PART TWO

THE COMMON-LAW RULE AGAINST PERPETUITIES
A. THE ENGLISH BACKGROUND

EVERY mature system of law which recognizes private property and permits its alienation has to contend with the man of property who seeks to found and endow a family by tying up his wealth so that his descendants will enjoy it in perpetuity without being able to dissipate it. If he is permitted to do so, the property involved is perpetually withdrawn from commerce and thus is unavailable for purchase by persons who could make better use of it than the descendants of the founder. Those descendants cannot mortgage or sell the property to meet urgent current needs and may be unable to use the property to their own best advantage because they cannot finance improvements by mortgage or by sale of a part. They are discouraged from making even those improvements which they can finance by their inability to sell or control more than a life interest in the property. Moreover, the general existence of such perpetuities tends toward the concentration of the bulk of the community’s wealth in a few families who constitute a hereditary aristocracy of wealth without obligation, and frequently without the motive or ability, to use it productively, with the consequent reduction of the rest of the population to a

1 Scrutton, Land in Fetters, (1886) is an eloquent exposition of the evils of such fetters. See also Property Restatement, Div. IV, Part I, Introductory Note (1944).
state of poverty and dependence. These disadvantages have led most systems of law to place some limitations on the creation of "perpetuities" or upon the duration of the restraints on alienation which they involve.²

Part One of this work describes the attempts of English landowners to create perpetuities by two methods, the entail and the direct restraint on alienation. After 1613 the entail could not be used to create a perpetuity because any tenant in tail could convey a fee simple by suffering a common recovery, and his power to do so could not be restricted by any prohibition, condition, or limitation.³ A perpetual prohibition on alienation of a fee simple would tend to create a perpetuity worse than an unbarrable entail because no tenant could convey even an estate for his own life. As has been seen, such prohibitions were void after the enactment of the statute *Quia Emptores Terrarum.*⁴ The common-law Rule Against Perpetuities, which is the subject of Part Two, was developed by the English courts to restrict the creation of perpetuities by a third method, the remote future interest.

² Butler's Note 77, V (7) to 1 Coke, *Institutes,* 13th ed., 191a (1787); Strickland v. Strickland, [1908] A.C. 551. In English legal usage, the term "perpetuity" originally meant an unbarrable entail. The meaning was later extended to include the perpetual freehold, as to which see note 13, *infra.* In modern legal writing the term usually refers to a future interest the vesting of which is postponed to some remote time. Sweet, "Perpetuities," 15 L.Q.R. 71-85 (1899). The word has sometimes been used to describe a perpetual estate conveyed to an ecclesiastical corporation and a perpetually indestructible trust. All of these uses of the word involve situations in which the title to property is tied up in such a manner as to impede alienation for an extended period.


⁴ Statute of Westminster III, 18 Edw. I, stat. 1 (1290); Chapter 3 *supra.*
The sole freehold future estate known to the common law was the remainder. A remainder could be created only incident to the conveyance to a definite living person of a present possessory estate for life or in tail and so as to become possessory immediately upon the expiration of the preceding "particular" estate. Andrew Baker could not convey land to John Stiles effective after ten years or upon the death of Andrew. He could convey land to James Thorpe for life or in tail, remainder to John Stiles. A remainder could not be limited upon a fee simple. Andrew Baker could not convey to James Thorpe and his heirs, remainder to John Stiles and his heirs. A remainder could not be so limited as to cut off a

