seems never to have been any doubt that the section limiting the purposes for which trusts might be created did not apply to trusts of other types of personal property, and New York decisions rendered as late as 1862 held that the sections making the interest of the cestui que trust inalienable did not apply to such trusts. Nevertheless, on the basis of New York statutes governing personal property, it was settled in 1865 that the interest of the cestui of a trust for the receipt of income from personal property was subject to the same inalienability as that of the cestui of a trust for the receipt of the rents and profits of land.

The Michigan statute “Of Uses and Trusts” is part of Title XIV of the Revised Statutes of 1846, which bears the same title as Chapter I of Part II of the New York Revised Statutes of 1829. Michigan never adopted

635 3 R.S.N.Y. 584 (ed. 1836).
636 The cases are collected in Griswold, SPENDTHRIFT TRUSTS, 2d ed., §69 (1947).
the New York personal property statutes. Consequently
the Michigan statute "Of Uses and Trusts," Chapter 63
of the Revised Statutes of 1846, has no application to
trusts of personal property, other than chattels real,
and they are governed by the English rules of equity, as
modified by judicial decision. Moreover, when the
trust instrument directs the trustee to convert land into
personalty, the doctrine of equitable conversion applies,
and the trust is treated as one of personal property, un-
affected by the provisions of Chapters 62 and 63 of the
Revised Statutes of 1846.

If, then, a trust is of personal property, other than
chattels real, or is treated as such, the normal Anglo-

638 Ledyard's Appeal, 51 Mich. 623, 17 N.W. 208 (1883); Hopkins v.
Crossley, 132 Mich. 612, 96 N.W. 499 (1903); Moore v. O'Leary, 180
Mich. 261, 146 N.W. 661 (1914).
639 Penny v. Croul, 76 Mich. 471, 43 N.W. 649 (1889); Ford v. Ford,
80 Mich. 42, 44 N.W. 1057 (1890) (direction to convert Michigan land
into Missouri land exempted trust from the statutes); Michigan Trust
Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924); Gettins v. Grand
Rapids Trust Co., 249 Mich. 238, 228 N.W. 703 (1930); Floyd v. Smith,
626, 289 N.W. 275 (1939). These cases involved the question of
whether Rev. Stat. 1846, c. 62, §15, note 591 supra, applied to the
trusts involved, but the same result should be reached as to the applica-
tion of Rev. Stat. 1846, c. 63, §§13, 19, note 583 supra. It was sug-
gested in Thatcher v. Wardens and Vestrymen of St. Andrew's Church
of Ann Arbor, 37 Mich. 264 (1877), that if the terms of a trust give
the trustee power of sale, a trust does not offend Rev. Stat. 1846, c.
62, §15, regardless of duration. It does not follow that such a trust
would cease to be one for receipt of the rents and profits of land and
so free from the prohibition on alienation of the cestui que trust's
interest imposed by Rev. Stat. 1846, c. 63, §§13, 19, until the land is
actually sold. The suggestion in the Thatcher case was questioned in
Palms v. Palms, 68 Mich. 355 at 386, 36 N.W. 419 (1888), and later
overruled by a decision that a power of sale for reinvestment does not
exempt a trust of land from the provisions of Rev. Stat. 1846, c. 62,
20, Section B (3) infra. Of course, if a trust of land is valid and the
trustee actually does sell the land and reinvest in personalty under a
power conferred on him by the terms of the trust, the trust ceases to
be one for receipt of the rents and profits of land and the statutory
prohibition on alienation of the beneficiary's interest imposed by Rev.
Stat. 1846, c. 63, §§13, 19, ceases to operate.
American rules of equity apply to transfers of the legal title by the trustee, and the interest of the *cestui que trust* is freely alienable and accessible to his creditors unless the terms of the trust itself validly restrain alienation.\(^{640}\) As has been seen, the "spendthrift trust" doctrine accepted in most American states permits the imposition of a prohibitory restraint on alienation when the only rights of the *cestui que trust* are to receive the income from the trust property during his life or some shorter period.\(^{641}\) When the *cestui que trust* also has rights in the principal, there is less harmony as to the validity of such a prohibitory restraint, especially when it purports to restrain alienation of the interest in the principal as well as the right to the income.\(^{642}\)

*Hackley v. Littell*\(^{643}\) was a proceeding in equity, brought by the trustee, to set aside assignments of her interest made by a *cestui que trust*. In 1887 Mrs. Littell transferred $50,000 to a trustee, to pay the income to her during her lifetime and transfer the principal to others upon her death. The trust instrument provided that Mrs. Littell could not anticipate, transfer, or assign any part of the income or principal. In 1901 the trustee sued Mrs. Littell in equity and in 1902 a decree was entered declaring that the trust was a valid spendthrift trust which Mrs. Littell had no right to terminate and under which she was entitled only to the income. In 1905 Mrs. Littell made several security assignments of her interest under the trust and the assignees claimed the income. A decree determining that the assignments were "void and of no effect," and directing the trustee

