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THE RULES AGAINST RESTRAINTS ON ALIENATION,
AND AGAINST SUSPENSION OF THE ABSOLUTE
POWER OF ALIENATION IN MINNESOTA.

By Everett Fraser*

The common law from a very early period has been opposed
to restraints on alienation, or to unreasonable suspension of
the power of alienation. It has been the policy of the law to
keep property alienable, and liable for debts, and the policy has
been generally carried out, even in the face of a legislative enact-
ment to the contrary. The courts seldom discuss the social basis
for the policy. They assume the utility of the rules they apply.

Attempts to make property inalienable take two general forms.
The alienor may attempt to impose express restraints upon the
alienation of the property which he transfers. Ownership of or
an estate in property may be given with an express provision
that the property shall not be aliened or taken for the debts of
the alienee. This provision may be a condition against alienation,
leaving, if valid, a right of re-entry in the alienor or his heirs for
breach of the condition. Or it may be a conditional limitation
of the property over to another upon breach. In either case there
is forfeiture. Again it may be a mere declaration that the property
shall not be aliened or liable for the debts of the alienee without
providing for a forfeiture on the attempt to alien. The rules

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1For the general history see 1 Pollock and Maftland, Hist. Eng. Law
310 et seq.; Gray, Restraints on Alienation. 2nd Ed. secs. 4-7, 13 et seq.;
Gray, Rule Against Perpetuities, 3rd Ed. sec. 109 et seq.; for a brief sum-
mary see 7 MINNESOTA LAW REVIEW 564-569.
2The Statute De Donis (1285) created the estate-tail and declared
that the tenant in tail could not alien the estate. The courts two centuries
later allowed the tenant to alien by a common recovery. Taltarum's Case,
(1472) Y.B. 12 Edw. IV 19.
against these attempts are known as the rules against restraints on alienation.

Suspension of the absolute power of alienation exists when the property is so limited that it is incapable of alienation for lack of persons to alien the interests created. When the law allowed interests to be limited to persons unborn or unascertained it became possible to postpone absolute ownership of the property and consequently to suspend the absolute power of alienation of it. To prevent carrying this scheme to extremes the common law developed the rule against perpetuities and the Minnesota statutes have the rules against suspension of the absolute power of alienation.

Under the Minnesota statutes there is another way by which suspension of the absolute power of alienation may arise. The statutes authorize the creation of trusts and provide that the interests arising under certain of these trusts shall be inalienable. The owners may be ascertained persons, but their interests are made inalienable by the law. The statutes then provide that trusts under which the property in trust might be inalienable beyond a certain period and trusts to continue beyond a certain period shall be void. These statutory provisions are included in the rules against suspension of the absolute power of alienation.

The statutes of Minnesota have greatly changed the common law relating to suspension of the absolute power of alienation. The statutory rules in some respects allow greater freedom and in other respects restrict much more narrowly suspension of the absolute power of alienation of real estate. They allow the greatest latitude to trusts of personal property. In the diversity, complexity, arbitrariness, and uncertainty of these rules Minnesota can hardly be equalled, and cannot be outdone.

The main purpose of this article is to call attention to the need of a revision of the rules against suspension of the absolute power of alienation. But as there is confusion of the rules against

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3 Gray, Perpetuities, 3rd Ed., secs. 2, 2a; Gray, Restraints, 2nd Ed., secs. 8-10.
4 Minn., G. S. 1913 sec. 6710.
5 Minn., G. S. 1913 secs. 6718, 6720. "No person beneficially interested in a trust for the receipt of rents and profits of land can assign, or in any manner dispose of, such interest..." "When the trust is expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees in contravention of the trust shall be absolutely void."
6 Minn., G. S. 1913 sec. 6710, (3) (4) (6).
8 Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 139 N. W. 805.
restraints of alienation with the rules against suspension of the absolute power of alienation, it is thought well first to state briefly the rules against restraints that their relationship to the rules against suspension may be clearly understood.

The Minnesota rules against restraints are not statutory. They are in general the same rules that exist in other common law jurisdictions, and use will be made of decisions in other jurisdictions on questions undecided in this state.