5 Gray, Rule Against Perpetuities, 3rd ed., §918 (1915). The common law recognized another type of freehold estate which was expectant as to possession, the reversion. Part One, note 356 supra. The reversion was looked upon, however, not as a future estate but as the unconveyed residue of a present estate. 1 Coke, Institutes 22b (1628); 3 Sheppard, Abridgement 220 (1675). As tenure existed between the reversioner and the tenant of the particular estate, a reversion was a present seigniory. Note, R.S.Y.B. 22 Edw. I, p. 641 (1294); 2 Coke, Institutes 504 (1641). In any event a reversion cannot offend the common-law Rule Against Perpetuities because it is always deemed vested, even though expectant upon a particular estate in tail, for life or for years on special limitation. 2 Cruise, Real Property, 1st Am. ed., 457 (1808); Gray, Rule Against Perpetuities, 3rd ed., §§113-113b, 205, 283 (1915); 1 Simes, Law of Future Interests, §47 (1936); Property Restatement, §370, Comment e. (1944). It will be recalled that the statute Quia Emptores Terrarum forbade the retention of a reversion on a conveyance in fee simple. 2 Cruise Id. 455; Part One, note 354 supra.


preceding estate prior to its normal expiration. Andrew Baker could not convey land to Lucy Baker for life but if Lucy remarry, remainder to John Stiles and his heirs. The mediaeval law would not permit a “gap in seisin” during which there would be no possessory freehold tenant responsible for the feudal duties owed by the land to its overlord. Hence a remainder could not be so limited as to take effect in possession at some time subsequent to the expiration of the preceding estate. Andrew Baker could not convey to James Thorpe for life, remainder two years after the death of James to John Stiles and his heirs.

By 1550 it was settled that a remainder could be contingent, that is, subject to a condition precedent which might not occur at or before the expiration of the preceding particular estate. Because of the rule against to its normal expiration because the fee simple might be on special limitation (e.g. to John Stiles and his heirs so long as London Bridge shall stand), and even a fee simple absolute may expire upon extinction of heirs, in which case there is an escheat.

8 Corbet's Case, 1 Co. Rep. 83b at 86b, 76 Eng. Rep. 187 at 195 (1600); 3 Sheppard, ABRIDGMENT 223 (1675). See Colthirst v. Bejushin, 1 Plowden 21a at 25a, 75 Eng. Rep. 33 at 39 (1550). This is a corollary of the rule that only the grantor or his heirs may take advantage of a condition subsequent. 1 Coke, INSTITUTES 214a (1628); Sheppard, TOUCHSTONE OF COMMON ASSURANCES 149 (1648). But a remainder may follow a particular estate on special limitation (e.g. to Lucy Baker during widowhood, remainder to John Stiles and his heirs). 1 Coke, INSTITUTES 214b (1628).

9 See Chudleigh's Case, 1 Co. Rep. 120a at 130a, 76 Eng. Rep. 270 at 296 (1595); Archer's Case, 1 Co. Rep. 66b, 76 Eng. Rep. 146 at 151-157 (1597); Boraston's Case, 3 Co. Rep. 19a at 21a, 76 Eng. Rep. 668 at 674 (1587). This rule led the courts to decide that where land was limited to a man for life, remainder to his son, a posthumous son could not take because of the gap in seisin between his father's death and his birth. The House of Lords held, however, that a posthumous son could take in remainder under a will. [Reeve v. Long, 1 Salk. 227, 91 Eng. Rep. 202 (1694)] and Stat. 10 & 11 Gul. III, c. 16 (1699) provided that he could do so under an inter vivos conveyance.

gaps in seisin, however, such a remainder could never take effect unless the condition precedent actually did occur at or before the termination of the preceding estate. For example, a remainder to a person not in being was subject to the condition precedent of the remainderman coming into being and could not take effect if he failed to do so at or before the expiration of the preceding estate. If Andrew Baker conveyed to James Thorpe for life, remainder to the eldest son of John Stiles, and James died before John had a son, the contingent remainder could never become effective, even though John later did have a son. Moreover, this rule operated to destroy a contingent remainder if the preceding particular estate was extinguished or prematurely terminated before the remainder vested, that is, the condition precedent occurred. This happened if the tenant of the particular estate, whether for life or in tail, suffered a common recovery in fee simple, and in several other situations. If Andrew Baker conveyed to John Stiles for life or in tail, remainder to the eldest son of John, John could destroy the contingent re-

Rep. 200 (1694). A vested remainder on a term of years (e.g. Andrew Baker to James Thorpe for ten years, remainder to John Stiles and his heirs) was valid not as a remainder but as a present estate subject to a possessory term. Boraston’s Case, 3 Co. Rep. 19a, 76 Eng. Rep. 668 (1587).