\(^{641}\) Note 569 *supra*.
\(^{642}\) Notes 571, 572 *supra*.
\(^{643}\) 150 Mich. 106, 113 N.W. 787 (1907).
to continue paying the income directly to Mrs. Littell, was affirmed on the ground the 1902 decree was *res judicata* of the spendthrift character of the trust. All of the justices seemed to assume the validity of spendthrift trusts. One justice dissented on the ground that spendthrift provisions are ineffective as to the interest of a *cestui que trust* who is also the settlor; that is, that a person may not set up a spendthrift trust for himself.\footnote{644}{See note 574 *supra*; Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910).}

The majority of the court agreed that, in view of the provisions of Chapter 90 of the Revised Statutes of 1846,\footnote{645}{Note 628 *supra*.}


\footnote{647}{255 Mich. 275, 238 N.W. 284 (1931). *Accord*: Hay v. LeBus, 317 Mich. 698, 27 N.W. (2d) 309 (1947). It is not made certain in the opinion or the record in the Rose case that there was no land involved, but the will contained a direction to convert land to personalty. The Hay case involved a trust of both land and personalty.}

"one may not declare a trust in his own property, reserving a beneficial interest in himself, which interest shall not be subject to proceedings by a judgment creditor," \footnote{648}{644 See note 574 *supra*; Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910).} but questioned whether the settlor of a trust may not bar his own voluntary alienation of his interest under it. The form of the litigation suggests a factor in the spendthrift trust problem which is seldom emphasized, that spendthrift provisions are often inserted in trust instruments not so much to protect the *cestui que trust* against his own folly as to protect the trustee against the trouble of dealing with the claims of creditors and assignees.

*Rose v. Southern Michigan National Bank*\footnote{647}{255 Mich. 275, 238 N.W. 284 (1931). *Accord*: Hay v. LeBus, 317 Mich. 698, 27 N.W. (2d) 309 (1947). It is not made certain in the opinion or the record in the Rose case that there was no land involved, but the will contained a direction to convert land to personalty. The Hay case involved a trust of both land and personalty.} was a proceeding for approval of a compromise brought under a statute permitting the competent living persons whose interests will be affected to compromise any good faith contest of the admission of a will to probate, or any good
faith controversy as to the construction of a will, subject to approval of the probate or circuit court. The statute provided for the appointment of a guardian ad litem to represent unborn and unascertained persons with contingent interests. The will involved, which was contested on the ground of mental incapacity of the testator, bequeathed personal property to a trustee to pay the income to the testator's son during his lifetime and, upon his death, to transfer the property to the then living lawful heirs of the testator. The will directed that the son's interest should not be liable for his debts. The compromise agreement provided that the property covered by the trust should be turned over to the son, free of trust. The trustee and the guardian ad litem for future contingent interests appealed from a decree approving the compromise. The decree was reversed on the grounds that the trust set up by the will was a spendthrift trust under which the beneficiary's interest was inalienable by virtue of Section 19 of Chapter 63, Revised Statutes of 1846, and that a court of equity has no power to terminate a spendthrift trust prematurely. The opinion overlooks the facts that the will imposed no restraint on voluntary alienation by the son and that

648 Act 249, P.A. 1921, Comp. Laws (1929) §§15581 to 15584; reenacted, Act 288, P.A. 1939, c. 2, §§45 to 48; Mich. Stat. Ann. §§27.5178 (115-118); Comp. Laws (1948) §§702.45 to 702.48. Sec. 47 provides, in part, "such court shall, if such contest or controversy shall appear to be in good faith and if the effects of such agreement upon the estates and interests of the persons and interests so represented by any fiduciary or guardian ad litem and upon any inalienable estate or interest shall be found to be just and reasonable, make an order approving such agreement. . . ." Emphasis supplied. The underlined words were in the statute when the compromise involved in the Rose case was entered into. Compromise agreements modifying trusts without spendthrift provisions have been approved, even when the modification involved acceleration of payments to beneficiaries. Metzner v. Newman, 224 Mich. 324, 194 N.W. 1008 (1923); Detroit Trust Co. v. Neubauer, 325 Mich. 319, 38 N.W. (2d) 371 (1949).
Chapter 63 has no application to trusts of personal property. It also fails to distinguish between an attempt to terminate prematurely a valid trust and a compromise agreement made under the statute where there is real question as to whether the will creating the trust is valid. If the decision had been based on the unfairness of the agreement to the unascertained contingent remaindermen, no quarrel could be found with it. It would also be justified if based on a finding that the will contest was not in good faith but a mere subterfuge for getting rid of the spendthrift trust. The opinion as written seems unsound and leaves the law on the points involved in an unhappily confused state.

_In re Ford's Estate_ was a proceeding under the statute involved in the _Rose_ case for approval of a compromise agreement as to the construction of a will. The will provided that, on the death of the testator's widow, certain assets should be used to create two trusts, one for the benefit of each of the testator's sons and the issue of such son. It authorized the trustees, in their discretion, to pay $100 a month from income to each son and directed them to pay a third of the corpus of his trust to each son on reaching 30, a third on reaching 35, and the balance on reaching 40. Other paragraphs provided,

“Should either or both of my sons at any time or times develop spendthrift or disorderly habits, my trustees are authorized and empowered to withhold from such son any part of the income and any part of the distributable corpus provided herein directed to be paid to any beneficiary.

