CHAPTER 7

Legal Interests in Chattels Personal

A. THE DIFFERENCES BETWEEN LAND AND CHATTELS

SIR EDWARD COKE, in commenting on Section 360 of Littleton's Tenures,401 said,

"if a man be possessed of a lease for years, or of a horse, or of any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of reverter, and it is against trade and traffique, and bargaining and contracting between man and man: . . .” 402

The precise meaning of the Lord Chief Justice is not as clear as might be desired, but the passage probably asserts two reasons for the invalidity of a condition subsequent, providing for forfeiture on alienation, incident to a transfer of a chattel: (1) that a legal interest analogous to a possibility of reverter or right of entry on breach of condition subsequent cannot exist in a chattel personal, and (2) that such a condition is in illegal restraint of trade.

The first asserted reason involves the problem of the possibility of creating legal interests in expectancy in chattels personal. As Professor Maitland remarked, the law of personal property is “backward and meagre.” 403 By comparison to the land law, the law of chattels personal is relatively undeveloped and such full develop-

401 Note 110 supra.
402 1 INSTITUTES 223a.
403 2 Pollock & Maitland, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 181 (1895).
ment as there is is fragmentary and disconnected. The reasons are largely historical. In the centuries when the doctrine of estates in land was being developed and defined, the common chattels, animals, foodstuffs, and clothing, were not of a nature to encourage attempts to create complex and divided titles. The Mediaeval Church's prohibition of interest prevented extensive security transactions. The tremendous current investment of wealth in bonds, corporate stock, and life insurance policies, which we look upon as property for some purposes, is wholly a modern development. Moreover, whereas the law of land was developed and unified by a single tribunal, the Court of Common Pleas, the law of chattels was created by numerous courts with divergent systems of jurisprudence and varying concepts of policy. The ecclesiastical courts of the English dioceses handled probate of wills and administration of estates according to rules of canon law which varied with the customs of the several sees. Their jurisdiction was of doubtful extent, interfered with by the jealousy of the common-law courts and eventually absorbed in large part by the High Court of Chancery. The courts of common law provided most of the protection of chattels against crime and tort, but the High Court of Admiralty, administering a system based on the Roman civil law, had a part in developing the law of ships and other marine property. Until its competing courts, administering divergent systems of law, were consolidated in the nineteenth century, England was in no position to develop a complete and unified law of personal property which could stand beside the elaborate scheme of the land law. 404

The law of chattels developed by the common-law

404 3 Holdsworth, History of English Law, 3d ed., 351-360, 554-595 (1923); 7 id. 447-515 (1926).
courts has two striking omissions. First, it contains no concept of ownership of chattels like that of ownership of land. It is, rather, a law of rights to possession of chattels and injuries to such rights. The only common-law actions for specific recovery of chattels, replevin and detinue, could be converted into actions for money damages at the will of the defendant. The owner of a freehold interest in land had remedies at law, the real actions and, later, ejectment, by which he could secure the land itself. As has been seen, the owner of a chattel real acquired a like remedy. The "owner" of chattels personal never did. So far as the common-law courts are concerned, his only right was to bring an action for money damages for wrongful taking or detention.

Second, the law of chattels has no doctrine of estates, of ownership divided into temporal segments. At the beginning of the thirteenth century the common law was consistent in requiring, as to both land and chattels, a delivery of possession to effectuate a transfer of a proprietary interest. During that century the requirement was modified as to land by the recognition of the remainder. A single livery of seisin to A could be made to pass a life estate to A and a remainder in fee, a present proprietary right to future possession, to B.

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406 Snane v. Rumenal, Bract. N.B., pl. 1140 (1235); Anonymous, Y.B. 7 Ed. IV, Pasch., pl. 16 (1468); Anonymous, Y.B. 21 Ed. IV, Mich., pl. 2 (1482).
408 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 354 (1923).
actment in 1535 of the Statute of Uses, which converted the Chancery-developed uses into legal estates, made it possible to create legal future interests, by way of springing and shifting use, without any livery of seisin. Neither modification was extended to chattels. The common-law courts would not permit delivery of a chattel personal to A to operate to create a limited interest in A and a future interest in B; it passed the whole title to A. The Statute of Uses applied only to interests in land, so interests in chattels created by way of use remained purely equitable, without recognition or means of enforcement by the common-law courts. The only temporally divided ownership in chattels recognized at common law was the bailment. The bailor has a proprietary interest in expectancy analogous to a reversion expectant upon an estate at will or for years in land. Unlike the lessor, however, he has no effective common-law means of compelling the bailee to return the goods at the expiration of the term. Probably because of this lack of a specific remedy, the law of bailment has developed along contract, as distinguished from property, lines. Apart from the quasi-reversionary interest of the bailor, English law to this day does not permit the creation inter vivos of a legal property interest in expectancy in chattels personal.

410 27 Hen. VIII, c. 10 (1585).
411 7 Holdsworth, HISTORY OF ENGLISH LAW 83 (1926).
413 Bacon, READING UPON THE STATUTES OF USES 43 (1804).
414 Notes 405, 407, supra.
The local canon law administered by the ecclesiastical courts, to whose judgments the courts of common law gave grudging recognition, permitted the transmission of chattels personal by will. Until the late seventeenth century, testamentary power of disposition of personality by will was, however, much restricted by local custom, a married man usually having such power over only a third of his goods.\footnote{416} Unlike a devise of land under the sixteenth century Statute of Wills,\footnote{417} a bequest of chattels was not a direct transfer of legal title to the legatee. Legal title to all personal property of the deceased passed to his executor,\footnote{418} and the only right of a legatee was to have the ecclesiastical court compel the executor to carry out the provisions of the will. Except for the fact that he was controlled by the ordinary of the diocese rather than the High Court of Chancery, the executor was, for all essential purposes, a trustee, holding legal title subject to duties owed to creditors and legatees.\footnote{419}

Even by will it was not possible to make a temporal division in the legal title to chattels personal. They could not be bequeathed to A for life, remainder to B. When the executor transferred them to A, A took the whole title.\footnote{420} In the fifteenth century, however, a method

\footnote{417} 32 Hen. VIII, c. 1 (1540).
\footnote{418} Anonymous, Y.B. 14 Hen. IV, Hil., pl. 37 (1412); Anonymous, Y. B. 2 Ed. IV, Mich., pl. 1 (1462).
\footnote{420} Note 412 \textit{supra}; Anonymous, March 106, pl. 183, 82 Eng. Rep. 432 (1641).
of creating future interests in chattels by will was developed. Chattels could be bequeathed to the executor, with directions to permit A to use and occupy them for life, then to transfer them to B.\footnote{Anonymous, 37 Hen. VI, Trin., pl. 11 (1459); Fitz-James's Case, Owen 33, 74 Eng. Rep. 879 (1565); note 412 supra. See Welcden v. Elkington, 2 Plowd. 516, 75 Eng. Rep. 763 (1578); Paramour v. Yardley, 2 Plowd. 539, 75 Eng. Rep. 794 (1578). The trust being a much more satisfactory device for creating future interests in chattels, the law of legal future interests in chattels was never developed fully in England and there is much doubt as to their incidents and theoretical basis. Gray, RULE AGAINST PERPETUITIES, 3d ed., §§77-86, 789-856 (1915); 7 Holdsworth, HISTORY OF ENGLISH LAW 471-478 (1926); Bordwell, "Interests in Chattels Real and Personal," 1 Mo. L. REV. 119, 127-132, 137-141 (1936); Oliver, "Interests for Life and Quasi-Remainders in Chattels Personal," 24 L.Q. REV. 431-439 (1908); Simes, "Future Interests in Chattels Personal," 39 YALE L.J. 771-803 (1930). See Part Two, note 167 infra.} In later centuries, when most of the enforcement and interpretation of wills shifted to the High Court of Chancery, wills purporting to create legal future interests in chattels tended to be construed as bequests of use and occupation, thus permitting their enforcement.\footnote{Catchmay v. Nicholas, Rep. temp. Finch 116, 23 Eng. Rep. 63 (1673). Other cases are collected in Gray, RULE AGAINST PERPETUITIES §85n (1915).}