12 Idem.; Biggot v. Smyth, Cro. Car. 102, 79 Eng. Rep. 691 (1628); Purefoy v. Rogers, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1671); Pigott, COMMON RECOVERIES, 2d ed., 125 (1770); 1 Fearne, CONTINGENT REMAINDERS, 5th ed., *465-469 (1795). Any act by which the life tenant’s estate was destroyed or turned into a mere right of action had this effect. There was destruction by forfeiture if the life tenant was convicted of treason or felony or made a feoffment or levied a fine in fee, and destruction by merger if he acquired the reversion or remainder following the contingent remainder. The life tenant’s estate was turned into a mere right of action if he was disseized and the disseisor died.
mainder by suffering a common recovery before he had a son.

Before the destructibility of contingent remainders was settled, attempts were made to create perpetuities by means of the "perpetual freehold" or endless series of life estates. Andrew Baker might convey land to John Stiles for life, remainder to the eldest son of John for life, remainder to the eldest son of John's eldest son for life and so on, ad infinitum. If such attempts had succeeded in their purpose, the alienability of the fee simple would have been restrained forever; none of the successive tenants for life could have conveyed more than his life estate. They did not succeed. The courts held not merely that such contingent remainders were destructible but that those after the first were void ab initio; that a remainder could not be limited to the unborn child of an unborn life remainderman. The rule so established, sometimes called the Old Rule Against Perpetuities, meant practically that remainders following life estates in family settlements must become possessory within lives in being plus a period of gestation.

Haddon's Case, cited in Perrot's Case, Moore 368 at 372, 72 Eng Rep. 634 at 637 (1594); Whitby v. Mitchell, L.R. 44 Ch. Div. 85 (1890); 1 Fearne, Contingent Remainders, 10th ed., 565 (Butler's Note) (1844). See Chudleigh's Case, 1 Co. Rep. 120a at 188a, 76 Eng. Rep. 270 at 320 (1595); Sir Hugh Cholmley's Case, 2 Co. Rep. 50a at 51b, 76 Eng. Rep. 527 at 530 (1597); Duke of Marlborough v. Earl Godolphin, 1 Eden 404 at 415, 28 Eng. Rep. 741 at 745 (1759). But see: Manning and Andrews Case, 1 Leon. 256, 74 Eng. Rep. 234 (1576). The rule was applied to an equitable contingent remainder in In re Nash [1910] 1 Ch. 1. This rule, known variously as the Old Rule Against Perpetuities, the Rule Against Double Possibilities, and the Rule in Whitby v. Mitchell, has been a subject of controversy between legal scholars, who disagree as to whether it was superseded by the modern Rule Against Perpetuities. 2 Simes, Law of Future Interests. §486 (1936); Bordwell, "Alienability and Perpetuities V," 25 Iowa L. Rev. 1, 16-22 (1939). In any event it has been abolished by statute in England [15 Geo. V, c. 20, §161 (1925)] and has not been applied in this country.
In the latter half of the seventeenth century, conveyancers perfected a device, called the strict settlement, which proved effective in preventing the destruction of contingent remainders.\footnote{Sir Orlando Bridgman (chief justice of the Court of Common Pleas, 1660-1668; lord keeper, 1667-1672) and Sir Geoffrey Palmer have usually been credited with inventing the strict settlement. 2 Blackstone, \textit{Commentaries}, Cooley's 2d ed., 172 (1872); 7 Holdsworth, \textit{History of English Law} 112 (1926); Lord Hardwicke, L.C. in Garth v. Cotton, 3 Atk. 752 at 753-755, 26 Eng. Rep. 1231 at 1232-1233 (1753). One of Bridgman's early forms of strict settlement is reprinted in App. 3 to Holdsworth, \textit{op. cit.}, at 547-559. Sir Frederick Pollock has pointed out, however, that the essentials of the device were in use a century before Bridgman. \textit{The Land Laws}, 3rd ed., 224 (1896).} When his daughter Lucy married John Stiles, Andrew Baker might convey land to nominees to the use of John and Lucy for 99 years if either should so long live, remainder to the use of trustees for the lives of John and Lucy upon trust to preserve contingent remainders, remainder to the use of the unborn children of the marriage in tail. The Statute of Uses operated to transform the uses of John, Lucy, the trustees, and the unborn children into legal estates, but it did not execute the trust to preserve contingent remainders because it was a use on a use. The result was that the trustees took a present vested estate \textit{pur autre vie}, subject to the term of years of John and Lucy, with a legal contingent remainder in tail to the unborn children.\footnote{Another form of strict settlement, which was more questionable, was a conveyance to the use of John for life, remainder to the use of trustees to preserve contingent remainders for the life of John, remainder to the use of John's unborn children. Logically the remainder to the trustees in this case would seem to be contingent and so destructible. Nevertheless it was held to be vested and indestructible as in the type of settlement described in the text. Duncomb v. Duncomb, 3 Lev. 437, 83 Eng. Rep. 770 (1697); see Parkhurst v. Smith ex dem. Dormer, 6 Brown 351, 2 Eng. Rep. 1127 (1740). A third form of strict settlement, which is clearly valid and more likely to be found in the}
not destroy the contingent remainder. Although the trustees, as tenants of the particular estate, had legal power to destroy the contingent remainder, anyone who took title from them with knowledge of the trust or without paying a valuable consideration would be compelled in equity to recreate the contingent remainder.