“The trustee shall not be permitted nor authorized to

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650 331 Mich. 220, 49 N.W. (2d) 154 (1951). The trustees had converted the real property in the estate into personalty before the date of the compromise agreement.
recognize any assignment of interest or principal herein directed to be paid to any beneficiary."

The testator died in 1942, when his son Milton was 29 and his son Melvin was 27. Milton died in 1944, after his thirtieth birthday. After Melvin reached 35, he, Milton's administratrix, guardians for the living children of the two sons, and the widow of the testator, entered into the compromise agreement, providing for immediate distribution of the entire corpus of Milton's trust, one-third to his estate and two-thirds to his child, immediate distribution of two-thirds of the corpus of Melvin's trust to him, the payment of the full income of the balance of Melvin's trust to him, and the distribution of the remaining corpus to him on reaching 40. A guardian ad litem for interested persons not in being appealed from a judgment approving the compromise on the grounds that the will did not authorize any distribution prior to the death of the testator's widow and that immediate distribution would constitute premature termination of spendthrift trusts. The judgment was affirmed on the ground that the trusts were not spendthrift trusts because of the cestui's interest in principal. The decision appears to stand for the proposition that, if the cestui has an interest in the principal, spendthrift provisions are void, even as to his interest in income.

Roberts v. Michigan Trust Co.\textsuperscript{651} was a suit to surcharge trustees for breach of trust. Catherine A. Peck bequeathed personal property valued at about $415,000 to the Michigan Trust Company and Percy S. Peck, upon trust to pay the income to Percy S. Peck during his life-

\textsuperscript{651} 273 Mich. 91, 262 N.W. 744 (1935). The trust consisted exclusively of personalty at the time it was created. The trustees later acquired real estate valued at $1,579.68, evidently by foreclosure of a mortgage and a land contract.
time, remainder as he should by will appoint or, in default of appointment, to his issue. The will provided,

"No person beneficially interested in any legacy or devise given by this will to my said Trustee or Trustees shall have power to assign, convey, pledge, hypothecate or anticipate the payment of any sum or delivery of any property which may at any time be or become due or payable by way of income or principal, under the terms of this will; and if any such assignment, conveyance, pledge, hypothecation or other instrument by way of anticipation is executed, the same shall be void and of no effect, and shall not be recognized by my Trustee or Trustees, and it or they shall have power to withhold further payment to such person so beneficially interested in such legacy or devise, until such assignment, conveyance, pledge, hypothecation or other instrument shall be withdrawn or canceled, in such manner as shall be satisfactory to my said Trustee or Trustees."

The trustees lent $162,000 of trust funds to Percy S. Peck, taking as security mortgages on land valued at about twice that amount which he owned individually. The children of Percy S. Peck brought this suit in their father's lifetime, contending that the loans to him were in violation of the spendthrift clause and impaired their interests as contingent remaindermen. The court held that the transactions in question did not violate the spendthrift clause, which the court treated as valid. The case is interesting in that it suggests the validity of a prohibitory restraint on alienation of a beneficiary's right to receive income for life, even though the beneficiary has a power of disposition of the remainder interest in the principal.652 The particular spendthrift clause

652 In re Peck Estates, 320 Mich. 692, 32 N.W. (2d) 14 (1948), involved the same trust. Percy S. Peck was adjudicated a bankrupt in 1935 and his interest under the trust assigned to the plaintiff by his trustee in bankruptcy. The court held no interest under the trust, in income or principal, passed to the trustee in bankruptcy.
PERPETUITIES AND OTHER RESTRAINTS

is also interesting because it contained a provision for forfeiture on alienation as well as a general prohibition on alienation.\textsuperscript{653}

\textit{Wyrzykowski v. Budds} \textsuperscript{654} was a garnishment proceeding against a city to reach instalments of pension due the principal defendant, a retired city policeman. The pension fund, comprising employer and employee contributions, was established by the city charter, which provided that pensioners could not assign their rights and that pension payments due should not be subject to legal process for the debts of the pensioner. The writ was served after a check had been drawn in favor of the principal defendant but before it had been delivered to him. A judgment quashing the writ was affirmed. The court thought that the pension payments were gifts rather than income payable under a trust, but it sustained the validity of the charter provisions by analogy to like provisions of spendthrift trusts.

It is apparent from the cases that Michigan sustains the validity of spendthrift trusts of personal property. The precise limits of the spendthrift trust doctrine in this state have not yet been set. Whether as a matter of policy spendthrift trusts should be allowed, that is, whether prohibitions on alienation of equitable interests in property should be enforced, is gravely doubtful. As Dean Griswold has pointed out, the whole spendthrift trust doctrine in this country has probably grown up as a result of misunderstanding and confusion.\textsuperscript{655} Pro-

\textsuperscript{653} For an example of a discretionary trust, of the type which is used in England to serve the purpose of spendthrift trusts, because they are invalid there, see Boyer \textit{v.} Backus, 282 Mich. 593, 276 N.W. 564 (1937).


fessor John Chipman Gray's classic work on *Restraints on Alienation* \(^{656}\) is an eloquent attack on the whole doctrine, based on history, logic, and policy. No satisfactory answer to the arguments against spendthrift trusts advanced in the Preface to the Second Edition of that work has been made. Even if spendthrift trusts are to be allowed, there is no adequate reason for the distinctions which exist in this state between trusts of land and trusts of personal property. Some arguments can be made in favor of permitting the settlor of a trust to impose prohibitory restraints on the alienation of the interest of the *cestui que trust*. None can be advanced in favor of the Michigan statutes which make the interest of the beneficiary of a trust for receipt of the rents and profits of land inalienable even though the settlor wishes it to be alienable. Those statutes have caused much confusion. Their application to trusts which involve both land and personal property raises serious questions. Regardless of the desirability of spendthrift trusts, those statutes should be repealed.