It appears, therefore, that Sir Edward Coke's first reason\footnote{Note 402 supra.} suggests one major difference between the law of restraints on alienation of land and that of restraints on alienation of chattels, namely, that the limited possibilities of creating interests in expectancy in chattels greatly restrict the available devices for imposing restraints. His second reason suggests another major difference. Land was not looked upon as an article of commerce in the thirteenth and fourteenth centuries, and that remained so, as to estates of inheritance, throughout the mediaeval period. Hence the law of restraints on alienation of estates in fee simple and fee tail, developed during that period, is a law governing donative and testa-
mentary transactions. In the later Middle Ages leasehold interests did become articles of commerce, and, as has been seen, a different set of rules developed as to them. The mediaeval reason for restraining alienation of estates in fee was to keep land in the family. This type of restraint was not permitted. The mediaeval reason for restraining alienation of leasehold interests was to protect reversioners and remaindermen against waste. This type of restraint, imposed largely for commercial reasons, was permitted. In modern times land has become an article of commerce and a new reason for restraining alienation of estates in fee, to protect the character of a neighborhood, has appeared. But the law as to restraints on estates of inheritance had become too well settled for change, and the old rules, developed when land was not a commercial commodity, were applied to a new situation. Chattels, on the other hand, have always been articles of commerce, and rules governing restraints on their alienation did not become fixed during the mediaeval period. The mediaeval rules governing donative and testamentary dispositions of land may be followed as to like dispositions of chattels, but we cannot be certain that they are applicable to commercial transactions involving chattels. Certainly there are substantial differences in the considerations of policy which affect the two types of transactions.

A third major difference between the law of restraints on alienation of land and that of restraints on alienation of chattels should be noted. The law as to land developed fully centuries ago; that as to chattels is relatively modern, incomplete, and rapidly developing. The rules as to land were developed in connection with the doctrine of estates and became fixed in the mediaeval period, when status was dominant. Indeed, the very
word "estate" is a variant of "status." English law knows no estates in chattels, and the rules governing restraint on their alienation, so far as there are any, were developed in an era when the concept of contract was dominant; when courts were impatient with the fixed and arbitrary rules of the mediaeval common law and anxious to enforce the intention of parties to contracts so long as they did not contravene current concepts of public policy. The era of laissez faire has waned. We have entered upon a new era of status, of fixed and arbitrary rules imposed by government fiat. It seems probable that the law of restraints on alienation of chattels will complete its development in a setting of strict government regulation of property, business, and human relationships. Already legislative and administrative restrictions have an important place in the field. Very likely there will eventually be rules as to restraints on alienation of chattels as complete, precise, and strict as those which relate to land. We cannot predict their exact nature, but we can be reasonably sure that, insofar as commercial transactions are concerned, they will not be the same rules which the judges of the Plantagenet period developed as to restraints on alienation of land.

424 Pollock & Maitland, History of English Law Before the Time of Edward I, 11 (1895); Turner, The Equity of Redemption 1-3 (1931). It should be borne in mind, too, that the legislative declaration [stat. Quia Emptores Terrarum, 18 Edw. I, stat. 1, c. 1 (1290)] that estates in fee simple were alienable and the judicial declaration [Taltarum's Case, Y.B. 12 Edw. IV, Mich., pl. 25 (1472), note 67 supra] that entail were barrable were the results of socio-economic conflicts in which powerful interests were opposed to alienability. The general alienability of chattels has never been questioned or opposed and there has never been a problem of preventing potent economic forces from making chattels generally inalienable.

425 Keynes, The End of Laissez-Faire (1926).
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B. DONATIVE AND TESTAMENTARY TRANSACTIONS

In England the impossibility of inter vivos creation of interests in expectancy in chattels and the unsuitability for the purpose of the devices of bailment and contract have tended to restrict attempts to restrain the alienation of chattels to the trust device and provisions in wills for forfeiture on alienation. The possibilities of the trust will be explored with restraints on equitable interests. In connection with a bequest of the use and occupation of chattels for life or a term of years, the English courts would probably sustain the validity of a provision for forfeiture on alienation by way of executory bequest to another.426 They have held such a provision void when attached to a bequest of the general property in chattels.427 As to testamentary restraints, then, the English law of chattels appears to follow that of land. Probably because of misinterpretation of a passage in Blackstone’s Commentaries;428 most American courts have tended to assume that interests in expectancy in chattels, of the types permissible in land, can be created

426 This is the rule as to life interests in chattels bequeathed in trust. The cases are collected in Gray, Restraints on Alienation, 2d ed., §78 (1895). In England the rules governing restraints on alienation of equitable interests tend to follow those which apply to equivalent legal interests.

427 Bradley v. Peixoto, 3 Ves. Jr. 324, 30 Eng. Rep. 1034 (1797); Rishton v. Cobb, 5 Myl. & Cr. 145, 41 Eng. Rep. 326 (1839). In Powell v. Boggis, 35 Beav. 535, 55 Eng. Rep. 1004 (1866) there was a bequest of corporate stock to a sister for life, then to be sold by the executors and the proceeds divided among nephews and nieces. A provision of the will that the legacy of any nephew or niece should be forfeited if he aliened his interest before distribution was held to be a void restraint on alienation.

428 "If a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good." 2 Commentaries *398; see 7 Holdsworth, History of English Law 471 (1926). Professor Bordwell has suggested that Blackstone probably had a deed of trust in mind. "Interests in Chattels Real and Personal," 1 Mo. L. Rev. 119 at 141 (1936).
by deed as well as by will.\textsuperscript{429} There is substantial authority in this country for the validity of legal interests in non-consumable chattels which correspond to the reversion, the remainder, the shifting use, and the shifting executory devise in land.\textsuperscript{430} It has been suggested that interests analogous to the possibility of reverter and the right of entry on breach of condition subsequent are possible.\textsuperscript{431} In the setting of this development the American writers have maintained and such decisions as there are tend to confirm the view that the rules governing the validity of prohibitions and provisions for forfeiture on alienation of legal interests in chattels are the same as those which apply to similar restraints on alienation of estates in land of like duration.\textsuperscript{432} For this purpose,


\textsuperscript{430} The cases are collected in Simes, "Future Interests in Chattels Personal," 39 Yale L.J. 771 at 783-785 (1930). The validity of future interests in personality corresponding to remainders, created by will, was recognized in Glover v. Reid, 80 Mich. 228, 45 N.W. 91 (1890); Michigan Trust Co. v. Hertzig, 133 Mich. 513, 95 N.W. 531 (1903); Sellick v. Sellick, 207 Mich. 194, 173 N.W. 609 (1919), and Hankey v. French, 281 Mich. 454, 275 N.W. 206 (1937). A transfer of corporate stock, reserving a life interest, which is really a conveyance of a springing executory interest in personality, was held valid in Bloodgood v. Terry, 134 Mich. 305, 96 N.W. 446 (1903). See Part Two, note 167 infra.


\textsuperscript{432} Gray, Restraints on Alienation, 2d ed., §§27, 28, 78, 105, 134 (1895); 2 Simes, Future Interests §§446, 447, 456, 457, 463, 465 (1936); Schnebly, "Restrains Upon the Alienation of Property," 6 American Law of Property, §26.18 (1952). The articles of Professor Schnebly ["Restrains Upon the Alienation of Legal Interests," 44 Yale L.J. 961-995, 1186-1215, 1380-1408 (1935)] and Mr. Manning ["The Development of Restrictions on Alienation Since Gray," 48 Harv. L. Rev. 376-406 (1935)] do not discuss the law of chattels personal. The Restatement of Property does not discuss restraints on alienation of chattels personal, saying, "The problems thereby raised and the considerations which enter into their solution are to
the general property in a chattel is assimilated to an estate in fee simple in land, a treatment suggested by the passage from Coke quoted at the beginning of this section. 433

State v. Dunbar Estate 434 was a claim against the guardian of a lunatic for the cost of the ward’s care in an asylum. The only assets in the hands of the guardian were funds bequeathed to the ward by a will which provided,

“I direct that income and principal also shall be received by all beneficiaries free and clear of their debts, contracts, anticipations, and alienations, and of all liability for or by reason of the same, and from all levies, attachments and executions. Payments must be made either directly to the beneficiaries, or upon their respective orders, signed not more than three months beforehand.”