I.

THE RULES AGAINST DIRECT RESTRAINTS ON ALIENATION

(a) Of Estates in Fee Simple.—In general restraints on the alienation of a fee simple estate in realty or an absolute interest in personality, legal or equitable, in possession or in remainder, are void. Whether the restraint be in the form of a condition creating a right of re-entry in the alienor, or a conditional limitation over to another, or a mere declaration that the alienee shall have no power to alien makes no difference. There is a little authority that a restraint against alienation to a restricted class is valid, but authority in the United States has been against its validity. Even if the restraint is limited in respect to time, e.g., the life of the alienee or ten years, it is void by the weight of authority when attached to a fee simple or to an absolute interest in personality.

In *Hause v. O'Leary* there was a devise to devisor's husband for life, then to their son in fee "provided that he shall not sell the said described premises for five years after his father's death." This gave the son a vested remainder in fee with a condition against alienation. The district court considered the effect of the statutes which provide that:

"Every future estate is void in its creation, which suspends 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. The absolute power of alienation shall not be suspended, by any limitation or condition whatever,


10Gray, Restraints, 2nd Ed. secs. 13-30, 105-131k. A contingent remainder being inalienable at common law, a provision for forfeiture, if alienation were attempted, was valid. *Large's Case*, (1588) 2 Leon. 82. Likewise a vested remainder for a reason peculiar to English law. See *Kales, Estates and Future Interests*, 2nd Ed. sec. 713; *In re Porter*, [1892] 3 Ch. 481, and see note 62.

11(1917) 136 Minn. 126, 161 N.W. 392.
for a longer period than during the continuance of two lives in being at the creation of the estate . . .”

The district court decided that the condition was intended to restrain the son only, and so would come to an end on his death even if he died within the five years. The power of alienation was on this construction suspended for only one life in being at the creation of the estate. Thus the proviso satisfied the statute and the statute was held exclusive. The district court held the proviso valid.

The supreme court agreed with this construction of the condition but held it void on common law principles as repugnant to the estate devised. The court quoted with approval from the leading case of *Mandlebaum v. McDonell*:

“We are entirely satisfied that there has never been a time since the statute *Quia Emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant’s counsel, that such restrictions should be held valid, if imposed only for a reasonable time . . . The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.”

A conditional limitation over to another on alienation by a prior taker is equally void. *Potter v. Couch* is a typical case. Real and personal property was devised for a term of twenty years, with a vested remainder in fee to four persons. The devisee directed that none of the property should go to creditors or assigns of the devisees, and that the share of any devisee who should in any manner cease to be entitled should go over to others. One of the devisees of the remainder assigned his share. The devisee over brought suit for the property but the devisee over was held void. The Court said:

“The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate

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12 (1874) 29 Mich. 78.
13 For the difference between a condition and a conditional limitation see Gray, Restraints, 2nd Ed., sec. 22 note.
14 Gray, Restraints, 2nd Ed. secs. 12, 29a, 79, 80.
be legal or equitable. And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation."

A mere restraint without provision for forfeiture is also void. In Anderson v. Cary there was a devise of land to devisor's two sons, T. and C.,

"Upon the following conditions: I direct that they shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son C. (then fourteen) arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever."

T. mortgaged his undivided interest within the time. It was held that this mortgage was valid. The court said:

"By these conditions (so nominated) we do not understand that the testator intended a forfeiture upon breach; there is no limitation over in favor of any one. . . . By the policy of our law, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts, at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force."

