PART THREE

THE TWO LIVES STATUTES
CHAPTER 18

The Statutory Scheme

A. THE STATUTES

CHAPTER 62 of the Michigan Revised Statutes of 1846, which became effective March 1, 1847, provided:

"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.

"Sec. 17. Successive estates for life shall not be limited, unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those per-
sons, the remainder shall take effect, in the same manner as if no other life estate had been created.

"Sec. 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall any remainder be created upon such an estate in a term for years, unless it be for the whole residue of the term.

"Sec. 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named as the persons during whose lives the estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

"Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

"Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

"Sec. 41. The delivery of the grant, where an expectancy estate is created by grant; and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate." ¹

¹ Rev. Stat. 1846, c. 62, §§14 to 21, 23, 41; Comp. Laws (1857) §§2598 to 2605, 2607, 2625; Comp. Laws (1871) §§4081 to 4088, 4090, 4108; Comp. Laws (1897) §§8796 to 8803, 8805, 8823; How. Stat., §§5530 to 5537, 5539, 5557; Comp. Laws (1915) §§11532 to 11539, 11541, 11559; Comp. Laws (1929) §§12934 to 12941, 12943, 12961; Mich. Stat.
THE STATUTORY SCHEME

These statutory provisions were frequently criticized. Sections 14 through 20 and 23 were repealed by Act 38, Public Acts of 1949, which provided that the common-law Rule Against Perpetuities should thereafter be applicable to interests in Michigan land and that,

"Sec. 3. This act applies only to wills with respect to which the testator dies after the effective date of this act and to deeds and other instruments executed after the effective date of this act." 3

The repealing act became effective September 23, 1949. The form of the repeal being such that it does not extend to limitations in instruments which became effective before that date, Michigan lawyers will be obliged to contend with the restrictive provisions of Chapter 62 of the Revised Statutes of 1846 for many years to come.

The quoted provisions of Chapter 62 of the Revised Statutes of 1846 were taken from the New York Revised Ann., §§26.14 to 26.21, 26.23, 26.41; Comp. Laws (1948) §§554.14 to 554.21, 554.23, 554.41. As to the drafting of the Michigan statutes, see Part One, at note 582 supra. The judicial interpretation of these statutes is discussed in some detail in PROPERTY RESTATEMENT, App., Ch. B, §§50-58, 85 (1944), and Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §§525.36-25.47, 25.98 (1952), and in more summary fashion in 2 Simes, LAW OF FUTURE INTERESTS, §576 (1936) and Brake, "Satisfying Michigan's Perpetuity Rules," 5 UNIV. OF DETROIT L.J. 160 at 174-179 (1942).


Statutes of 1829. The New York revisers explained their purpose as follows:

"Notwithstanding the abolition of estates tail, our law allows certain executory dispositions of land and the profits of land, by which the former may be rendered inalienable, and the latter may be made to accumulate for a life or lives in being, and twenty-one years thereafter. This limit is derived from the English law, and was originally adopted by the English judges from analogy to settlements by entail. A settlement on a parent for life, with remainder to his eldest son in tail, and any number of remainders over for life and in tail, could be barred by the son’s suffering a recovery as soon as he came of age. Not to give a greater perpetuity to a disposition by executory devise, than the possible (and from the exigencies of society, even in that country, the general) limits of an entail, the courts held that no executory devise could be good, unless it must necessarily take effect within a life or lives in being, or twenty one years thereafter.

"When our legislature abolished entails, they left the
common law in regard to executory limitations, unaltered; so that all we have gained by abolishing entails, is, that we have avoided the necessity of levying a fine or suffering a recovery to bar the estate tail. Indeed land may be rendered inalienable for a longer period by springing use, or executory devise, than by an entail. In the settlement of an estate tail, like that above mentioned, the life estate depends upon a single life; but in these executory dispositions, as the lives are not necessarily required to take any interest in the estate, or to be in any way connected with it, any number may be introduced, at the pleasure of the party, and for the mere purpose of protracting the period of alienation. In England this has often been done. In one case, twenty-eight persons (all of whom except seven, were strangers, taking no interest in the land,) were inserted for the purpose of securing the longest possible term. It is obvious that the chance of finding, out of so great a number a very long life, is much greater than in the case of the entail. Again: The term of twenty-one years in the case of the settlement by entail, only occurs during the actual infancy of the party entitled in remainder. In the case of the executory devise, &c. it is added to the life or lives in being, as an absolute term, and there may be cases, where, after the expiration of the twenty-one years, the real infancy of the party may be added to the former term thus rendering the land inalienable, except in special cases, for twenty-one years longer.