A judgment allowing the claim was affirmed, the court saying,

“We do not think the language open to the construction that, after the fund had in fact come into the hands of the legatee, it should not be liable for his subsequent engagements.” 435

Abrey v. Duffield 436 was a suit to construe a will, a codicil to which provided that, “my son Thomas is to have the use and possession of [a piano] during his life, but that the same is not to be disposed of by him.” The validity of this restraint on alienation was not decided or discussed.

such an extent different, in a state of flux and subjected to statutory provisions, that it is undesirable to treat them. . . .” Div. IV, Part II, Introductory Note.

433 Note 402 supra.
Turnbull v. Johnson 437 was a suit to rescind for fraud a sale of corporate stock. The stock, with other property, had been bequeathed to the testator’s widow, “to be hers absolutely during her lifetime, and at her death what of the same might be left to my two sons, . . . , share and share alike, and their heirs forever.” The widow, the sons, and a bank to which the stock had been pledged assigned the stock to the defendant. The sons brought suit, claiming that their joinder in the assignment had been procured by fraud. A decree for the defendant was affirmed on the general ground the will operated to place the entire title to the stock in the widow, so that the sons had no interest in it. The court cited Jones v. Jones 438 and some of the line of cases following it which hold, in effect, that a gift over on failure of the first taker to alienate inter vivos is repugnant to a grant or devise in fee simple because it is a restraint on testation and intestate descent. 439 The decision in Turnbull v. Johnson follows what is probably the general rule in this country, that an executory bequest over on failure of a legatee of the entire title to personalty to alienate inter vivos is void as a restraint on testation and intestate distribution. 440

Wessborg v. Merrill 441 was an appeal from a probate order of distribution. The testator bequeathed corporate stock to three trustees to pay the income to his wife and five children “and to their respective heirs, share and share alike,” until August 11, 1914. The will provided,

439 Note 182 supra. Glover v. Reid, 80 Mich. 228, 45 N.W. 91 (1890), which involved personalty, held such a gift over valid where the first taker was given only a life interest with a limited power of disposition inter vivos.
441 195 Mich. 556, 162 N.W. 102 (1917).
"After August 11, 1914, the stock shall be equally divided among them . . . , and each may dispose of his or her own stock at will, under this condition, however, that the stock shall be sold to one of their own number, to keep it in the family, providing the price obtained is as good as any outsider will give."

One of the daughters died in 1913, bequeathing her estate to the respondent in trust. The probate order, which distributed a child's share in the stock to the respondent, was affirmed without comment on the validity of the restraint on alienation. Inasmuch as the respondent was not one of the children, the effect of the decision was to hold the restraint inoperative as to a disposition by will. The restraint was, in effect, a pre-emptive option which, in the case of land, would seem to be valid under Michigan law despite the fact that it was perpetual and so, under the law of most jurisdictions, in violation of the Rule Against Perpetuities.442

Hankey v. French 443 was a suit to construe a will. Testator bequeathed to his wife,

"the use and income of my share or interest in the business of R. T. French & Sons, wheresoever conducted, provided, however, that my interest in said business is not to be sold or disposed of, but that the business is to be continued and that my share of the profits arising from the conduct of said business is to be paid to my wife, . . . , so long as she shall remain my widow.

"Paragraph 3. I give, devise and bequeath to my children, . . . , in equal shares, my interest in the partnership of R. T. French & Sons, after the death of my wife, . . . , or in the event of her remarriage, and I do further especially direct that my interest in the partner-

ship of R. T. French & Sons shall not be sold or disposed of during the minority of either of my said sons."

The circuit court held that the interest in the partnership, which owned land, was personalty, that the restraints on alienation imposed by the second and third paragraphs of the will were void,\(^4\) and that the bequest was adeemed by a change in the partnership which occurred between the date of the will and the death of the testator. There was no appeal from the first two conclusions. The decree was reversed and a decree ordered in "accordance with the quoted language of the will," the Supreme Court holding that there had been no ademption. The opinion does not discuss the validity of either restraint on alienation, but, in view of the nature of a chancery appeal, the decision is probably some authority for the proposition that a prohibition on alienation in a bequest of personalty is void, both as to a life interest and as to a succeeding interest in the nature of a remainder in fee.

The authorities are scanty but, such as they are, they indicate that, in donative and testamentary transactions, Michigan tends to apply to restraints on alienation of interests in chattels personal the rules which govern the validity of similar restraints on estates in land of like duration. If so, it may be assumed that all prohibitory restraints, those which would compel the owner of a legal interest in a chattel to remain owner in spite of his attempt to transfer it, are void. Penalty restraints by way of forfeiture on alienation are void if attached to a gift or bequest of the otherwise absolute general prop-

\(^{444}\) The Supreme Court opinion indicates that the decree below held only the restraint imposed by paragraph 3 void. 281 Mich. 454 at 459. The actual decree of the circuit court, however, determined that the restraints imposed by paragraphs 2 and 3 were both void. Record, p. 29.
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erty in chattels. Penalty restraints on a bequest of an interest in chattels for life or years, by way of a provision for an executory bequest to another in the event of alienation, are probably valid. A provision in a gratuitous bailment for life or a term of years that the bailor may treat the bailment as terminated and retake possession if the bailee transfers his interest to another is almost certainly valid. Whether a provision in a gratuitous bailment for forfeiture on alienation to someone other than the bailor would be valid is highly doubtful, in view of the lack of authority for the creation of future interests in chattels by transactions inter vivos.

C. COMMERCIAL TRANSACTIONS

The interest of a bailee of chattels under a pawn or under that type of hiring known in the Roman law as locatio rei corresponds to the interest of a lessee of land for life or years. In the thirteenth century the lease of land was commonly given as security for money lent, thus serving the same purpose as the pawn. The similarity between a demise of land to be used for commercial operations of the lessee and the demise of a ship for like use is evident. At the beginning of that century the interests of the lessee of land and the bailee of chattels were treated much alike, primarily as personal contract rights against the lessor or bailor rather than as interests in property in rem. Although estates for years in land remained personal property, the development of remedies for their specific enforcement and their use in

448 Id. at 213, 336-351.
donative and testamentary transactions tended toward their treatment more as property than as personal contract rights. The bailment, on the other hand, has remained a topic of the law of contract and tort, more an aspect of commercial law than that of property. Hence, whereas the interest of the lessee for life or years is prima facie alienable, the interest of the bailee is treated as personal to himself and inalienable in most cases, even when his interest is not terminable at the will of the bailor.

The general rule that the interest of a bailee is inalienable has some exceptions. The pawnee may transfer his interest in the pawn with an assignment of the debt. Although the English view is that the interest of a bailee who has a common-law artisan’s lien is inalienable, some American states, including Michigan, permit such a bailee to assign the lien with his claim against the bailor. The interest of a hirer under a hire-purchase contract is assignable, as is that of a purchaser under a conditional sale contract. Assignments and subcharters

449 Notes 236, 291, 292 supra.
451 Mores v. Conham, Owen 123, 74 Eng. Rep. 946 (1609); Donald v. Suckling, L.R. 1 Q.B. 585 (1866); Drake v. Cloonan, 99 Mich. 121, 57 N.W. 1098 (1894); other American cases are collected in Brown, Personal Property 579n (1936).
453 Gardner v. Le Fevre, 180 Mich. 219, 146 N.W. 653 (1914). Other cases are collected in Brown, Personal Property 534n (1936).
454 Whiteley, Ltd. v. Hilt, [1918] 2 K.B. 808 (C.A.). This is assumed by the Hire-Purchase Act, 1 & 2 Geo. VI, c. 53, §21 (1938).
455 The cases are collected in 1 Williston, Sales §332n (1924). Hoar, Conditional Sales 59, 345 (1937). As to the right of possession of a chattel mortgagor, see Cadwell v. Pray, 41 Mich. 307, 2 N.W. 52 (1879); Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51, 22 N.W. 105 (1885). In Michigan, however, it is dangerous for a chattel mortgagor or conditional sale contract vendee to assign his interest. Act 328, P.A. 1931, §175, Mich. Stat. Ann. §28.374, Comp. Laws (1948) §750.177, provides: “Any person who shall . . . dispose of any personal
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are common in connection with the demise of ships. Normally the bailee under a fixed-term bailment or bailment lease may transfer his interest.