**G. CHARITABLE TRUSTS**

As has been seen, although a condition subsequent in general restraint of alienation in a conveyance of legal title in fee simple to a private person is always void,\(^{657}\) such a condition in a conveyance of legal title in fee simple to a charitable or public corporation is valid.\(^{658}\) The same problem can arise as to a conveyance

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\(^{656}\) (1st ed. 1885); (2d ed. 1895). See note 255 *supra* and Schnebly, "Restrains Upon the Alienation of Property," 6 *American Law of Property*, §26.100 (1952).

\(^{657}\) Notes 108, 109 *supra*; Mandlebaum v. McDonell, 29 Mich. 78 (1874), note 138 *supra*.

to the trustee of a charitable trust. Michigan refused to enforce charitable trusts until they were authorized by statute in 1907. A statute enacted in 1925 provides that when land is conveyed to a charitable use, subject to such a condition, and it becomes impossible or impracticable to use the land in the manner specified, the circuit court may authorize sale of the land free of the condition of forfeiture. It would seem that such conditions in general restraint of alienation are still valid, however, and will entitle the grantor to assert a forfeiture upon alienation other than pursuant to the statute.

H. MORTGAGES AND EXECUTORY LAND CONTRACTS

The Mediaeval Church did not permit Christians to charge interest on a loan of money or on the unpaid balance of the purchase price due under a sale on credit. The Law of Moses prohibited Jews charging interest on loans to Jews but not on loans to Gentiles. As the Jews in England were liquidated or ex-

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662 O'Brien, An Essay on Mediaeval Economic Teaching 119 (1920). Similarly, it was sinful to charge a larger price in a credit sale than in a cash sale. Id. at 119, 187-189.


EQUITABLE INTERESTS

iled under Edward I and Jews were not permitted in the country from then until the seventeenth century, their exemption from the ban was not a factor in the development of the later mediaeval law. Throughout the Middle Ages, English law reinforced the prohibition of canon law. Consequently, one in need could borrow money commercially only by means of a subterfuge. The needy landowner could make an outright sale of an estate for years; the needy merchant could sell a share in his business. The doctrine of just price would, of course, require such sales to be at that price.

Security transactions were permissible, so long as the lender did not seek interest. One early form was that of giving the lender a lease for years with a provision that he should have a fee if the loan was not repaid by the expiration of the term. A later form was substantially that of the modern mortgage, a conveyance in fee simple to the lender, subject to a condition subsequent which entitled the borrower to re-enter upon payment of the debt, or to a covenant by the lender that he would reconvey the fee upon payment of the debt. Under either form of mortgage the lender took possession immediately upon the execution of the mortgage and held it until the debt was paid in full. He was expected, in theory, to apply the entire rents and profits in reduction of the debt. In practice, mortgagees must have contrived to make a surreptitious profit out of their pos-

665 Leges Edw. Confessoris, c. 37 (1043; re-enacted, 1066; ed. 1840); Stat. 15 Edw. III, stat. 1, c. 5 (1341), 1 Statutes of the Realm 296; 3 Hen. VII, cc. 5, 6 (1487), 2 Statutes of the Realm 514, 515; 8 Holdsworth, History of English Law 100-102 (1926).


667 1 Coke, Institutes 208a-208b; Turner, The Equity of Redemption 18 (1931).
session of the mortgaged land, or such transactions would not have been as common as they were. In the condition type of mortgage in fee, the interest in the land retained by the mortgagor was a mere right of entry. In the covenant type his retained interest was a pure chose in action, a right to sue for specific performance of the covenant. Neither of these interests was alienable, and neither entitled the mortgagor to possession until the debt was paid in full. If the debt was not paid in full by the due date, the fee simple title of the mortgagor became absolute, and the mortgagor had nothing.

As commercial activity increased, the Church relaxed slightly in its attitude toward credit transactions, permitting a lender to receive damages if the debt was not paid on time, at least if he could show that he suffered loss due to the default. By the fifteenth century it was recognized that inability to take advantage of an opportunity for a profitable investment constituted such loss. As a merchant or trader could always show "loss" of this type, it became common to make gratuitous loans for very short periods with a provision for payment of interest in the form of liquidated damages, to begin on the nominal due date of the loan. In such a transaction neither party expected that the debt would be paid on the nominal due date. These ecclesiastical relaxations of the prohibition on interest were reflected in

668 1 Coke, Institutes, 210a; Turner, The Equity of Redemption 19 (1931).
669 O’Brien, An Essay on Mediaeval Economic Teaching 184-187 (1920). If the penalty for default (poena conventionalis) was stated in the instrument evidencing the debt, the creditor could collect it without proof of damage; if not, he had the burden of proving injury (damnum emergens). The loss usually shown was some calamity which necessitated the creditor himself borrowing money.
670 Id. at 187-193; 8 Holdsworth, History of English Law 103 (1926). Compensation for this type of loss was called "lucrum cessans."
an English statute of 1494. Nevertheless, neither the Mediaeval Church nor the mediaeval law permitted a loan of money upon interest which was payable from the date of the loan.