"In the case of the will of Peter Thelusson, the testator availed himself of the executory devise, to secure the accumulation of his personal estate, and the rents and profits of his realty, to such an extent, that the British parliament passed an act, (40 Geo. III. c. 98,) 'to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited.'"

"This act has not been re-enacted in this state; but in the preceding sections, the Revisers have proposed some
new regulations on this subject, which will considerably abridge the present power of rendering real estate inalienable; and in a subsequent section, they have restrained the accumulation of profits within still narrower limits than are now allowed in England. The difference between the preceding sections and the existing law, consists in the following particulars:

"1. Alienation cannot be protracted by means of mere nominees unconnected with the estate, beyond the period of two lives.

"2. No more than two successive estates for life can be created.

"3. The period of twenty-one years, after a life or lives in being, is no longer allowed as an absolute term; but the rule is restored to its original object, by being confined to the case of actual infancy, which is directly provided for by rendering the disposition defeasible, and allowing another to be substituted during that period.

"It is presumed that no argument need be advanced in favor of restricting, at least to the extent here proposed, the power of creating perpetuities. It is perhaps a more doubtful question, whether the genius of our government, and the state of our society, do not require that the right of suspending alienation should be still further reduced.

"It is proper to observe that these sections agree in some respects with the propositions contained in the recent work of Mr. Humphreys on the law of real property in England.

"It may be useful to illustrate by examples, the effect of §16, as its meaning may not be immediately obvious. Suppose an estate devised to A for life, and upon his death, to his issue then living; but in case such issue shall die under the age of twenty-one years, or in case such issue shall die under the age of twenty-one years and without lawful issue, then to B in fee. Here, in both cases, the remainder to B would be valid as embraced by

5 The statutes restricting accumulations, here referred to, are discussed in Chapter 16, supra.
the terms of the section; but if the devise were to *A for life, and after his death to B for the term of twenty-one years; and upon the expiration of such term, to the eldest male descendant of *A then living, and if there be no such male descendant then living, to C in fee*. Here the period of twenty-one years being an absolute term, wholly unconnected with the infancy of any person entitled, both the term and all the remainders dependent on it would be void; and on the determination of the life estate, the fee would descend to the heirs of the testator. To prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add, that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred. Where the remainder is vested as where the lands are given to *A for life, remainder to B* (a person then in being) in fee, there is no suspense of the power of alienation; for the remainderman and the owner of the prior estate, by uniting, may always convey the whole estate. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in ¶14.”

The Michigan statutes differed from those of New York in two important respects. First, the New York statutes contained complementary provisions forbidding suspension of the “absolute ownership” of personal property, so the statutory scheme there covered limitations of all types of property, real, personal, and mixed. The Michigan statutes contained no such complementary

---

7 “§1. The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator.”

“§2. In all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in the first Chapter of this Act, in relation to future estates in lands.” N.Y. Rev. Stat., 1829, Part Two, Ch. IV, Tit. IV, §§1, 2.
provisions, so the statutory scheme here covered only limitations of land, including freehold estates and estates for years.\(^8\) Moreover, the Michigan Supreme Court held that if a will contained a mandatory direction to convert land into other property, the direction worked an equitable conversion and the statutory scheme did not apply.\(^9\) As has been seen, however, the Court extended the statutory scheme to mixed dispositions of land and personalty by refusing to treat them as separable.\(^{10}\) Second, Section 24 in the New York version of the statutes provided 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."\(^{11}\) This provision was not adopted in Michigan. As the New York courts made it the basis for deciding that the statutory scheme prohibited remoteness of vesting as well as suspension of the absolute power of alienation,\(^{12}\) its omission here is significant. The effect of this omission will be discussed in Chapter 20.