The theory of the cases holding the interest of the bailee under some types of bailment alienable is that, in those situations, the element of personal trust is not so prominent as in the ordinary bailment relationship. Even in such situations, the terms of the bailment may indicate that personal trust is intended. Hence, the text-writers assert that the terms of a bailment under which the bailee’s interest would otherwise be alienable may validly restrain alienation by providing that alienation by the bailee will terminate the bailment and entitle the bailor to immediate possession. This is closely analogous to a provision for forfeiture on alienation in a lease of land for life or years, inserted for the protection of the reversioner. It would seem, therefore, that the law of restraints on alienation of the bailee’s interest in a chattel property held by him subject to any chattel mortgage or written instrument intended to operate as a chattel mortgage, or any lease or written instrument intended to operate as a lease, or any contract to purchase not yet fulfilled with intent to injure or defraud the mortgagee, lessor or vendor under such contract or any assignee thereof, shall . . . be guilty of a felony.” It has been held under this statute that mere proof of a sale raises a presumption of intent to defraud. Bowen v. Borland, 257 Mich. 306, 241 N.W. 201 (1932). As the word “injure” might mean mere inconvenience, the lessee or conditional vendee of chattels assumes a serious risk in transferring his interest.

E.g., Rutherford, Sender & Co. v. Goldthorpe, Scott & Wright, Ltd. [1922] 1 K.B. 508.


1 Halsbury, Laws of England 555 (1907); Pereira, Law of Hire and Hire-Purchase 120 (1939); Brown, Personal Property 579n (1936). The Hire-Purchase Act, 1 & 2 Geo. VI, c. 53, §7 (1938) and the Uniform Conditional Sales Act, §13, assume the validity of such provisions. See Whitney v. McConnell, 29 Mich. 12 (1874).
tel is in general accord with the law as to restraints on estates in land of like duration. Unlike the case of land, however, it is probable that the provision for forfeiture must be in favor of the bailor; the bailee’s interest probably cannot be made to shift to a third party on alienation.

Commercial sales in the early Middle Ages were normally direct transactions between producer and consumer. The farmer brought his produce to market and sold to the town housewife. The artisan sold his manufactures in his own shop or the local market to purchasers who bought for personal use. In this setting the Mediaeval Church developed its doctrine of just price, which applied to both prices and wages. Under this doctrine the just price was, in general, the actual cost of production plus an amount sufficient to enable the producer to maintain himself and his family in the customary manner of persons of his status; the just wage was an amount sufficient to enable the laborer to maintain himself and his family according to his status. The just price did not fluctuate with supply and demand. For the seller to raise prices because of scarcity was to make an unearned and immoral profit. For the buyer to seek a lower price because of a glut on the market was to take an unfair advantage of the producer. For the laborer to ask higher wages because of a shortage of labor or because the product of his labor was more valuable than that of other persons of like status was wrongful. Thus the doctrine tended to condemn competition and all profits and wages which were more than the amount necessary for the subsistence of the producer or laborer according to the fixed customs of his social status.459

459 Cunningham, Growth of English Industry and Commerce During the Early and Middle Ages, 6th ed., 461 (1915); O’Brien, An
The theory of this early period had no place for the trader, the person who purchased goods for resale, whether wholesaler or retailer. With the growth of towns and the expansion of foreign commerce in the later Middle Ages, however, the necessity and value of the labor of those who provided transportation and storage of goods received grudging ecclesiastical recognition. Trade was still regarded as fraught with temptation to sin, however, and the wholesaler was looked upon with particular suspicion. Resale by traders was governed by the doctrine of just price. The resale price should be the cost price plus the actual cost of transportation, storage, or labor performed in improving the goods, plus an amount sufficient to enable the trader to maintain himself and his family in the manner customary to persons of his status. Speculative trading, purchasing with a view to deriving profit from an advance in the market price, was improper in all circumstances.460

Corollary to the doctrine of just price was a doctrine that the parties to sales, because of ignorance and the temptation to seek an unjust profit, were ordinarily unfit to fix the just price with accuracy. Hence prices, wages, the quality of goods and the details of commerce should be prescribed by public authority and enforced by governmental agencies.461

Essay on Mediaeval Economic Teaching 102-106, 109-123 (1920). Dr. O'Brien suggests that, in some circumstances, elements other than the cost of production and the labor of the producer might enter into the computation of the just price, but these two elements were dominant in the process, pp. 112-120. Tawney, Religion and the Rise of Capitalism, 1950 ed., 27-28, 35, 38.

460 O'Brien, An Essay on Mediaeval Economic Teaching 144-151, 152-155 (1920). It should be noted that, as an aspect of the prohibition of usury, the price in a credit sale was not allowed to be larger than in a cash transaction and, of course, the seller might not charge interest on the unpaid balance. Id. at 119. Tawney, Religion and the Rise of Capitalism, 1950 ed., 37-38.

Mediaeval English law reflects the doctrine of just price and its corollary. From Norman to Tudor times prices, wages, quality of goods, the training of artisans, and the most minute details of commercial activity were strictly regulated to eliminate competition, “unjust” prices, and unearned profits. Some of this regulation was done by the central government directly, through statutes, orders in council, and royal proclamations. Most of it was delegated to chartered companies, boroughs and markets, which exercised their powers under the supervision of the central government. Competition was eliminated in many fields by the grant of monopolies to individuals or chartered companies.\(^4\)\(^6\)\(^2\) Evasion of local regulations and speculation in commodities were forbidden by drastic provisions of the criminal law which denounced as “forestalling” purchasing or contracting to purchase merchandise en route to any city, port, market, or fair from inland or overseas, and attempts to raise the prices or encourage the withholding from sale of such merchandise.\(^4\)\(^6\)\(^3\) This operated to confine trading to areas where regulation could be effective.

The Reformation weakened the influence of the Roman Catholic doctrine of just price, but it did not result in any relaxation of government controls of commerce. Instead, they became more extensive and better en-


\(^4\)\(^6\)\(^3\) Stat. 51 Hen. III, stat. 6, c. 3, §5 (1266); 25 Edw. III, stat. 4, c. 3 (1350); confirmed by 2 Ric. II, stat. 1, c. 2 (1378); explained by 5 & 6 Edw. VI, c. 14, §1 (1552). The statute of 51 Hen. III forbade purchase at a market before it opened. This suggests the primary purpose of these penal statutes: to confine trading to public markets where it could be regulated effectively. The mediaeval authorities were trying to eliminate “under the counter” sales. There were other statutes on the subject. Herbruck, “Forestalling, Regrating and Engrossing,” 27 Mich. L. Rev. 365-376 (1929).
forced. In the Tudor, Stuart, and Hanoverian periods, the motive of regulation ceased to be the enforcement of just prices and the elimination of unjust profits and became that of the mercantile system, the enhancement of the power, prestige, and wealth of the national state in peace and war. The new regulation permitted large profits when they served to encourage the growth of industries deemed desirable. It did not, however, tolerate profiteering in food. By a statute of Henry VIII, the central government assumed direct control of the regulation of food prices. A statute of Edward VI restated the old criminal law of forestalling and prohibited “re-grating,” reselling of foodstuffs purchased in a fair or market, in a fair or market held at the same place or within four miles thereof, and “ingrossing,” which the statute declared was committed when any person or persons, “get into his or their hands, by buying, contracting or promise-taking, other than by demise, grant, or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again.”