If the trustees conveyed to a bona fide purchaser for value, they could be compelled in equity to buy land of equal value and convey it to the wronged contingent remaindermen. Moreover, none of the contingent remaindermen could dock the entail during the lifetime of either of his parents or during his own minority because a common recovery could be suffered by a tenant in tail only after he was of age and with the cooperation of the tenant of the possessor freehold, in this case the trustees. Andrew Baker’s strict settlement could not be destroyed until John and Lucy were dead and their child who took the first remainder in tail was twenty-one years old. If the remainder in tail under a strict settlement was to a posthumous child, the settlement might be indestructible for lives in being plus a minority and a period of gestation. This was the most durable “perpe-

United States than the other two, is a conveyance to the use of trustees for the life of John upon trust for John and to preserve contingent remainders, remainder to the use of John’s unborn children. See Moody v. Walters, 16 Ves. Jr. 283, 33 Eng. Rep. 992 (1809).


tuity” which could be created by means of the contingent remainder.

For centuries the ingenuity of English conveyancers was devoted to attempts to establish perpetuities by creating indestructible future interests in remote unborn generations. Some of these failed. Because a tenant for years could not suffer a common recovery, an entail of a term would be unbarrable. It was held that a term of years could not be entailed and that an attempt to entail one gave the whole term to the first taker. 22 Future interests created by way of use executed by the Statute of Uses or devise under the Statute of Wills, if so limited as to become possessory upon the expiration of a preceding estate of freehold, were held to be contingent remainders, destructible as such. 23 When the fee simple was conveyed to trustees upon trust for an equitable tenant in tail, the cestui que trust in tail could bar the entail and destroy future interests limited to follow, or in defeasance of, the estate tail by suffering a common recovery. 24