The Protestant Reformation brought a change in attitude. Some of the reformers, notably Calvin and Melancthon, approved of interest at fair rates, and it had become evident to many that to permit the charging of interest at regulated rates was better than to drive borrowers to the use of subterfuges which really entailed greater expense to them. A statute of 1545 permitted charging up to ten per cent per annum interest on loans, including those secured by mortgage on land. Some Protestant leaders retained the mediaeval attitude toward interest, however, and the statute was repealed in 1552. A statute of 1623 permitted collection of interest at not to exceed eight per cent per annum, and the charging of interest has been lawful, so far as the secular government is concerned, since then.

The permission to charge interest made it possible for a mortgagee to make a reasonable return on his investment without taking possession of the land. In the seventeenth century it became common for the mortgagee to permit the mortgagor to remain in possession until default. The mortgagor still had no right to possession in

671 Stat. 11 Hen. VII, c. 8 (1494), 2 Statutes of the Realm 574.
673 Stat. 5 & 6 Edw. VI, c. 20 (1552). The statute imposed penalties of forfeiture of the sum lent, imprisonment, and fine for charging interest. The penalties were removed, where the interest did not exceed 10%, by 15 Eliz. c. 8, §§2, 5, 9 (1570) and 39 Eliz. c. 18, §§12, 33 (1597), but these statutes did not permit collection of the interest.
674 Stat. 21 Jac. I, c. 17, §2 (1623), made permanent, 3 Car. I, c. 4, §5 (1627). The rate was reduced to 6% by 12 Car. II, c. 13, §2 (1660), and to 5% by 12 Anne, stat. 2, c. 16, §1 (1713). All statutory restrictions on charging interest were repealed by 17-18 Vict. c. 90 (1854).
the absence of express agreement.675 So far as the law was concerned, the mortgagor in possession was a mere tenant at will or for years of the mortgagee.676 At common law, if the mortgage debt was not paid on the due date, the mortgagee became the absolute owner of the fee.677

By default in payment on the due date, the mortgagor was likely to lose his land for an inadequate consideration. In the course of the seventeenth century, the High Court of Chancery began to grant relief from these forfeitures, considering that interest was adequate compensation to the mortgagee for delayed payment. The mortgagor who had defaulted in payment and so had lost all his rights in the land at law was permitted to sue in equity for redemption. Upon payment of the debt, with interest, the mortgagee would be compelled to reconvey the land to the mortgagor.678 The High Court of Chancery did not, however, interfere with the mortgagee’s right to possession pending full redemption.679 If the mortgage entitled him to possession from its date, he retained that right. If it entitled him to take possession on default, he could still do so, and could keep possession until redemption. The equity of re-

677 1 Coke, INSTITUTES 205a and Butler’s Note 96 to 13th ed. (1787).
678 Turner, THE EQUITY OF REDEMPTION 17-42 (1931); Master and Fellows of Emanuel College, Cambridge, v. Evans, 1 Chan. Rep. 18, 21 Eng. Rep. 494 (1625). As a necessary corollary to this creation of an equity of redemption without definite limitation in duration, the High Court of Chancery developed a correlative remedy for the mortgagee who wanted his money. He could sue for foreclosure of the equity of redemption, that is, for a decree requiring the debtor to pay by a fixed date or lose his equity of redemption through sale of the land to satisfy the debt. How v. Vigures, 1 Chan. Rep. 32, 21 Eng. Rep. 499 (1628).
deemption was only a right of the mortgagor to pay the debt and recover the land after the due date of the mortgage.

It will be recalled that, at law, the rights of the mortgagor under the condition for re-entry or covenant for reconveyance were personal and inalienable. In Chancery, however, the equity of redemption became an equitable estate in land, equivalent in quantity to the mortgagor's former legal estate. It was as freely alienable and devisable as like legal estates. By the eighteenth century, Lord Hardwicke could say:

"An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."

The High Court of Chancery would not countenance any provision in a mortgage which would defeat, clog, or fetter the equity of redemption. In the words of Lord Northington,

"A mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not truly speaking, free

680 Note 668 supra.
men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

From these principles it followed that any provision in a mortgage restricting devolution of the equity of redemption upon the death of the mortgagor, or restraining inter vivos alienation by him, is void. Even a provision giving the mortgagee an option to purchase the land for a fair price upon default is unenforceable. As the mortgagee is the legal owner of the land, his estate, too, is freely alienable.

Most American states now treat the mortgagor as the legal owner of the land and the interest of the mortgagee as a mere lien. Where this is so, the validity of restraints on alienation of the mortgagor's interest is determined by the rules applicable to legal estates. Where the equity of redemption remains an equitable estate, the Restatement of Property takes the position that restraints on its alienation are valid only if a like restraint would be valid as to an equivalent legal estate. Such cases as

684 Vernon v. Bethell, 2 Eden. 110 at 113, 28 Eng. Rep. 838 (1762). Lord Hardwicke stated the rule in similar language in Toomes v. Conset, 3 Atk. 261, 26 Eng. Rep. 952 (1745), adding, "and the reason is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender."