Sir Edward Coke thought that the quoted language was only designed to prohibit resale in gross and did not prevent purchase of foodstuffs for resale at retail, but

465 Stat. 25 Hen. VIII, c. 2 (1533). This act did not abolish local price regulation but authorized price-fixing by the Council when local regulation was inadequate. For the operation of the price and wage regulation systems under Elizabeth, see Cunningham, Growth of English Industry and Commerce in Modern Times, 6th ed., 25-36, 85-99 (1919).
466 Stat. 5 & 6 Edw. VI, c. 14, §§2, 3 (1552).
467 3 Institutes, *195-196. Sheppard, Grand Abridgement, Part II, 226-227 (1675) is positive on this point, stating that resale at retail
the broad language of the statute appears to condemn the whole business of trading in groceries, wholesale and retail alike. In 1620 a grocer was prosecuted for buying twenty quarters of wheat, making it into starch, and selling the starch to several persons. The Court of King's Bench held that this was not a violation of the statute, which tends to confirm Coke's view.\textsuperscript{408} However, prosecutions under the statute were begun against ordinary retailers of butter and cheese who sold in the normal course of business.\textsuperscript{469} A statute of 1623 declares that the statute of Edward VI made "no proviso" for retailers, that they had been troubled by prosecutions under it, and provides that it shall not prevent licensed cheese-mongers from retailing butter and cheese in London.\textsuperscript{470}

After the Restoration, the central government ceased to enforce or supervise the enforcement of regulations governing prices, wages, and the quality of goods. Local regulatory bodies tended to relax or break down en-

was ingrossing if, but only if, the resale price was unreasonable. The first statutory use of the term "ingross" seems to have been in 37 Edw. III, c. 5 (1363), which complains "that the merchants, called grocers, do ingross all manner of merchandise vendible; and suddenly do enhance the price of such merchandise within the realm, putting to sale by covin and ordinance made betwixt them, called the fraternity and gild of merchants, the merchandises, which be most dear, and keep in store the other, till the time that dearth or scarcity be of the same. . . ." This suggests that the offense was hoarding with a view to making an unjust profit on resale; not the mere business of engaging in the wholesale or retail grocery trade.


\textsuperscript{469} E.g. Bedoe v. Alpe, W. Jones 156, 82 Eng. Rep. 83 (1622). The vague language of the statute worked a serious hardship on legitimate merchants because the mode of enforcement was by \textit{qui tam} actions brought by mercenary informers. It was probably cheaper to buy off these informers than to defend even groundless prosecutions.

\textsuperscript{470} Stat. 21 Jac. I, c. 22 (1623). This statute also freed London retailers from the inhibitions of Stat. 3 & 4 Edw. VI, c. 21 (1549) which explicitly forbade wholesale dealing in butter and cheese and restricted retail sales to quantities not in excess of a waye of cheese or a barrel of butter.
tirely. There was little to prevent speculators from making large profits through resale of commodities except the occasional activities of informers who brought *qui tam* actions for penalties under the old statutes. The statute of Edward VI was repealed in 1772, but as late as 1800 a person was convicted of ingrossing by buying a fifth of the hops on sale at Worcester Market with a view to resale when the price went up. The court held that the repeal of the statute did not abolish the common-law crime of ingrossing and rejected the contention of the defendant's counsel that there could not be a conviction without proof of intent to resell in gross, that is, wholesale.

The writings of the Physiocratic School in France and of the English economists Adam Smith and David Ricardo effected a profound change in the general attitude toward commerce and resulted by 1846 in a revolution in British policy. The new view was that prosperity could best be served by removing all restrictions from industry and trade, by allowing prices and wages to be

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472 Stat. 12 Geo. III, c. 71 (1772). This also repealed Stat. 3 & 4 Edw. VI, c. 21 (1549), note 470 supra.
473 The King v. Waddington, 1 East 143, 102 Eng. Rep. 56 (1800). Lord Kenyon's opinion states that he had read Adam Smith's *Wealth of Nations* to inform himself on the economic problems involved but was not convinced of the advantages of unregulated trade. 1 East 157, 102 Eng. Rep. 62. Senator Benjamin thought that the crime was committed only when the purchase was of large quantities [*Treatise on the Law of Sale of Personal Property*, 7th ed., 530 (1931)] but the butter and cheese cases throw some doubt on this. The opinions in The King v. Waddington do indicate, however, that the evil of the offense lay in the tendency to enhance prices. Compare 3 Coke, *Institutes*, *195-196*. This definition of the evil accords with the language of a statute of Henry III or Edward I. 1 Stat. of the Realm, 203-204; Herbruck, "Forestalling, Regrating and Engrossing," 27 Mich. L. Rev. 365 at 374-375 (1929). Theoretically market manipulations could not enhance prices fixed by law, but mediaeval regulators, like modern ones, had troubles with the "black market."
fixed by supply and demand, by the enlightened self-interest of the individuals concerned in free and unregulated competition. Under it, competition was seen as a public good instead of an evil to be suppressed by elaborate regulation. The old statutes fixing wages and prices, regulating the quality of goods, limiting by licensing the persons who could engage in trades, and prohibiting unjust profits, were repealed. The crimes of forestalling, regrating, and engrossing were abolished. The era of *laissez faire* had begun; for the first time individuals were free to fix prices, wages, and the terms of commercial transactions by private contract, subject only to newly developed doctrines that contracts must not be in restraint of trade.

The term "restraint of trade" was not new, but it acquired a wholly new meaning. Cases decided as early as the fifteenth century had declared that all contracts in restraint of trade were contrary to public policy and void. But those cases were decided in an era when wages, prices, quality of goods, the right to engage in trade, and the terms of commercial transactions were governed by minute regulations. These regulations left

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474 Stats. 3 Geo. IV, c. 41 (1822); 5 Geo. IV, c. 66 (1824); 5 Geo. IV, c. 95 (1824); 7 & 8 Vict., c. 24 (1844). The list of statutes repealed by the last act gives some indication of the elaborateness of the mediaeval and mercantile systems of regulation. See Herbruck, "Forestalling, Regrating and Engrossing," 27 Mich. L. Rev. 365 (1929).

475 Dyers' Case, Y.B. 2 Hen. V, Pasch., pl. 26 (1415); Colgate v. Bachelor, Cro. Eliz. 872, 78 Eng. Rep. 1097 (1601); Ipswich Tailors' Case, 11 Co. Rep. 53a, 77 Eng. Rep. 1218 (1614). In a period when the Crown was granting patents of absolute monopoly of the manufacture and sale of common commodities to court favorites who were not businessmen at all, for the sole purpose of permitting the patentees to make enormous profits out of licensing such manufacture and sale, the word "monopoly" also had a meaning quite different from the current use of the term. See The Case of Monopolies, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (1602); 4 Holdsworth, History of English Law 349-353 (1924); Formoy, Historical Foundations of Modern Company Law 11-16 (1923).
virtually no sphere of operation for private commercial contracts; such a contract was in “restraint of trade” if it attempted to vary the applicable regulations. It was void for the same reason that private contracts purporting to fix prices or rents higher than those set by the American war time price and rent control regulations were void. The whole mediaeval system was designed to prevent competition; hence a contract designed to foster competition was void. Under the new system of *laissez faire*, free competition was looked upon as an important object of public policy. In its new sense, “restraint of trade” means restraint of competition. This radical change in the meaning of the term must be borne in mind in the use of old authorities on the subject. Moreover, the old cases involved contracts by skilled artisans not to engage in their trades. In an era when the right to engage in a skilled trade involved seven years' apprenticeship and membership in a local guild, enforcement of such a contract meant a change of status for the artisan. In the mediaeval view, everyone was born to his status, and the policy of the law was to keep him in it. The doctrine of just price, allowing the producer exactly enough profit to enable him to maintain his status, tended toward this end by preventing the seller of goods from rising above or falling below his fixed status. In this view, a contract in “restraint of trade” was objectionable because it was an attempt to change hereditary status by contract. It is strange that nineteenth century judges who admired the heroes of Horatio Alger should have applied precedents based on such principles to invalidate contracts regulating resale of goods.