By the common law the restraint on the fee simple is no more effective when the property is put in trust, and the restraint is imposed on the equitable fee simple of the beneficiary. Mebane v. Mebane is a leading case. There was a devise of real and personal property on trust for devisor's son with power to the trustee at any time to take possession of the property and to apply the income to the maintenance of the son. The testator's declared purpose was that the property should not be subject to the son's debts. A judgment debtor of the son filed a bill for satisfaction out of the trust property and got judgment. The court said that:

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17Gray, Restraints, 2nd Ed. secs. 104-278a.
18(1881) 36 Ohio St. 506, 38 Am. Rep. 602.
19Gray, Restraints, 2nd Ed. sec. 105 et seq. This statement is not now true in Illinois and Massachusetts. See post note 62.
"In a court of equity, a cestui que trust is looked on as the real owner, and the trust is governed in this respect by the same rules which govern legal interests, and, consequently, it is equally repugnant to equitable ownership that the owner should not have the power of alienating his property."

There were but two exceptions recognized by the common law. A restraint of alienation annexed to a fee simple given to a married woman for her separate use was effectual during her coverture.\(^{21}\) And property could be made inalienable by creating a charitable trust.\(^{22}\) Even in those jurisdictions where a spendthrift trust for a person sui juris is valid the restraints have generally been held valid only in respect to life estates, and not in respect to the fee simple or ownership of personalty.\(^{23}\)

There is some authority that a restraint forbidding alienation of a fee simple to a certain person, or to a particular class is valid.\(^{24}\) The English courts have in a few cases upheld conditions which restrain alienation very narrowly.\(^{25}\) But the better considered cases hold the restraints void unless they leave the power of alienation very broad.\(^{26}\) The decisions in America are in conflict on the validity of restraints qualified as to persons.\(^{27}\)

In *Title Guarantee and Trust Co. v. Garrott*,\(^{28}\) the plaintiff had in 1910 conveyed the land to K., on condition that if K. or her heirs conveyed the land to a person of African, Chinese, or Japanese descent prior to January 1, 1925, the title should revert to the grantor. The plaintiff sought to enforce forfeiture for

\(^{21}\)Baggett v. Meux, (1844) 1 Coll. 138.

\(^{22}\)"Gifts for these purposes have always formed an exception to the general rule that the law does not allow property to be made permanently inalienable." Sweet, Restraints on Alienation, 33 Law Quart. Rev. 237; Gray, Perpetuities, 3rd Ed. sec. 590.


\(^{24}\)Littleton, Tenures, sec. 361; Shepard's Touchstone 129; Gray, Restraints, 2nd Ed. sec. 31 et seq.

\(^{25}\)Doe v. Pearson (1805) 6 East 173 ("no power to dispose of her share except to her sister or sisters, or to their children"); in re Macleay, (1875) L.R. 20 Eq. 186 ("on condition that he never sells it out of the family"). A valuable article by Mr. Charles Sweet, 33 Law Quart. Rev. 236, 342, shows that these cases were wrongly decided because of a misunderstanding by the court of two earlier cases. See pages 246-252, 342-348. This is the first satisfactory explanation of these cases which have caused much of the uncertainty on this question.

\(^{26}\)Attwater v. Attwater, (1853) 18 Bea. 36, 18 Jur. 50, 2 W.R. 81; In re Rosher, (1884) L.R. 26 Ch. Div. 801; Sweet, op. cit. 242, 342.

\(^{27}\)Jenne v. Jenné, (1916) 271 Ill. 526, 111 N.E. 540 (gift over if devisees give any part to S or his wife,—invalid).

\(^{28}\)(1919) 42 Cal. App. 152, 183 Pac. 470. See 4 MINNESOTA LAW REVIEW 68.
a breach but the court held the condition void. There is, however, authority to the contrary in other jurisdictions.

The validity of restraints prohibiting alienation to a particular person or class is an open one in Minnesota. Morse v. Blood, decided that a restraint in a will against alienation to relatives of either the devisor or devisee, was void. The court seems to lean towards the view that the test is the reasonableness of the restraint. But the facts of the case were peculiar and it throws little light upon the question.

Restraints on alienation of the fee simple qualified as to time are void by the great weight of American authority. In Title Guarantee and Trust Co. v. Garrott the condition restrained alienation for only fifteen years; in Mebane v. Mebane the restraint was for a life in being; in Anderson v. Cary the restraint was for seventeen years; in Potter v. Couch the gift over was to take effect only if the devisee ceased to be entitled before he came into possession; and in the Minnesota case of Hause v. O'Leary the restraint was limited to five years or to the life of the devisee if he died within this time. And the restraint was held void in all of them.