To the extent that the Michigan statutes were identical with those of New York, judicial interpretations of the statutes made in New York before 1846, when they were adopted in Michigan, were treated by our Supreme Court as virtually binding on it.\(^{13}\) Later New York ju-

---

\(^8\) Part Two, note 52 \textit{supra}. As to the possibility that the scope of those sections of the statutory scheme which were not repealed by Act 38, P.A. 1949, was extended to include limitations of chattels personal by Act 227, P.A. 1949, see Part Two, note 184 \textit{supra}.

\(^9\) Part Two, note 59 \textit{supra}.

\(^{10}\) Part Two, notes 53, 553, 554, \textit{supra}.


\(^{13}\) State v. Holmes, 115 Mich. 456, 73 N.W. 548 (1898), the theory being that, in adopting the New York statutes, the Michigan Legislature was presumed to have adopted the prior interpretation of them in New York. Controlling force was not accorded the decisions of inferior New York courts. Foster v. Stevens, 146 Mich. 131 at 141, 109 N.W. 265 (1906).
dicial decisions were accorded weight but not treated as binding.\textsuperscript{14}

\textbf{B. SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION}

The notes of the New York revisers quoted in the preceding section indicate that they thought the only effect of the statutes prohibiting suspension of the absolute power of alienation (Sections 14, 15 and 16) was to shorten the period of the common-law Rule Against Perpetuities by changing "any number of lives in being" to "two lives in being" and by eliminating the period of twenty-one years in gross. They did not think that they had changed the theory or nature of the Rule. That this was their understanding of the statutes which they had drafted is made evident by their statement, "an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred." That statement was roughly true under English law because contingent future interests were inalienable at common law\textsuperscript{15} and the English courts would not enforce prohibitions on alienation of any other interest in property, legal or equitable.\textsuperscript{16} But the revisers evidently failed to realize fully that other provisions of their own revision changed the law on both these points by making contingent future interests alienable\textsuperscript{17} and the inter-

\textsuperscript{15} Part One, note 359 \textit{supra}.
\textsuperscript{16} Part One, note 556 \textit{supra}. There was an exception in the case of the separate equitable estate of a married woman. Part One, note 557 \textit{supra}.
\textsuperscript{17} N.Y. Rev. Stat. 1829, Part Two, Ch. I, Tit. II, Art. First, §85; Part One, note 371 \textit{supra}.
ests of beneficiaries of trusts for receipt of the rents and profits of land inalienable. If contingent future interests are alienable, such an interest limited to an ascertained living person does not suspend the absolute power of alienation, as such suspension is defined by Section 14, because there are persons in being by whom an absolute fee in possession can be conveyed. If Andrew Baker devises land to James Thorpe and his heirs so long as the Penobscot Building shall stand, remainder to John Stiles and his heirs, the remainder of John is contingent, but James and John are persons in being "by whom an absolute fee in possession can be conveyed." Hence, although the interest of John violates the common-law Rule Against Perpetuities, because it may vest too remotely, it does not suspend the absolute power of alienation.

On the other hand, as the New York courts soon held, a present trust for receipt of the rents and profits of land does suspend the absolute power of alienation because

18 N.Y. Rev. Stat. 1829, Part Two, Ch. I, Tit. II, Art. Second, §63; Part One, notes 580, 621, supra. It is virtually certain that the revisers did not realize that this would make present trusts suspend the absolute power of alienation. Powell and Whiteside, The Statutes of the State of New York Concerning Perpetuities and Related Matters, 56 [New York Legislative Document (1936) No. 65 (H)]; Property Restatement, App., Ch. A, ¶17 (1944); Rundell, "The Suspension of the Absolute Power of Alienation," 19 Mich. L. Rev. 235 at 249-251 (1921). Dean Rundell's article is an interesting and valuable commentary on all the topics treated in this section.