The reign of *laissez faire* in England lasted for about a century, the period between the end of the Napoleonic
wars and the beginning of World War I and the longest period during which Europe has been free of general wars. Since then there has been increasing governmental regulation of wages, prices, and the terms of commercial transactions. The current tendency is toward governmental ownership of industry. Freedom of private contract in commercial transactions had a brief existence, and it is not surprising that the law governing the extent to which restraints may be placed on resale of chattels by that means has not attained complete development. It has attained some development, and that development merits examination.

The growth of the practices of marketing commodities under brand names and of advertising the merits of these products in media of wide circulation creates in the manufacturer of such a product a strong economic interest in controlling its resale for the protection of the good will achieved by the brand name. To ensure that his product is effectively marketed throughout the country he is likely to wish to allot areas for resale to wholesalers and retailers. He has an interest in seeing that the public everywhere can depend upon his product being marketed in quantities and quality which are uniform and consistent with his advertising. He has an interest in controlling resale prices, both to enhance the effectiveness of his advertising and to prevent seriously adverse effects on his whole scheme of distribution. If one druggist in a community sells Dr. Galen's Kidney Pills at a price below wholesale cost with a view to inducing customers to come to his store and buy other goods, the other druggists in the community cannot afford to sell them at all and will persuade their customers to buy a substitute, with the result, in the long run, that much of the value of the manufacturer's advertising is lost.
The manufacturer may, of course, control all this by retailing his own product, but this is scarcely feasible for the manufacturer of a single drug or a few types of canned foods. Hence the manufacturer has an interest in binding wholesalers and retailers of his product to abide by the conditions he imposes upon resale.

English manufacturers have placed chief reliance, in their efforts to control the prices and conditions of resale of their products, on trade associations comprising all or virtually all the manufacturers and wholesalers in a given field. The Tobacco Trade Association, the Proprietary Articles Trade Association (drugs), and the Motor Trade Association are examples. The rules of these associations prohibit wholesalers from selling to retailers who have not agreed to sell only at prices fixed by the manufacturers and approved by the association. If a retailer sells in violation of the restrictions imposed upon him, his name is placed on a “stop list,” and no wholesaler will sell him anything. Thus if a druggist attempts to sell Dr. Galen’s Kidney Pills at a cut price, he will be unable to buy any drugs at all from any British wholesaler. The British courts have upheld the lawfulness of these associations and their “stop-list” device.

The trade association device is not always available and effective. The manufacturer may wish to seek enforcement in the courts of direct contracts with retailers regul-

476 Dix, Law Relative to Competitive Trading 83-109 (1938); Report of the Committee on Resale Price Maintenance (Cmd. 7696, 1949). The committee recommended that these practices be made illegal.

477 Thorne v. Motor Trade Association, [1937] A.C. 797. Combinations which restrict competition against the public interest may, in some cases, be prohibited or regulated by administrative bodies under the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. VI, c. 66.
lating resale prices and of contracts binding wholesalers
to sell only to retailers who agree to maintain the prices
prescribed by the manufacturer. The British courts are
willing to enforce both types of contract specifically by
injunction against the contracting parties.\(^478\) There are
suggestions in the opinions that such a contract might
be illegal if calculated to produce a pernicious monopoly,
but none seems to have been held invalid on that
ground.\(^479\)

Sometimes a retailer who is not a party to a price
maintenance contract secures a stock of brand-name
goods by deceiving a wholesaler or retailer who is a party
to such a contract or through mistake or deliberate
breach of contract on the part of such a party. Such a
retailer might conceivably, under some circumstances,
be liable to the manufacturer in tort for inducing breach
of contract.\(^480\) Manufacturers have sought to bind him
by their price regulations on the theory that an equitable
restriction was imposed on the goods, either by the con­
tact with the wholesaler or through notice attached to
the goods. The equitable restriction on use of land was
developed in the nineteenth century by extension of the
rules of covenants running with the land and has been
buttressed by analogies to conditions subsequent and
easements.\(^481\) Easements and transfers on condition sub­
sequent are unknown in the law of chattels. Dictum in

\(^{478}\) Elliman, Sons & Co. v. Carrington and Son, Ltd., [1901] 2 Ch.
275; Palmolive Co., Ltd. v. Freedman, [1928] Ch. 264 (C.A.). En­
forcement will be denied if the contract is clearly unreasonable as
418.


\(^{481}\) Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848); Clark, REAL
COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"
149-157 (1929); Elphinstone, COVENANTS AFFECTING LAND 69-76 (1946);
a sixteenth century case denied that covenants could run with the title to chattels as they may with the title to land.\textsuperscript{482} In consequence, the English courts have held that ordinary chattels cannot be subjected to equitable use restrictions.\textsuperscript{483} Hence price maintenance schemes are not enforcible by judicial means against dealers who are not parties to contracts binding them to observe the scheme. The British courts make an exception in the case of patented articles, holding that the patent entitles the patentee to impose restrictions on their resale which run with the goods and bind every taker with notice.\textsuperscript{484}

The law of commercial dealing in chattels is complicated in the United States by the fact that the Federal Constitution empowers Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, but leaves the regulation of other commerce to the states.\textsuperscript{485} Nineteenth century federal policy favored, in general, freedom of contract and freedom of competition in domestic commerce. A feeling that freedom of contract was being used to hamper free competition to an undesirable extent led to the enactment in 1890 of the Sherman Anti-Trust Act, which provided,

"Every contract, combination in the form of trust or

\textsuperscript{482} Spencer's Case, 5 Co. Rep. 16a, 16b-17a, 77 Eng. Rep. 72, 74 (1583). There is another difficulty: equitable restrictions on the use of land must be appurtenant to an estate in the same or neighboring land. Milbourn v. Lyons, [1914] 2 Ch. 231 (C.A.); London County Council v. Allen, [1914] 3 K.B. 642 (C.A.); Torbay Hotel Co. v. Jenkins, [1927] 2 Ch. 225.


\textsuperscript{484} National Phonograph Co. v. Menck, [1911] A.C. 836.

\textsuperscript{485} Art. I, §VIII, cl. 3; Amendment X."
otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 486

It has been suggested that the generality of the language of this act made it forbid the normal transactions of business, that "Business men now enjoy liberty only according as the prosecuting authorities indulge them in the open breach of the law." 487 In this respect the act resembles the statute of Edward VI against ingrossing which, if read literally, forbade all trade in foodstuffs. 488 The interpretation of the statute in the federal courts tends to justify this criticism. The earlier federal decisions, both before and after the statute, affirmed the validity of resale price maintenance contracts and suggested that our law would follow the British. 489 Then, beginning in 1907, a series of decisions of the Supreme Court and the Circuit Courts of Appeals completely reversed the rules, holding, in effect, that schemes for retail price maintenance by contract or equitable restriction are illegal at common law and under the statute and seriously curtailing even the manufacturer's right to refuse to sell to dealers who habitually cut prices. 490