Some of the conveyancers’ attempts to create indestructible future interests in unborn generations succeeded. Although in strict common-law theory there is no such thing as a remainder in personal property, it

was possible by will to limit chattels real or personal to one person for life, with future interests following which could not be destroyed by the first taker. If Andrew Baker devised a term of 500 years to John Stiles for life and then to the eldest son of John, John could not destroy the executory interest of the unborn son. Future interests created by way of use executed by the Statute of Uses or devise under the Statute of Wills which could not have taken effect as remainders because they followed a fee simple, cut off a preceding estate prior to its normal expiration, or created a gap in seisin were held valid and, if not preceded by an estate tail, indestructible by holders of prior interests. If Andrew Baker conveyed or devised land "to James Thorpe and his heirs but if James die in the lifetime of John Stiles then to John and his heirs," James could not destroy the executory interest of John. Equitable future interests subject to a trust, whether or not they could take effect as remainders, and whether in land or personalty, were indestructible by holders of prior equitable interests not in tail; if Andrew Baker conveyed land to trustees upon trust for John Stiles for life and then for the eldest son of John in tail, John could not destroy the equitable contingent remainder of his unborn son.

The decisions that executory interests and equitable

future interests were indestructible would have made possible the perpetual tying up of land in a family had not the English courts, in a long series of cases which was not complete until the nineteenth century, created the modern common-law Rule Against Perpetuities. The Rule in its developed form, unlike the old restrictions on contingent remainders, did not limit the time when future interests must become possessory. It was phrased rather in terms of remoteness of vesting. Every indestructible future interest must be so limited that it must necessarily vest, if at all, within lives in being plus one or more actual periods of gestation, plus an actual minority or twenty-one years in gross. Any future interest not so limited was void. Andrew Baker could convey or devise land to John Stiles for life, remainder to the eldest son of John in fee simple, but if such eldest son died during his minority then to the eldest son of John’s eldest son in fee simple. This would be valid even though both the eldest son of John (who took a contingent remainder) and his eldest son (who took a shifting executory interest) were posthumous. Andrew Baker could convey or devise land to John Stiles for life, then to Lucy Baker for 21 years, then to the oldest living descendant of John in being at the expiration of the 21 years. The Rule permitted some perpetuities which


29 E.g. if Andrew Baker conveys to Lucy Baker in fee simple but, if Lucy die unmarried, to James Thorpe in fee tail, remainder to John Stiles in fee simple, the limitation to John Stiles does not violate the Rule because it must vest, if at all, on the death of Lucy, although it may not become possessory for centuries. Gray, Rule Against Perpetuities, 3rd ed., §206 (1915).
were indestructible for slightly longer than the strict settlement. Its detailed application will be considered in subsequent chapters.

**B. MICHIGAN'S RECEPTION OF THE RULE**

The common law of England was received as the law of Michigan in the last decade of the eighteenth century.\(^{30}\) By this time the modern Rule Against Perpetuities had become part of the English common law, its general nature was well understood, and most of its applications were either settled or foreseeable. There is no doubt that, in receiving the common law, Michigan received the Rule Against Perpetuities.

By the end of the seventeenth century it had been settled that a future interest which must necessarily vest within lives in being plus an actual minority plus one or more actual periods of gestation did not offend the rule.\(^{31}\) It had also been settled that a future interest which must necessarily vest within lives in being plus one year in gross did not violate the Rule.\(^{32}\) When English law came to Michigan, the only question relative to the permissible period of postponement of vesting under the Rule Against Perpetuities which was still undecided was that of the maximum allowable number of years in gross. Before that numerous dicta had suggested that

\(^{30}\) Either by Stat. 32 Geo. III (Upper Canada), c. 1, §3 (1792), Part One, note 33 supra, or by the Law of the Northwest Territory of July 14, 1795, Laws of the Territory of the United States North-West of the Ohio, 175, 176 (1796), Part One, note 34 supra. Stout v. Keyes, 2 Doug. 184 (Mich. 1845); Lorman v. Benson, 8 Mich. 18 (1860); Reynolds v. McMullan, 55 Mich. 568, 22 N.W. 41 (1885), Part One, note 41 supra.