685 Anonymous, 2 Freeman 84, 22 Eng. Rep. 1073 (1681); Ord v. Smith, 2 Eq. Cas. Abr. 600, 22 Eng. Rep. 504 (1725). In the latter case the mortgagor's heir was allowed to redeem 26 years after default. The rule was otherwise at law. Littleton, Tenures, §337 (1481).


689 Section 415 (1944).
there are appear to support this proposition. Therefore, if the equitable estate of the mortgagor is in fee simple, every prohibition on alienation or condition in general restraint of its alienation is void.

Before the Statute of Uses, legal possessory estates in land could not be conveyed without a formal livery of seisin. In equity a bargain and sale, that is, an executed contract of present sale, raised a use in the bargainee. That is to say, although a mere agreement of present sale and payment of the purchase price did not transfer the legal title, the vendor stood seised to the use of the vendee. After the Statute of Uses, this use became a legal estate. In consequence, after the statute the deed of bargain and sale became a common method of conveying the legal title to land.

In later centuries the High Court of Chancery, through the device of granting specific performance of executory contracts for the sale of land, developed the rights of the vendee under such a contract by analogy to the old rights of the bargainee under an executed bargain and sale. When a contract was entered into, binding the vendee to pay the purchase price in the future and the vendor to convey upon receipt of the price, the vendee became the owner in equity and the vendor a sort of trustee of the legal title. Lord Hardwicke stated the basis of the doctrine in these words:

“that which is contracted for valuable consideration to be done, will by the court be considered as done; all the consequences arising as if it had been so, and as if a


691 Stat. 27 Hen. VIII, c. 10 (1535).

conveyance had been made of the land at the time to the vendee." 693

In holding that the vendee bears the risk of loss by fire, Lord Eldon said,

"for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heirs." 694

As these statements indicate, the rights of the vendee under an executory contract for sale of land are not a mere chose in action, they are an equitable estate in the land of the same duration as the legal estate contracted for. This being so, the equitable estate of the vendee is freely alienable and his transferee is entitled to specific performance of the contract against the vendor. 695

As Lord Eldon put it,

"Being, as I say they were, the owners of the estate in equity, they had a right, . . . . to sell such right, title, and interest as they had. . . . It is extremely clear that an equitable interest under a contract of purchase, may be the subject of sale." 696

It will be apparent that, as developed by the High Court of Chancery, the rights of a vendee under an

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executory contract for the sale of land were virtually identical with those of a mortgagor under the type of mortgage which was, in form, an absolute conveyance in fee to a mortgagee who covenanted to reconvey upon payment of the debt secured. In each case the legal title was held as security for a debt and subject to a covenant to convey upon payment. In each case the beneficiary of the covenant was entitled to specific performance of it upon payment and, pending payment, was treated as equitable owner of the land, with full power of alienation inter vivos and by will. In each case the equitable owner was not entitled to possession prior to payment in full unless the terms of the transaction gave him such a right, and, if they did, his possession was merely that of a tenant for years or at will, subject to the restrictions which apply to such tenancies. In each case equity deemed time not to be of the essence and would compel conveyance even though the payment was not made on time.\footnote{Seton v. Slade, note 695 supra.} The one difference between them was that whereas, in the case of a mortgage, the High Court of Chancery would never give effect to any provision which tended to make time of the essence and so shorten or cut off the equity of redemption, in the case of the executory land contract, time could be made of the essence by express stipulation.\footnote{Ibid.} Inasmuch as the typical English executory land contract contemplated a cash sale, so that cutting off the vendee's right to performance upon default in payment deprived him only of the bargain and, perhaps, a small deposit, whereas cutting off an equity of redemption meant allowing the mortgagee to have the land for an inadequate price, this difference is understandable and appropriate.
The early Michigan cases treat the mortgage as it was treated in England. The mortgagee was entitled to take possession of the land upon default and to keep it until the mortgagor redeemed, without bringing foreclosure proceedings, and equity would not interfere with the mortgagee's doing so.\textsuperscript{699} The mortgagee could maintain an action of ejectment immediately upon default, without foreclosing.\textsuperscript{700} A statute of 1843 changed the situation as to mortgages of land by providing,

"That no action of ejectment shall hereafter be maintained by a mortgagee or his assigns or representatives, for the recovery of the mortgaged premises, until after a foreclosure of the mortgage, and the time for redemption thereof shall have expired." \textsuperscript{701}

The Michigan Supreme Court has given the statute a very broad interpretation, holding that it prevents the mortgagee from taking possession by self-help\textsuperscript{702} and that it invalidates every provision in a mortgage which would give the mortgagee a right to possession or the rents and profits before foreclosure and the expiration


\textsuperscript{701} Act 62, P.A. 1843; superseded by Rev. Stat. 1846, c. 108, §61, Comp. Laws (1857) §4614; Comp. Laws (1871) §6263; How. Stat. §7847; Comp. Laws (1897) §11006; re-enacted, Act 314, P.A. 1915, c. 29, §54, Comp. Laws (1915) §13221; Comp. Laws (1929) §14956; Mich. Stat. Ann. §27.1967; Comp. Laws (1948) §629.54, which provides, "No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until the title thereto shall have become absolute upon the foreclosure of the mortgage."