488 Stat. 5 & 6 Edw. VI, c. 14, §3 (1552); notes 466-470, 472 supra.
489 The cases are collected in Seligman and Love, Price Cutting and Price Maintenance 43-52 (1932).
The Miller-Tydings Amendment of 1937 inserted a proviso in the Sherman Act to the effect that contracts permitted by state law prescribing minimum prices for products sold under trade-mark or brand name should not be illegal by reason of that act or the Federal Trade Commission Act. The proviso does not permit contracts between producers, between wholesalers, between retailers, or between others in competition with each other; that is, it limits them to contracts between a producer and his distributors or between a wholesaler and his retail outlets. By the end of 1936, 14 states had enacted statutes, commonly called "fair trade" laws, authorizing resale price maintenance contracts as to trade-marked and brand named goods. In 1937, 28 more states enacted such statutes, and by 1950, 45 states had such legislation in force. State statutes enacted in 1933 and thereafter contained a "non-signer" provision to the effect that whenever a producer has entered into a price-maintenance contract, price-cutting by anyone, whether or not a party to the contract, is actionable. The Supreme Court had held in 1936 that such a provision was valid, under the Fourteenth Amendment, as to transactions in intra-state commerce. It was decided in 1953 that a 1952 amendment to the Sherman and Federal Trade Commission Acts permitted the enforcement of

493 It is of interest to note that seventeenth century smugglers who violated the trade regulations imposed under the mercantile system referred to their operations as "fair trade." Scott, GUY MANNERING, c. 4.
such “non-signer” provisions as to transactions in inter-
state and foreign commerce.496

A Michigan statute enacted in 1899 makes illegal and
unenforceable contracts fixing resale prices in terms so
broad as to make it questionable whether even an agree-
ment between partners as to the prices at which their
firm will sell is not illegal.497 This statute, like the Sher-

496 Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205
F. (2d) 788 (5th Cir. 1953), certiorari denied, 74 Sup. Ct. 71 (1953).
The amendment was made by the McGuire Act of July 14, 1952, 66
Stat. 632, 15 U.S.C. 45, which was designed to overcome the decision
in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71
S.Ct. 745 (1951) that the Miller-Tydings Amendment did not permit
their enforcement in interstate and foreign transactions.

497 "Sec. 1. That a trust is a combination of capital, skill or arts
by two or more persons, firms, partnerships, corporations or associations
of persons, or of any two or more of them, for either, any or all of
the following purposes:

"1. To create or carry out restrictions in trade or commerce;

"2. To limit or reduce the production, or increase or reduce the
price of, merchandise or any commodity;

"3. To prevent competition in manufacturing, making, transporta-
tion, sale or purchase of merchandise, produce or any commodity;

"4. To fix at any standard or figure, whereby its price to the public
or consumer shall be in any manner controlled or established, any
article or commodity of merchandise, produce or commerce intended
for sale, barter, use or consumption in this State;

"5. It shall hereafter be unlawful for two or more persons, firms,
partnerships, corporations or associations of persons, or of any two or
more of them, to make or enter into or execute or carry out any con-
tracts, obligations or agreements of any kind or description, by which
they shall bind or have bound themselves not to sell, dispose of or
transport any article or any commodity or any article of trade, use,
merchandise, commerce or consumption below a common standard
figure or fixed value, or by which they shall agree in any manner to
keep the price of such article, commodity or transportation at a fixed
or graduated figure, or by which they shall in any manner establish or
settle the price of any article, commodity or transportation between
them or themselves and others, so as to directly or indirectly preclude
a free and unrestricted competition among themselves, or any pur-
chasers or consumers, in the sale or transportation of any such article
or commodity, or by which they shall agree to pool, combine or directly
or indirectly unite any interests that they may have connected with
the sale or transportation of any such article or commodity, that its
price might in any manner be affected. Every such trust as is defined
herein is declared to be unlawful, against public policy and void....

"Sec. 8. That any contract or agreement in violation of the pro-
visions of this act shall be absolutely void and not enforceable either
man Anti-Trust Act 498 and the statute of Edward VI, 499 if literally interpreted, would forbid virtually all trade. Like them it is an example of a type of legislation which is an invitation to tyranny, branding legitimate businessmen as criminals and subjecting them to the caprice of prosecuting officials. There are mischievous types of monopoly which ought to be criminal. It is unfortunate that our legislatures have been unwilling to undertake the difficult task of defining them with precision so that traders who wish to abide by the law might be able to determine what activities are permitted and what are not.

_Hunt v. Riverside Co-operative Club_ 500 was a proceeding to restrain violation of the act of 1899. The defendant was an association comprising all seven of the plumbing supply dealers and 131 of 168 master plumbers in the City of Detroit. Its rules provided that the wholesaler would sell only to master plumbers at prices fixed by a committee of the association, the prices to master plumbers who were not members to be 15% to 30% higher than those charged members. An injunction against enforcement of these rules was granted, the court saying that such a price-fixing arrangement, designed to create a monopoly, was illegal at common law. Unquestionably the arrangement violated the act of 1899, so there can be no proper criticism of the result reached.

498 Note 486 _supra_.
499 Stat. 5 & 6 Edw. VI, c. 14, §3 (1552); notes 466, 470, 472 _supra_.
500 140 Mich. 538, 104 N.W. 40 (1905).
If by "common law" is meant the English law of 1607, however, it will be recalled that such price-fixing by local gilds was looked upon as the normal and proper method of determining just prices.

_**W. H. Hill Co. v. Gray & Worcester**_ \(^{501}\) was a suit by a drug manufacturer against a retailer to restrain price-cutting. The plaintiff manufactured Hill's Cascara Bromide Quinine and marketed it through wholesalers who contracted not to resell to retailers disapproved by the plaintiff. In order to secure approval, retailers were required to contract with the plaintiff not to sell at less than the price marked on each package of the drug. The defendant entered into such a contract in March, 1906, and complied with it until December, 1907, when it was rescinded by mutual consent. Soon after, the defendant secured a supply of Hill's Cascara Bromide Quinine from a wholesaler, who did not know of the rescission of the contract, and began retailing the product at a cut price. A decree dismissing the bill of complaint was affirmed. The court held that the plaintiff's system of retail price maintenance was illegal, both under the statute and at common law, relying entirely upon the federal decisions in _**John D. Park & Sons Co. v. Hartman**_ \(^{502}\) and _**Dr. Miles Medical Co. v. Park & Sons Co.**_ \(^{503}\) and quoting the following from Judge Lurton's opinion in the _Hartman_ case:

"'A prime objection to the enforceability to [sic] such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. The right of alienation is one of the essential incidents of a right of general property in moveables, and restraints

\(^{501}\) 163 Mich. 12, 127 N.W. 803 (1910),

\(^{502}\) (6th Cir. 1907) 153 F. 24, note 490 supra.

\(^{503}\) (6th Cir. 1908) 164 F. 803, affd. 220 U.S. 373, 31 S.Ct. 376 (1911), note 490 supra.
upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave, or an heirloom, have been generally held void. “If a man,” says Lord Coke, in Coke on Littleton, s. 360, “be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.” It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel, so as to follow the article and obligate the subpurchaser by operation of notice. ‘’504

The quotation from Sir Edward Coke suggests that the rule laid down by these cases proscribes even a single contract restricting resale of a single chattel under circumstances which involve neither monopoly nor any effect on general market conditions. The fact that Coke is disqualified as an authority in this field by the vastly different economic and legal setting in which he wrote has already been suggested. Despite this reliance upon a line of reasoning which would apply to a single contract as well as to an extensive system designed to establish a monopoly, the opinions in both the Hartman and Gray and Worcester cases expressly state that a single contract is not governed by the same rule of illegality.505

505 153 F. 24 at 37; 163 Mich. 12 at 21, 127 N.W. 803. “A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a
In their attempt to state the common law in a situation governed by statute, these opinions add confusion to the common law. It seems unfortunate that the court was not content to rest its decision in *W. H. Hill Co. v. Gray & Worcester* on the Michigan statute of 1899.606

*Mulliken v. Naph-Sol Refining Co.*607 was an action for damages for breach of contract. The plaintiff, a wholesaler and retailer of gasoline, sent a letter to the defendant, agreeing to buy his gasoline requirements for a year from defendant at one and three quarters cents per gallon below the retail price set by the defendant for the Grand Rapids area. It contained no agreement by the plaintiff to abide by the retail prices so set. The parties dealt on this basis for nine months. There was dispute as to whether the plaintiff or the defendant refused to deal. The circuit judge directed a verdict for the defendant on the ground that, although the plaintiff had promised to buy gasoline, the defendant had not contracted to sell it. A judgment for the defendant was affirmed on the sole ground that the contract was illegal

'system' of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object." *Ibid.* One could wish that the common law prohibited such sentences as that quoted.