\(^{32}\) Loyd v. Carew, Prec. Ch. 72, 24 Eng. Rep. 35 (1697); Marks v. Marks, 10 Mod. 419, 88 Eng. Rep. 789 (1718).
this was twenty-one years. Sir William Blackstone in his *Commentaries*, published in 1766 and vastly influential in America, adopted the same view, and this was established as the law of England by a decision in 1833. Such a decision was predictable when Michigan adopted the common law, and the rule it announced may be considered as part of that law.

As has been seen, the modern common-law Rule Against Perpetuities was developed to prevent the creation of perpetuities by means of executory interests and equitable contingent remainders, both of which future interests were indestructible by the tenant in possession. When Michigan received the common law, the English courts had not yet decided that the Rule applied to legal contingent remainders in land, but it was evi-


37 It had long been assumed that equitable contingent remainders, because they were indestructible, were subject to the Rule Against Perpetuities, and this was decided in Abbiss v. Burney, 17 Ch. D. 211 (1881). English writers differed as to whether legal contingent remainders were properly subject to the Rule. Challis, *Law of Real Property*, 3rd ed., 197-200, 215-217 (1911); Gray, *Rule Against Perpetuities*, 3rd ed., §§284-298 (1915); 2 Simes, *Law of Future Interests*, §505 (1936). That they are subject to the rule was indicated by several judicial dicta [Cattlin v. Brown, 11 Ha. 372 at 374, 68 Eng. Rep. 1319 at 1320 (1853); Re Frost, 43 Ch. D. 246 at 254 (1889)] and definitely decided in *Re Ashforth*, [1905] 1 Ch. 555. Accord: Whitby v. Von Luedecke, [1906] 1 Ch. 783. Stat. 15 Geo. V, c. 20, §1 and First Schedule, Part I (1925) transformed all contingent remainders into equitable estates, so the question can no longer arise in England.
dent that the policy underlying the Rule extended to contingent remainders which are indestructible. Michigan statutes have made legal contingent remainders indestructible by the tenant in possession since 1838. 38

St. Amour v. Rivard 39 was a suit to construe the will of a testator who died in 1841. As interpreted by the Supreme Court, the will purported to devise life estates in land to nine persons with contingent remainders for life to the children of the first tenants, remainders for life to the children of the children, and so on forever. This, then, was an attempt to create a "perpetual freehold" or endless series of life estates in successive generations. As has been seen, the English courts thwarted such attempts in the sixteenth century by devising the so-called Old Rule Against Perpetuities, the rule that a contingent remainder could not be limited to the child of an unborn life remainderman. 40 The Michigan Court, after carefully distinguishing between contingent remainders and executory interests, tracing the development in England of the modern common-law Rule Against Perpetuities through 1833 and noting that it was developed primarily to restrict executory interests, held the devises void in toto for violation of the modern common-law Rule. This decision appears to stand for four important propositions: (1) Michigan received the


39 2 Mich. 294 (1852). The language of the will is quoted and another aspect of the case discussed in Part One supra at notes 258-259.

40 Part Two, note 13 supra.
modern Rule Against Perpetuities as part of the common law of England; (2) The Rule Against Perpetuities was received in the completely developed form which it attained in England in 1833, not in the rudimentary form of some date prior to its complete evolution;\(^ {41}\) (3) The modern Rule Against Perpetuities applies to legal contingent remainders;\(^ {42}\) and (4) The so-called Old Rule Against Perpetuities, that a contingent remainder could not be limited to the child of an unborn life remainderman, was never received as law in Michigan.\(^ {43}\)

The Michigan Revised Statutes of 1846,\(^ {44}\) which became effective March 1, 1847, contained a chapter (62) on estates in land taken from the New York Revised Statutes of 1829.\(^ {45}\) This chapter contained a number of provisions designed to prevent the creation of undesirable perpetuities by means of future freehold and leasehold interests in land.\(^ {46}\) The meaning and application of these provisions will be discussed in detail in Part Three of this work. For present purposes it is sufficient to note that the most important of them provided, in


\(^{42}\) Accord as to indestructible contingent remainders: Property Restatement, §370, Comment b (1944); 2 Simes, Law of Future Interests, §505 (1936). Legal contingent remainders in Michigan land have been indestructible since 1833. Part Two, note 38 supra.