of the period of redemption allowed therein.\textsuperscript{703} Michigan has adopted the view that the mortgagor's interest is a legal estate and that of the mortgagee a mere lien.\textsuperscript{704}

Michigan follows the English rule that the vendee under an executory contract for the sale of land is the equitable owner of the land.\textsuperscript{705} A land contract does not necessarily entitle the vendee to possession, and the act of 1843 has no application to land contracts. Therefore, a provision in a land contract which authorizes the vendor to take possession on default is valid.\textsuperscript{706} In consequence of these differences between


\textsuperscript{705} Bowen v. Lansing, 129 Mich. 117, 88 N.W. 384 (1901).

the mortgage and the land contract, it is common in Michigan to effect credit sales of land by means of executory land contracts instead of by conveyance to the vendee with purchase money mortgage back to the vendor. There is no doubt that the interest of the vendee under such a contract is alienable by assignment, subcontract, or conveyance in the absence of valid restraints on alienation imposed in the contract.\textsuperscript{707} The extent to which such restraints are effective is not so clear.

Waiver of provisions in land contracts which required assignments by the vendee to be made in a particular manner or only with the consent of the vendor has been found in a number of cases, without definite decision as to the validity of the provisions.\textsuperscript{708}

\textit{Welling v. Strickland} \textsuperscript{709} was a suit by the original vendee for specific performance of a land contract. The contract provided that the vendee should not assign the contract or sublet the farm or any part thereof without the written consent of the vendor, and that any breach would work an immediate forfeiture. The vendee sublet most of the farm without permission and defaulted in payments. The vendor took possession and notified the vendee that the contract was forfeited. Specific performance was denied, the opinion suggesting that the subletting alone was enough to work a forfeiture.


\textsuperscript{709} 161 Mich. 235, 126 N.W. 471 (1910).
Rodenhouse v. De Golia\textsuperscript{710} was a suit to rescind an assignment of a land contract. In 1908 Langereis sold on land contract to Thomas. In August, 1913, Thomas sold to Vreeland by a subcontract providing that the vendee might not assign, transfer, lease, or sublet without the consent of the subvendor and for forfeiture on breach. Thomas later assigned the subvendor's interest under the subcontract to Langereis, the original vendor. In 1915 Vreeland assigned the subvendee's interest under the subcontract to De Golia, and the latter assigned it to Rodenhouse. These assignments were made without the consent of Langereis, and he refused to recognize them. Rodenhouse then sued De Golia to rescind the assignment to him. A decree granting rescission was affirmed.

Cutler v. Lovinger\textsuperscript{711} was a suit for specific performance of a subcontract for sale of land. Milligan sold the land to the defendants by a contract providing that they could not assign their interest without the consent of the vendor. The defendants, without Milligan's consent, contracted to assign their interest to the plaintiff. The defendants refused to perform on the ground Milligan would not consent. Milligan testified that he was willing to convey to the defendants upon payment of the balance due him. A decree for the plaintiff was affirmed, the court saying that the defendants could bind themselves by a contract to assign their interest even if an assignment would not be effective against Milligan. This seems obvious. One who owns no interest in land at all may bind himself by a contract to convey it. The decision demonstrates that a provision against assignment in a land contract will not be enforced as a prohibi-

\textsuperscript{710} 198 Mich. 402, 164 N.W. 488 (1917).
\textsuperscript{711} 212 Mich. 272, 180 N.W. 462 (1920).
tion on alienation in the sense that an attempt by the vendee to alienate imposes no obligation upon him whatever.

_Hull v. Hostettler_ 712 was a suit for specific performance of a contract for exchange of lands. The defendants were to assign their interest as vendees under a land contract which contained a covenant against assignment without the consent of the vendor but no provision for forfeiture on breach. The defendants executed such an assignment but refused to complete the rest of the exchange. Their vendors intervened to assert a forfeiture of the contract for assignment without consent. A decree granting specific performance was affirmed, the court holding that such a provision against assignment does not prevent assignment and does not give a right of forfeiture on breach in the absence of specific provision therefor. The court implied that the vendors' remedy, if any, was by action for breach of covenant. This is a clear decision that a provision against assignment in a land contract will not be enforced as a prohibition on alienation. If valid at all, it can only be as a penalty restraint.

_Porter v. Barrett_ 713 was a summary proceeding for possession of land. The plaintiffs sold land to Parent by a contract which provided, "This land is sold upon express condition that the . . . same shall never be sold or rented to a colored person." Parent assigned to Barrett with the consent of the vendors. Barrett, by separate executory contract, sold the land to Robinson, a colored person. The plaintiffs asserted a forfeiture for breach of the condition. A judgment for the defendants on pro-

713 233 Mich. 373, 206 N.W. 552 (1925). Also discussed above at note 158.
cedual grounds was affirmed on the ground the condition was void as an illegal restraint on alienation of an estate in fee simple.