606 The opinion concludes with this passage: "But we place our decision upon the ground that complainant's system of contracts deals with the manufactured product of its secret process, and not with the process itself, and that the system of contracts, being a restraint upon free competition, falls within the common-law prohibition of restraints of trade, and is void.

"Having reached this conclusion, it is unnecessary to decide whether or not such contracts are illegal and void under the statute of this State." 163 Mich. 12 at 26, 127 N.W. 803.

607 302 Mich. 410, 4 N.W. (2d) 707 (1942). The facts are not made clear in the opinion but are brought out in the record.
because it provided for the setting of retail prices by the defendant, the court citing *Hunt v. Riverside Co-operative Club* 508 and the Act of 1899. 509 The opinion contains the following language:

“In a reply brief appellant contends that the opening statement did not disclose a void contract and that the agreement ‘was a good deal like a lease arrangement.’ A lease is a contract and would be void under the statute quoted if it was for a purpose prohibited by law. So far as we are able to determine from this record, the arrangement between the parties was more nearly that of principal and agent, and an agency for an illegal purpose is void, just as is a contract for an illegal purpose.” 510

This language would seem to condemn as illegal a retail merchant’s prescribing the prices at which his sales clerks are to sell his goods. Such a construction of the Act of 1899 is certainly possible, but one may question whether the legislature really meant to restrain ordinary trade practices to such an extent.

*Staebler-Kempf Oil Co. v. Mac’s Auto Mart, Inc.* 511 was a suit to restrain the sale of gasoline at prices below those fixed by the plaintiff. In 1946 the plaintiff conveyed land in Ann Arbor to Martin Sales & Service Co. in fee simple by a deed containing a covenant by the grantee that if it built a filling station on the land it would purchase all its requirements of gasoline, oil, and lubricants from the plaintiff and would retail such products at the prices customarily furnished to other dealers in the area. The covenant provided that it should run with the land and be operative for ten years. In 1947

508 Note 500 *supra.*
509 Note 497 *supra.*
Martin Sales & Service Co. conveyed the land to the defendant by a deed containing the same covenant. The plaintiff sold 1,600 gallons of gasoline to the defendant and then requested the defendant to enter into a resale price maintenance contract of the type the plaintiff required of its retail dealers. The defendant declined. A decree restraining the defendant from selling at prices below those which the plaintiff prescribed for retailers bound by contract to it was affirmed. Without referring to the well-settled rule that use restrictions on land must be appurtenant to neighboring land, the court held that the covenant imposed a reasonable and valid use restriction which ran with the land and bound the defendant. As to the Act of 1899, the court said:

"The statute, if read literally, would seem to support the defendant's contentions. However, the statute does not define restraint of trade, and the definition has been judicially supplied. It has long been held that a contract would not be construed as in restraint of trade unless the restraint was unreasonable. . . .

"The cases cited by the appellant are not in point. *Hunt v. Riverside Co-Operative Club*, supra, and *Mulliken v. Naph-Sol Refining Co.*, supra, involved agreements which were patently injurious to the interests of the public. *W. H. Hill Co. v. Gray & Worcester*, supra, was decided prior to our Court's interpretation of the act of 1899 in *People, ex rel. Attorney General v. Detroit*


513 Note 500 *supra*.

514 Note 507 *supra*.

515 Note 501 *supra*. 
Asphalt Paving Co., supra, and does not represent the current judicial interpretation of the statute, nor do the facts present as fair and compelling a business purpose as is present in the instant case.

"In view of our decision there is no need to discuss the effect of the Michigan fair trade act, ... on this covenant." 517

The Michigan Fair Trade Law of 1937 provides that contracts relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or owner and which is in fair and open competition with similar commodities produced by others shall not be deemed in violation of state law because they provide that the buyer will not resell at less than the price fixed by the seller or that the buyer will not resell except to persons who agree to maintain resale prices. The act contains a "non-signer" provision, as follows:

"Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so

516 244 Mich. 119, 221 N.W. 122 (1928). This was a quo warranto proceeding under the Act of 1899 against a corporation organized by the four principal paving contractors in Detroit to effect a partial consolidation of their businesses.
advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby, and may be enjoined by a court of competent jurisdiction."

Notwithstanding the earlier decision of the Supreme Court of the United States that such a "non-signer" provision did not violate the Federal Constitution,519 the Michigan Supreme Court held in Shakespeare Company v. Lippman's Tool Shop Sporting Goods Company 520 that Section 2 was void under the State Constitution as to a "non-signer."

Except as to transactions governed by the Fair Trade Act, the law of restraints on resale of chattels is in an unhappily confused state. The old common law developed in a period when competition was looked upon as evil, and close public regulation of prices and commercial transactions was the normal rule. The nineteenth century revolution in thought and public policy, which exalted free competition and unregulated trade as an important object of society, made it difficult for the courts to make wise use of the precedents laid down in the old era. The anti-trust legislation of the turn of the century, which tended to class all restraints on competition, regardless of size or importance, with pernicious monopolies, added to the confusion. The recent realization, partly recognized by statute, that completely unregulated

520 334 Mich. 109, 54 N.W. (2d) 268 (1952). In Weco Products Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N.W. 611 (1941) an injunction against a "non-signer" was dissolved on the grounds that its price-cutting was not wilful and knowing and that the plaintiff had been guilty of inequitable behavior. An injunction against a "non-signer" was denied in Miles Laboratories, Inc. v. Simon, (D.C. Mich. 1940) 33 F. Supp. 962 on the ground that the defendant's practice of selling at the price set by the producer, without adding the state sales tax, was not a violation of the act.
competition is not always publicly desirable has complicated the situation still further. In the present state of the authorities it would be unwise to attempt to predict the validity of restraints on resale of chattels imposed in a commercial transaction where no elements of pernicious monopoly are present. May, for example, an artist who sells a painting to a museum at a low price in consideration of the vendee's contracting not to resell to a private collector for ten years, enforce the contract? His object, keeping the painting on public display, could be accomplished by means of the trust device. Whether the law of restraints on alienation of legal interests prevents its being accomplished by the device of contract, we do not know.

Shares in business enterprises, including partnerships, joint-stock companies, and corporations, have come to be treated as property for some purposes. The same may be said as to certain types of contract rights, notably such evidences of debt as bonds, debentures, and notes, insurance policies, and annuity contracts. Indeed, much of the wealth of the modern community is invested in property of these types. Shares in partnerships involve not only property interests but mutual agency, mutual trust and confidence in business skill, and liability for debts. Hence their alienability may be and usually is, much restricted. Shares in joint-stock companies and corporations involve powers of management and rights of association; corporations often perform quasi-governmental functions. Both the shareholder and the public have an interest in ensuring competency and continuity of management, which is sometimes protected by re-

straints on alienation of shares.\textsuperscript{522} Their free alienability has been further restricted by statute to protect the public against the promotion of fraudulent schemes and unsound enterprises.\textsuperscript{523} The rules as to transferability of bonds and notes have evolved as parts of the law of contracts and negotiable instruments. Insurance policies and annuity contracts involve elements which are peculiarly personal, relating to the character, health, and habits of the holders.\textsuperscript{524} In consequence of their peculiarities, special rules of law, much of it statutory, governing the transferability of shares in business enterprises and the mentioned types of intangible property, have developed.


\textsuperscript{524} Grismore, “Effect of a Restriction on Assignment in a Contract,” 31 \textit{MICH. L. REV.} 299-319 (1933).
These rules sometimes permit, incident to the creation of the interests or to commercial transactions involving them, restraints on alienation of types which would be invalid if applied to ordinary legal interests in land or chattels. Discussion of the validity of restraints on alienation of these special types of "property" which arise from or are related to their peculiar character is beyond the scope of this study.