\(^{43}\) Accord: Property Restatement, §370, Comment q. (1944); 2 Simes, Law of Future Interests, §487 (1936).

\(^{44}\) As to the drafting of which see Part One at note 582 supra. Chapter 62 differs in several important respects from the equivalent New York provisions.

\(^{45}\) As to the drafting of which see Part One at note 575 supra.

effect, that every future estate should be void in its creation which should suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate. This statutory provision differed substantially in phraseology, theory, and application from the common-law Rule Against Perpetuities. The common-law Rule is phrased in terms of remoteness of vesting; it has no application to vested interests and does not prohibit suspension of the absolute power of alienation as such. The statutory provision, on the other hand, did not in terms prohibit remoteness of vesting.

It is evident that a limitation of a future interest might violate the statutory provision although it would not violate the common-law Rule. Conversely, although the

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47 Rev. Stat. 1846, c. 62, §§14, 15, 16, note 46 supra. These sections read as follows:

"Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter: Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"Sec. 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 two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"Sec. 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."

48 Not only because the permissible period under the statute is shorter, but because some limitations which do not suspend vesting do suspend the absolute power of alienation. E.g. if Andrew Baker declared himself trustee of Blackacre to receive the rents and profits and apply them to the use of James Thorpe for life, then to the use of Lucy Baker for life, then to the use of John Stiles for life, then to the use of the children of John Stiles in fee, no part of the disposition would offend the common-law Rule Against Perpetuities because the three equitable life estates are presently vested, and the equitable contingent remainder to the children of John would necessarily vest, if at all, on the death of John, a life in being. The interests of both John and his children would, however, suspend the absolute power of
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proposition is not so evident, a limitation which would violate the common-law Rule Against Perpetuities might not offend against the statute. If Andrew Baker conveyed land "to James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs," the executory interest of John Stiles would violate the common-law Rule because it might not vest within lives in being and 21 years, but it is arguable that it would not suspend the absolute power of alienation at all because James and John together might at any time convey an indefeasible estate in fee simple absolute.49 Chapter 62 of the Revised Statutes of 1846 did not expressly abolish the common-law Rule Against Perpetuities, but it has been settled that its provisions superseded the common-law Rule as

alienation for longer than two lives in being because, under New York and Michigan law, neither the trustee nor the cestui of a trust for receipt of the rents and profits of land can alienate his interest. Part One supra, notes 592, 593.

49 See: Walker v. Marcellus and Otisco Lake Ry. Co., 226 N.Y. 347, 123 N.E. 736 (1919). At common law every unvested future interest suspended the absolute power of alienation because unvested future interests were inalienable. Part One, note 359 supra. As unvested legal future interests have been alienable in Michigan since 1838 (Part One, note 371 supra), they do not suspend the absolute power of alienation unless limited to unborn or unascertained persons. Torpy v. Betts, 123 Mich. 239, 81 N.W. 1094 (1900); Russell v. Musson, 240 Mich. 631, 216 N.W. 428 (1927); Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926). See: Fitzgerald v. City of Big Rapids, 123 Mich. 281 at 283-4, 82 N.W. 56 (1900); Michigan Trust Co. v. Baker, 226 Mich. 72 at 77, 196 N.W. 976 (1924); Gardner v. City National Bank & Trust Co., 267 Mich. 270 at 287, 255 N.W. 587 (1934); PROPERTY RESTATEMENT, c. B, ¶53. But see: Toms v. Williams, 41 Mich. 552 at 562, 2 N.W. 814 (1879); State v. Holmes, 115 Mich. 456, 73 N.W. 548 (1898). The limitation described in the text would, however, violate another provision of the New York Revised Statutes of 1829 (Part II, c. I, Tit. II, Art I, §24) that "a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article." This provision which, like the common-law Rule Against Perpetuities, prohibits remoteness of vesting, was not adopted in Michigan.
to transactions regulated by the statutes, so that only the statutory provisions need be satisfied.\textsuperscript{50}