29 But a condition that only persons of the Caucasian race be permitted to "occupy" the land was enforced. Los Angeles Inv. Co. v. Gary, (1920) 181 Cal. 680, 186 Pac. 596.

30 Queensborough Land Co. v. Cazeaux, (1915) 136 La. 724, 67 So. 641 (not to be sold or leased to a negro for twenty-five years,—valid); Koehler v. Rowland, (1918) 275 Mo. 573, 205 S.W. 217 (not to be sold or leased to a negro for twenty-five years,—valid); Overton v. Lea, (1902) 108 Tenn. 505, 68 S.W. 250, (gift over if devisee permit any of estate to come into possession of B. Kelly or her husband, or descendants, or any one bearing the name of Kelly,—valid).

31 (1897) 68 Minn. 442, 71 N.W. 682.

32 Especially if they are qualified only as to time. Gray, Restraints, 2nd Ed. secs. 45-54; Sweet, Article Restraints on Alienation, 33 Law Quart. Rev. 346; 3 L.R.A. (N.S.) 669 note; 24 Ann. Cas. 1329 note; Ann. Cas. 1916D 924; 25 Minn. L. Rev. 152, 183 Pac. 470; 4 MINNESOTA LAW REVIEW 68; 5 Cornell L. Quart. 361. Contra, Lawson v. Lightfoot, (1905) 27 Ky. Law Rep. 217, 84 S.W. 739 (restraint of fee in remainder during life of tenant,—valid); Kentland Coal & Coke Co. v. Keen, (1916) 168 Ky. 836, 183 S. W. 247, L.R.A. 1916D 924 (restraint against sale during life of grantor,—valid); and see note 30. But see Ramey v. Ramey, (1922) 195 Ky. 673, 243 S.W. 934 (restraint of fee in remainder during life of devisee void).

33 (1897) 68 Minn. 442, 71 N.W. 682.

34 (1845) 5 Ired. Eq. (N.C.) 131.


37 (1917) 136 Minn. 126, 161 N.W. 392.
The recent case of *Furst v. Lacher*, 38 A. conveyed land to her son J., on condition that if the land were conveyed or encumbered during the lifetime of A. or her husband, the conveyance should be void and the title revert to A. J. became bankrupt and thereafter gave back a quit claim deed of the land to A. The trustee in bankruptcy brought suit to have this conveyance set aside and the land subjected to the claims of creditors. Apart from the condition the trustee must have prevailed. And it was argued that the condition against alienation was void. But the condition was held valid. The court said:

"Where the intent of the parties is clear their rights and liabilities in respect to the conditions are determined and enforced as in other contracts. . . . We hold that the provision created in law a condition subsequent, and if the grantee failed to comply therewith the title would revert."

The court apparently went on the general principles governing conditions and failed to notice that conditions against alienation are opposed to public policy and are void. *Hause v. O'Leary* 40 was not cited.

Although the preponderance of authority is opposed to restraints and conditions against alienation limited in respect to time the principles underlying the decisions are not so clear. The restraint may be merely whimsical, but it may on the other hand have a well considered purpose. The alienor may desire to ensure good neighbors.41 Or he may wish to prevent the dissipation of the property by the alienee.42 These interests of the person creating the condition should be respected so far as they are not in conflict with public policy. In *In re Rosher* 43 the court in discussing the cases upholding conditions restricted as to persons and time said:

"It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether a condition was good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene omitting altogether all questions of repugnancy."