19 Part Three, note 1 supra.

20 Walker v. Marcellus and Otisco Lake Ry. Co., 226 N.Y. 347, 123 N.E. 736 (1919). But see Leonard v. Burr, 18 N.Y. 96 at 107 (1858). Although the interest of John in the example given does not suspend the absolute power of alienation, as such suspension is defined in Section 14, it would violate the portion of Section 24 which was not adopted in Michigan (Part Three, note 11 supra), because that portion of Section 24, like the common-law Rule Against Perpetuities, forbade remoteness of vesting. Matter of Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909). Dean Rundell thinks that §§14 and 15 should have been construed to restrict remoteness of vesting. "The Suspension of the Absolute Power of Alienation," 19 Mich. L. Rev. 235 at 259 (1921).
the interest of the *cestui que trust* is inalienable, although all interests in the land are vested. If Andrew Baker devises land to Roger White upon trust to receive the rents and profits and apply them to the use of James Thorpe and his heirs for ten years and then to convey the land to John Stiles, "there are no persons in being, by whom an absolute fee in possession can be conveyed," so the present trust suspends the absolute power of alienation for a period not limited to two lives in being, in violation of Section 15, although there are no unvested interests and hence no violation of the common-law Rule Against Perpetuities.

The decisions of the New York courts interpreting and applying the suspension statutes, rendered before 1846, when the statutes were adopted in Michigan, made it clear that, contrary to the view of the New York revisers, Sections 14, 15, and 16 did not merely shorten the period of the common-law Rule Against Perpetuities; they imposed restrictions on the creation of interests in property which, while they had the same general purpose as the common-law Rule, were of a quite different nature from that Rule and operated upon a different theory. Where-as the common-law Rule prohibited all future interests

21 Coster v. Lorillard, 14 Wend. 265 (1885); Hawley v. James, 16 Wend. 61 (1836), Chapter 20, Section C, *infra;* Dean Rundell thinks that this rule is unsound. "The Suspension of the Absolute Power of Alienation," 19 Mich. L. Rev. 235 at 251 (1921).


23 Chaplin, *Suspension of the Power of Alienation*, 3rd. ed., §14 (1928); Walsh, *Future Estates in New York*, §23 (1931). Because the New York statutes were construed to prohibit remoteness of vesting as well as suspension of the absolute power of alienation (Part Three, note 12 *supra*), their theory and operation did not differ so radically from those of the common-law Rule as did the narrower Michigan statutes. The only prohibition on remoteness of vesting in the Michigan statutes is that in Section 20 (Part Three, note 1 *supra*) as to a contingent remainder on a term of years.
which might vest too remotely and had no application whatever to present and other vested interests, Sections 14 and 15 applied equally to vested and contingent interests, whether present or future, prohibiting all and only those which so affected the title to land that no persons in being could convey an absolute fee in possession.

Because the statutes were phrased in terms of suspension of the absolute power of alienation, they have tended to be confused, by both courts and lawyers, with the common-law rules against direct restraints on alienation which are the subject of Part One of this study. Those rules are distinct from and were not superseded or modified by the suspension statutes; the statutes did not permit any direct restraint on alienation which was void at common law. At common law a prohibition or condition which would prevent or penalize the alienation of an estate in fee simple is void although the restraint will last for only a single day. This rule was not abrogated by the suspension statutes. A prohibition on alienation, if effective, would suspend the absolute power of alienation within the meaning of Section 14, but, except in the case of spendthrift trusts, all prohibi-

24 Part Three, note 1 supra.
26 Mandlebaum v. McDonell, 29 Mich. 78 at 107, 18 Am. Rep. 61 (1874), Part One, notes 138, 140, supra. The will involved in this case became effective before the suspension statutes.
28 Part Three, note 1 supra.
tions on alienation of otherwise alienable interests in property are void under the common-law rules. A condition subsequent restraining alienation would not suspend the absolute power of alienation within the meaning of Section 14. If Andrew Baker conveys land to John Stiles and his heirs “but if the grantee or his heirs shall attempt to alienate the estate hereby conveyed, the grantor or his heirs may enter and terminate the estate,” Andrew and John are persons in being “by whom an absolute fee in possession can be conveyed,” even if the condition were valid. But such a condition is void at common law and was not validated by the suspension statutes.