The New York Revised Statutes of 1829 extended the statutory provisions against perpetuities to all forms of property, real and personal.\textsuperscript{51} Chapter 62 of the Michigan Revised Statutes of 1846 applied only to interests in land, including freehold interests and chattels real. In consequence, after March 1, 1847, the validity of limitations of future interests in land was governed, so far as perpetuity problems were concerned, solely by the provisions of Chapter 62 whereas limitations of future interests in chattels personal and choses in action were, and still are, subject to the common-law Rule Against Perpetuities.\textsuperscript{52} When a single limitation of a future interest embraced both land and other property, regardless of the relative amounts of each, the limitation


\textsuperscript{51} Part II, c. 4, Tit. IV, \textsection 1, 2. There were some slight differences between the treatment of interests in land and that of other property.

failed unless it conformed to both the statutory provisions and the common-law Rule.53

Because the Michigan statutes make both the estate of the trustee and the interest of the *cestui que trust* under a trust for the receipt of the rents and profits of land inalienable,54 every future interest under such a trust suspends the absolute power of alienation.55 In 1877 the Michigan Supreme Court suggested that a trust, as such, did not suspend the absolute power of alienation if, by its terms, the trustee had discretionary power to sell the land constituting the corpus.56 This suggestion


56 Thatcher v. Wardens & Vestrymen of St. Andrew's Church of Ann Arbor, 37 Mich. 264 (1877). See: Methodist Episcopal Church of Newark v. Clark, 41 Mich. 730 at 740, 3 N.W. 207 (1879); Wilson v. Odell, 58 Mich. 533, 25 N.W. 506 (1885); Fitzgerald v. City of Big
was questioned eleven years later and overruled in 1901 by a decision that a mere power of sale for reinvestment does not prevent a trust of land from suspending the absolute power of alienation. It was settled by a number of decisions, however, that if the will or other instrument of trust directed the trustee to sell land constituting the corpus of the trust and reinvest in other types of property, the doctrine of equitable conversion applied and the trust would be treated as one of chattels personal, unaffected by the provisions of Chapter 62 of the Revised Statutes of 1846. It follows that the validity of future interests under such a trust would be governed by the common-law Rule Against Perpetuities.

Rapids, 123 Mich. 281, 82 N.W. 56 (1900); Property Restatement, App., c. B, ¶56, note 222. It does not follow that the validity of future interests under such a trust would be governed by the common-law Rule Against Perpetuities. The Thatcher case involved the validity of a vested legal remainder in fee simple following a trust which was to last for two lives and the time necessary to pay the second life cestui’s expenses of last illness and burial. Records and Briefs, June Term 1877, No. 36.


Act No. 38 of the Public Acts of 1949 repealed the provisions of Chapter 62 of the Revised Statutes of 1846 relating to perpetuities and suspension of the absolute power of alienation and declared:

"The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, whether freehold or non-freehold, legal or equitable, by way of trust or otherwise, thereby making uniform the rule as to perpetuities applicable to real and personal property." 61

This legislation makes it clear that limitations of future interests in conveyances or wills becoming effective on or after September 23, 1949, are subject to one, and only one, rule against perpetuities, the modern common-law Rule Against Perpetuities developed by the English courts between 1609 and 1833 and already in force in Michigan as to all limitations made prior to March 1, 1847. The statute also makes it clear that Michigan decisions relative to the application of the Rule Against Perpetuities to dispositions of interests in property other than land made between 1847 and 1949 are precedents for its application to limitations of interests in land made since 1949.