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38(1921) 149 Minn. 53, 182 N.W. 720.  
39See note 32.  
40(1917) 136 Minn. 126, 161 N.W. 392.  
42This is usually the object of spendthrift trusts. How anxious grantors are sometimes to prevent alienation by the grantee may be seen illustrated by a curious bit of special legislation in Minn. Laws, 1921, ch. 145.  
43(1884) 26 Ch. Div. 801.
No doubt if repugnancy is the true reason for holding unqualified conditions against alienation of a fee simple void, it applies with equal force to all restraints of alienation. Any restraint however limited would be repugnant to the normal nature of a fee simple. But the argument of repugnancy begs the question. Since the estates are made subject to the conditions when they are created they would not be normal estates with normal incidents. They would be created minus the incident of alienability. Certainly it is possible for the law to sanction estates in fee simple without the usual incidental power of alienation. Repugnancy is a scholastic reason that should have no weight in the twentieth century. The objection to limited restraints can have no other foundation than public policy.\footnote{What is meant by repugnancy? Not logical inconsistency. The conception of a condition against alienation attached to a legal fee simple or life estate presents no logical difficulties. If the legislature should declare such conditions valid, the courts would have no trouble in upholding them. This supposed repugnancy or incongruity is either 'a notion which savors of metaphysical refinement rather than of anything substantial' (per Lord Truro, C., in Watkins v. Williams, (1851) 3 MacN. & G. 622, 629) or it means 'against public policy.' Gray, Restraints, 2nd Ed. sec. 257. See also id. 74b-74f. And see Kales, Estates and Future Interests 2nd Ed. secs. 447, 714, 723, 735.}

Does public policy invalidate restraints limited in time? It might go so far. But it has stopped short of this point in other instances. As we shall see\footnote{Post, p. 194.} it is well settled that conditions against, or conditional limitations over upon, the alienation of estates for life, or for years, in both real and personal property are valid. The rule had its origin in the interest of lessors of such estates, but it has been extended to cases where the person reserving the condition has parted with all his interest in the property. A may convey to B for life, remainder to B's heirs, and insert a condition or a conditional limitation upon B's estate to take effect on alienation.

The common law allows the absolute power of alienation of the fee to be suspended by the creation of future interests for lives in being and twenty-one years. And the Minnesota statutes allow the power to be suspended for the same cause for two lives. It is true that suspension of the absolute power of alienation cannot be avoided if future interests to persons unborn or unascertained are permitted. The interest must be avoided to avoid the suspension. Whereas express restraints may be avoided and the limitations upheld. And it may be more important to allow alienors to give their property to such persons than it is...
to sanction their attempt to keep it in persons to whom it is given. Yet it is significant that public policy yields to the restricted use of this device.

Again in many states under the common law spendthrift trusts may be created for the lives of the beneficiaries that will effectively prevent the alienation of either the legal or equitable interests during these lives. It has even been held that the beneficiary of the equitable fee simple may thus be restrained from aliening it during his life. And the Minnesota statutes allow trusts to be created suspending the power of alienation of the legal fee simple for two lives and the statutes forbid the alienation of either the legal or the equitable estate for the lives of the beneficiaries. In *Hause v. O'Leary* the court suggests the object might have been attained by creating a spendthrift trust.

If these devices accord with the policy of the law, what objection can be urged against allowing equivalent restraints upon the legal fee simple? Why compel resort to devious ways to accomplish what might as well be done directly? Under our recording system there can be no greater danger of deceiving purchasers and creditors because the property is not in trust. The difference seems wholly one of form. Restraints on the legal estate limited in respect to time should stand or fall with spendthrift trusts.

(b) Of Estates for Life or for Years; and herein of Spendthrift Trusts.—Life estates or terms for years, either legal or equitable, in real or personal property may be made subject to conditions against alienation or bankruptcy, or subject to a limitation over to another upon either of these events. These conditions were first held valid in leases, which left a reversion in the lessor. The lessor's interest in providing against undesirable or irresponsible tenants was the reason for their enforcement. But they are now enforced when the alienor has parted with all his

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46 Post, p. 196.
47(1917) 136 Minn. 126, 161 N.W. 392.
48 "It may be noted in passing that a state of the law which declares a restraint on the alienation of a legal estate in fee, or absolute interests in personality, void on grounds of public policy, and yet permits the same restraint when an absolute and indefeasible interest is equitable, challenges inquiry." Kales, Estates and Future Interests, 2nd Ed., 729; 5 Ill. L. Rev. 318. See Emerson v. Marks, (1886) 24 Ill. App. 642, and see note 60.
49 Gray, Restraints, 2nd Ed. secs. 78-103.
50 Locker v. Savage, (1733) 2 Strange 947.
51 Roe v. Galliers, (1787) 2 Durn. & East 133.
interest in the property and the restraint is wholly for the benefit of others than the alienor.\(^{53}\)