The common-law rules against direct restraints on alienation, the common-law Rule Against Perpetuities, and the suspension statutes share a common purpose of keeping property alienable, but their scope is different. The common-law rules against direct restraints on alienation relate to provisions which would prevent an ascertained, living owner from alienating his own interest in property. The common-law Rule Against Perpetuities relates to future interests which indirectly restrain alienation of the full title to property because they are limited to persons unborn, who cannot convey, or on contingencies which are so uncertain as to make the interests commercially unmarketable. The suspension statutes related primarily to future interests which were inalienable because limited to unborn or unascertained persons and to interests under trusts which were made inalienable by statute. The suspension statutes, like the com-

30 Part One, notes 107, 244, 245, 297, 298, Part Three, notes 26, 27, supra.
31 Part Three, notes 26, 27, supra.
mon-law Rule Against Perpetuities, were aimed primarily at indirect restraints on alienation, limitations which do not in terms prohibit or penalize alienation but which have the indirect effect of making it difficult or impossible. They were designed to complement, not to supersede, the common-law rules against direct restraints on alienation.

C. SCOPE AND ARRANGEMENT OF PART THREE

The restrictions on the creation of life estates and remainders thereon imposed by Sections 17, 18, 19, and 21 were peculiar to the statutory scheme and will be discussed in Chapter 19. Because, as has been seen, the class of interests which suspended the absolute power of alienation in violation of Sections 14 and 15 did not coincide in all respects with the class of interests which suspend vesting in violation of the common-law Rule Against Perpetuities, Chapter 20 will be devoted to discussion of the types of limitations which could suspend the absolute power of alienation. As the period of suspension of the absolute power of alienation permitted by Sections 15 and 16 differs from the period of suspension of vesting permitted by the common-law Rule Against Perpetuities, the computation of the statutory period will be discussed in Chapter 21.

Although the statutory scheme differed from the common-law Rule Against Perpetuities as to the types of interests within its scope and as to the permissible period of suspension, it was a substitute for the common-law Rule, and many of the problems which arise under the common-law Rule arose and were solved in the same way

32 Part Three, note 1 supra.
33 Id.
34 Part Three, notes 20, 21, 23, supra.
under the statutes. The effect of destructibility of an interest, discussed in Chapter 10, was similar under the statutory scheme to what it is under the common-law Rule. Under the common-law Rule it has to be absolutely certain that an interest cannot vest at a time beyond the period of Rule, and under the statutes it had to be absolutely certain that a suspension of the absolute power of alienation would not last longer than the statutory period. When vesting was significant under the statutory scheme, the rules of vesting were the same as under the common-law Rule. Hence all of Chapter 11 has relevance to Part Three. The rules as to what constitutes a class gift, the composition of classes, and their closing were the same under the statutory scheme as at common law, so Chapter 12 is relevant to Part Three in these respects. The statutory definitions of absolute powers of revocation and disposition, discussed in Chapter 13, applied under the statutory scheme. The application of the statutory scheme to charities has already

35 Part Two at notes 69-81, supra.
37 Part Two, notes 122-124, 150, 131, supra.
38 Chaplin, Suspension of the Power of Alienation, 3rd ed., §§51, 131, 132 (1928); Walsh, Future Estates in New York, §§26, 30 (1931); Property Restatement, App., Ch. A, ¶¶30-32, (1944); Chapter 21, Section B, infra. Thus the conclusive presumption that every person is capable of having issue as long as he lives applied under the statutes as at common law. Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922), Part Two, note 145 supra; Property Restatement, App., Ch. A, ¶31, Ch. B, ¶56 (1944). Similarly, the general rule that events occurring before the time when certainty is required can be considered in determining certainty but events occurring after that time cannot (Part Two, notes 125-129, supra) applied under the statutes; Chaplin, id., §§89-92; Property Restatement, App., Ch. A, ¶¶29, 30, Ch. B, ¶56 (1944), Chapter 21, Section B, infra.
39 Part Two, notes 304-307, supra.
been discussed in Chapter 15.  The statutes regulating accumulations, which the New York revisers treated as an integral part of the statutory scheme, have been covered in Chapter 16. The consequences of violation of Sections 14 and 15 have been discussed in Chapter 17. These and other problems arising under the Statutory scheme which have been adequately covered in Part Two will not be treated in Part Three other than by cross-references to the relevant discussions.

41 Part Three, note 1 supra.