*William F. Nance Realty Co. v. Wood-Wardowski Co.* was a suit to set aside foreclosure of a land contract and for specific performance. The defendants sold land to Nance by a contract which provided,

"no assignment or conveyance by the purchaser shall create any liability whatsoever against the seller until a duplicate thereof duly witnessed and acknowledged, together with the residence address of such assignee, shall be delivered to the seller and receipt thereof indorsed hereon."

Nance quit-claimed his interest to the plaintiff corporation, of which he was president, without compliance with the quoted provision. There having been default in payments, the defendant instituted summary proceedings against Nance and secured a judgment of restitution. The amounts due were not paid within the grace period allowed by the statute authorizing such proceedings. A decree dismissing the bill was affirmed. The decision does not enforce a forfeiture for violation of the provision against assignment; it merely holds that the plaintiff was not entitled to equitable relief from forfeiture for default in payments.

*Sloman v. Cutler* was an action of assumpsit for payments due under a land contract. The plaintiffs,

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715 Act 314, P.A. 1915, c. 30, §25, as amended by Act 243, P.A. 1917; Comp. Laws (1915) §13253; amended, Act 373, P.A. 1927; Comp. Laws (1929) §14988; amended, Act 122, P.A. 1933; Mich. Stat. Ann. §27.1999; Comp. Laws (1948) §630.25. The grace period was 30 days when this case was decided. It was increased to 90 days by the 1933 amendment.
husband and wife, sold land of the husband by a contract providing that the vendee might not assign without the consent of the vendors and for forfeiture on breach. The vendee assigned his interest to the defendant who, in consideration of the plaintiff husband's consent to the assignment, assumed performance of the vendee's obligations. The defendant contended that the provision against assignment was a void restraint on alienation, and, therefore, that the consent to assignment was not consideration for his undertaking. A judgment for the defendant was reversed, the court holding that such a restraint on assignment is valid while the contract remains executory as a protection to the vendor's security interest.

*Jankowski v. Jankowski* was a suit to restrain summary proceedings for possession of land. The defendants sold land to the plaintiffs Jankowski by a contract which provided that the vendees should not assign or convey their interest or any part thereof without the consent of the vendors and for forfeiture on breach. The plaintiffs Jankowski, without the consent of the vendors, sold their interest by subcontract to the plaintiffs De Courval and later assigned the head contract to the De Courvals. The vendors declared a forfeiture for breach of the nonassignment clause and commenced the summary proceedings in question. A decree granting specific performance to the plaintiffs De Courval was affirmed. The court repeated the statement made in the opinion in *Sloman v. Cutler* that restrictions on assignment in a land contract are valid while the contract remains executory, "for the reason that the seller has a right to see that the property is kept in the hands of a respon-

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sible person," 718 but held that equitable relief from forfeiture under the facts of the case was appropriate.

The opinion in *Sloman v. Cutler* is the most extended discussion which the Michigan Supreme Court has made of the validity of provisions in land contracts restraining assignment. It was based on an *amicus curiae* brief prepared by Professor Edwin C. Goddard of the University of Michigan Law School, who later published his view that such provisions are valid. 719 His argument is by analogy to the lease for years, pointing out that the land contract vendor has an interest similar to that of the lessor in preventing waste. Professor Goddard was careful to observe, however, that "most cases hold that when the assignee tenders to the vendor full performance of the contract the vendor can no longer object," 720 which points to the fact that the vendee under a long-term executory land contract, like the mortgagor under the English decisions, has two distinct interests. One interest is purely legal. It includes his right at common law to have possession pending full payment, which is merely a legal estate for years, and his right to sue the vendor at law for damages for breach of contract. This legal interest may properly be made subject to strict forfeiture on alienation. The other interest, the right to specific performance in equity of the vendor's covenant to convey in fee upon full payment, is an equitable fee simple,

718 Id. at 344.
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alienation of which should not be subject to restraint by any condition or penalty whatever.\textsuperscript{721}

An example will demonstrate the inequity of permitting forfeiture of the equitable fee. A professional man purchases a home on executory land contract for a total price of $20,000, payable in instalments. When he has paid $19,000, his health fails and he is unable to pay the balance. He assigns his interest to another who immediately tenders payment of the full balance. To allow the vendor to forfeit the contract, take back the house, and keep the $19,000, would be grossly unfair. If he has such rights he is likely to exact a heavy pecuniary mulct for his consent to assignment; in effect, to get a larger price than that for which he agreed to sell. It was to prevent just such exactions that the statute \textit{Quia Emptores Terrarum} \textsuperscript{722} was enacted.

The decision in \textit{Jankowski v. Jankowski} indicates that the Michigan Supreme Court appreciates the problem and has not forgotten its great decision in \textit{Mandlebaum v. McDonell}.\textsuperscript{723} Nevertheless, the field of equitable relief against forfeiture of land contracts will require much extension and development before the land contract purchaser attains the degree of protection against oppression which courts of equity have afforded the mortgagor since the seventeenth century.

\textsuperscript{721} This is substantially the position taken by the \textbf{Property Restatement} §416 and comment e.

\textsuperscript{722} 18 Edw. I, stat. 1 (1290); notes 6, 104 \textit{supra}.

\textsuperscript{723} 29 Mich. 78 (1874), note 188 \textit{supra}.