In *Barnes v. Gunter*,\(^{54}\) B. devised land to his son W. for life, on his death to W’s children and continued:

“As I intend this bequest as a provision for the support of my son and his family I direct that the life interest shall not be subject to be sold by him, and that upon any sale of it . . . the said bequest of the remainder to his children shall immediately take effect as in case of his death.”

W. sold the land seven years after his father’s death. It was held that the life estate came to an end upon the conveyance by the life tenant, and the children then became entitled to the possession.

By the earlier laws mere restraints on life estates or terms for years which did not make the interests defeasible on alienation or bankruptcy were void both at law and in equity,\(^{55}\) except restraints on estates for the separate use of women during coverture and by charitable trusts.\(^{56}\) Life estates could be limited so as to come to an end on alienation or bankruptcy, but they could not be limited so as to continue free from the effects of these events. “No man should have an estate to live on and not an estate to pay his debts with.”\(^{57}\) How the line was drawn will be seen by a comparison of two cases from the same jurisdiction.

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\(^{52}\)This statement is perhaps subject to one exception in Minnesota. It has been held that a condition (against operating a saloon) inserted in the assignment of a term can not be enforced because the assignor has parted with all his interest. Cameron Tobin Baking Co. v. Tobin, (1908) 104 Minn. 333, 116 N.W. 838. This reasoning is applicable to a condition against alienation. But the decision is difficult to support (See 3 Minnesota Law Review 334 note 62; Tiffany, Real Prop. 2nd Ed. 269) as a general rule governing conditions. It might well have been the rule for conditions against alienation but it is not. See note 53.

\(^{53}\)It was this step that made spendthrift trusts almost inevitable. Cf. Lord v. Bunn. (1843) 2 Young & C.C.C. 98 and Younghusband v. Gisborne, (1844) 1 Coll. C. C. 400, 15 L. J. Ch. 355, post p. 196. To the extent that conditions against alienation protect interests of the alienor, either a reversion in the same property or an interest in other property as in the saloon case (note 52) there is sound reason for upholding them. But when the law sustained conditions and conditional limitations inserted to save the property from dissipation by the alienee, by which the property was taken from him on alienation or bankruptcy, it was a short step indeed to sanction a mere restraint by which it would be kept in him inalienable and free from claims of creditors. See Nichols v. Eaton, (1875), 91 U. S. 716, 23 L. Ed. 254. The error, if error there be, was in the first step rather than in the second. See Preface to second edition, Gray, Restraints.

\(^{54}\)(1910) 111 Minn. 383, 127 N.W. 398.

\(^{55}\)Gray, Restraints, 2nd Ed. sec. 134 et seq.

\(^{56}\)Notes 21, 22.

\(^{57}\)Tillinghast v. Bradford, (1858) 5 R.I. 205.
In *Lord v. Bunn*\(^6\) property was settled on trust to permit T. to receive the rents for his life but in case he should make any conveyance of his estate for the benefit of his creditors, or be discharged under any insolvent act, then the trustees should be possessed during his life to apply the income for support of him, his wife, and children, or any of them, for his, her, or their support in such manner as the trustees think proper. T. was discharged under the act for the relief of insolvent debtors. It was held that on this event his sole interest ceased and became an interest in himself, his wife and children to be enjoyed according to the discretion of the trustees. They had a power to appoint to any of them. The assignee took only such defeasible interest as the insolvent had. What the trustees appointed to him they must pay over to his assignee.

In *Younghusband v. Gisborne*\(^6\) there was a devise to trustees to raise an annuity of 400 pounds for J. for life, the annuity to be held by the trustees for the personal support, clothing, etc., of J., so as not to be liable to the claims of creditors; to be paid to himself until any other person claim it, and then to be applied for his personal support and for no other purpose. It was held that J.'s assignee in insolvency was entitled to it. The court pointed out that there was no clause of forfeiture or limitation over and added that it was merely a wordy trust for the benefit of the insolvent with a vain attempt to guard it from alienation.

These cases still represent in a general way the universal rule as to legal estates for life.\(^6\) They are also still the rule as to equitable estates in some jurisdictions. But in the majority of states a different rule prevails in equity.\(^6\) In these states clauses prohibiting the beneficiary of a trust assigning his life interest, and providing that these interests shall not be subject to the debts of the beneficiary are valid. In Massachusetts and Illinois clauses restraining alienation of the fee simple during the life of a beneficiary are valid.\(^6\)

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\(^6\) (1843) 2 Younge & Coll. Ch. Cas. 98.
\(^6\) (1844) 1 Coll. 400, 15 L.J. Ch. 355.
\(^6\) Conditions and conditional limitations against alienation of legal life estates are valid, but mere restraints are void. The only case (Gray, Restraints, 2nd Ed., secs. 135, 138; Kales, Estates and Future Interests, 2nd Ed. sec. 730) upholding a mere restraint on a legal life estate (Christy v. Pulliam, (1855) 17 Ill. 59) is now overruled. Randolph v. Wilkinson, (1920) 294 Ill. 508, 128 N.E. 525.
\(^6\) Earlier decisions of the several states are cited Gray, Restraints, 2nd Ed. sec. 177a et seq.; later cases in Bogert, Trusts, sec. 51.
\(^6\) Boston Safe Deposit & Trust Co. v. Collier, (1916) 222 Mass. 390,
The period during which these restraints may be validly imposed is not yet determined. The restraints upheld have not exceeded the period allowed by the common law rule against perpetuities. In the analogous case of restraints on the estates of married women it was held in England with some hesitation that a restraint was invalid which might continue for a longer period than the absolute power of alienation of the fee could be suspended by the creation of future interests,—lives in being and twenty-one years. The leading text writers suggest that the same rule will be applied to these spendthrift trusts in common law jurisdictions.

The validity of common law spendthrift trusts has not been decided in Minnesota. A dictum in Hause v. O’Leary favors


64In re Ridley, (1879) L.R. 11 Ch. Div. 645. A trust for M. for life, on her death in trust for all her children living at her death, and the issue then living of children who should have died in her lifetime per stirpes, provided that the legacies to females shall be for their sole use, free from the debts or control of their respective husbands, and not to be anticipated, sold or encumbered. M. died leaving two daughters born in testator’s lifetime, who had attained twenty-one and married. On petition that the fund be paid out to them it was so ordered, on the ground that the restraint by its terms extended to persons unborn at testator’s death, and so might continue more than twenty-one years after the termination of lives in being at that time. It should be noted that the gift was held good, that only the restraint was avoided, and that the restraint was avoided as to daughters born at testator’s death because by its terms it applied to those who might have been born afterwards. The last point seems wrong. In a gift to a class, some of whom may not be ascertained within the period allowed the gift is void as to all. The gift must be avoided in order to avoid the suspension, and it would be unjust to give the whole sum to a part of the class for whom it was intended. But in this case the gift is good. And it does no injustice to apply the restraint separately to the shares of those who were in being at testator’s death. The period of the rule against perpetuities may be taken as the limit for the continuance of these restraints, but it is quite unnecessary to adopt the manner of applying the rule. The rule was devised to restrict future estates, and can only be applied to direct restraints on vested interests by analogy. See note 65.

65Gray, Perpetuities. 3rd Ed. sec. 121c-121i; Gray, Restraints, 2nd Ed. secs. 272b-272c; Kales, Estates & Future Interests, 2nd Ed. sec. 737 et seq.

66(1917) 136 Minn. 126, 161 N.W. 392. “Several of the cases cited, notably Kessner v. Phillips, (1905) 189 Mo. 515, 88 S.W. 66, 107 A.S.R. 368, 3 Ann. Cas. 1005, call attention to the distinction between a grant of the fee coupled with an attempt to limit the power of alienation, and a so-called ‘spendthrift trust’; and, while recognizing spendthrift trusts as valid, reject as void any restriction upon the power of alienation attached
their validity. The dictum may refer to the trust authorized by statute to receive the rents and profits of land, and apply them to the use of any person.67 It is not necessary to put restraining clauses into a trust of this kind. No persons beneficially interested in this trust can assign or in any manner dispose of such interest.68 The property that may be protected from voluntary alienation by a common law spendthrift trust or by this statutory trust is not restricted in amount. Neither under the common law trust is there any restriction on the amount that may be made unavailable to creditors of the beneficiary. There is such a restriction on this statutory trust. The surplus of the rent and profits, beyond the sum necessary for the education and support of the person for whose benefit the trust is created, is subject in equity to the claims of his creditors.69 The statutory restraint on alienation of the whole amount and the statutory liability of the excess to creditors apply in terms only to one of the several classes of trusts that may be created. It is probably impossible for the creator of such a trust expressly to make larger sums unavailable to creditors in view of this statutory declaration of liability. But several other classes of trusts are authorized.70 As to them there are no statutory provisions against alienation or liability to creditors.71 Is the statutory spendthrift trust exclusive of its kind? Or will trusts of the other classes, e.g., of personal property without any restraining clauses be assimilated to trusts of this class and be governed by the same restrictions?72

67 Minn., G.S. 1913 sec. 6710 (3).
68 Minn., G. S. 1913 sec. 6718.
69 Minn., G.S. 1913 sec. 6712.
70 Minn., G. S. 1913 sec. 6710.
71 "The rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." Minn., G. S. 1913 sec. 6718.
72 New York, Michigan and Wisconsin have statutes identical with Minnesota G.S. 1913 secs. 6712, 6718. They have no statutes restraining assignment of beneficial interests in similar trusts of personal property. In New York trusts to receive the income of personal property and to apply it to the use of the beneficiaries are assimilated to similar trusts in
Or can the creator of other trusts effectively provide that the property shall be inalienable, and unavailable to creditors as in common law states? There is no authoritative answer to these questions in this state.

(To be Continued.)

real property, and the beneficial interests are not assignable. Tolles v. Wood, (1885) 99 N.Y. 616, 1 N.E. 251; Cochrane v. Schell, (1894) 140 N.Y. 516, 35 N.E. 971. They are assignable in Wisconsin. Williams v. Smith, (1903) 117 Wis. 142, 93 N.W. 464; Mangan v. Shea, (1914) 158 Wis. 619, 149 N.W. 378. No Michigan decision on the point has been found, but the statutes apply only to trusts of real property in other respects. Penny v. Croul, (1889) 76 Mich. 471.

In Estate of Samuel Thorne, (1920) 145 Minn. 412, 417, 177 N.W. 638, it is said:

"The origin of trusts was no doubt for the protection of the beneficiary so as to assure to him the income from the corpus of the trust and closing every avenue by which he, or others, might acquire, dispose of, impair or encumber the property itself. And the courts when dealing with trusts have, of course, adopted and applied principles of law which, as between the beneficiary, his creditors and his trustees, conserve the trust estate and attain the purposes of the trust." If this dictum means that the beneficiary of a trust who is unrestrained by statute or express provision in the trust instrument cannot alienate his interest, or make it liable for his debts, it is unsupported by authority. "As soon as such trusts appeared equity hastened to give a remedy; and the remedy was simply to apply the venerable principle of law and equity alike—that property shall be alienable and liable for debts." Gray, Restraints on Alienation, 2nd Ed., sec. 256. "In the absence of provisions in the trust instrument or statutes to the contrary the cestui que trust may alienate his interest as freely as he might a legal estate or interest." Bogert, Trusts 433 with citations. "The law is perfectly settled that the estate of a cestui que trust may be conveyed as well as any other." Elliott v. Armstrong, (1829) 2 Blackf. (Ind.) 198, 208.