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## Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reëxamined\*

IN July, 1895, John Chipman Gray, Royal Professor of Law in Harvard University, wrote that preface to the second edition of his *Restraints on the Alienation of Property*, which has stood ever since as the classic denunciation of so-called spendthrift trusts. He advanced in it three general propositions:

(1) The desirability "of the feeling of imperative duty to use all the money that a man can control for the payment of his debts"<sup>1</sup> which consequently made it the part "of all in authority, and particularly of all judges, to fortify . . . the duty of keeping one's promises and paying one's debts;"<sup>2</sup>

(2) "One of the worst results of spendthrift trusts . . . is the encouragement it gives to a plutocracy, and to the accumulation of a great fortune in a single hand, through the power it affords to rich men to assure the undisturbed possession of wealth to their children, however weak or wicked they may be;"<sup>3</sup>

(3) The superiority of the "doctrines of *laissez faire*, of sacredness of contract, and of individual liberty"<sup>4</sup>—"The general repeal of usury laws was the crowning triumph of the system"<sup>5</sup>—over the view that

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<sup>1</sup> GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) Preface, vii.

<sup>2</sup> *Ibid.* iii. "Among the causes which have produced the frame of mind in which the doctrine of spendthrift trusts has found a congenial home, there must be placed the attempts to avoid payment of money borrowed by the Nation, or by States or municipalities, either through repudiation, or through technical objections, or through debasement of the coin or currency, which have at times been too successful, and which have exercised so great an influence on political parties. Such things cannot be without a weakening of the moral sense, of the feeling of imperative duty to use all the money that a man can control for the payment of his debts." *Ibid.* vi-vii.

<sup>3</sup> *Ibid.* vi.

<sup>4</sup> *Ibid.* viii.

<sup>5</sup> *Ibid.* viii-ix.

"a main object of law is not to secure liberty of contract, but to restrain it, in the interest, or supposed interest, of the weaker, or supposed weaker, against the stronger, or supposed stronger, portion of the community. Hence, for instance, we have laws enacted or contemplated for eight hours' labor, for weekly payments of wages by corporations, for 'compulsory arbitration,' &c., that is, laws intended to take away from certain classes of the community, for their supposed good, their liberty of action and their 'power of contract,' in other words, attempts to bring society back to an organization founded on status and not upon contract."<sup>6</sup>

These three numbered propositions must be met, but not necessarily seriatim and not necessarily all at once. It is clear that the first proposition is an overstatement. It does not distinguish between just debts and unjust ones, and in respect to just debts it does not allow for conflicting duties, such as those owed to a man's wife and children. The duty of keeping one's promises and paying one's debts is, indeed, a duty to be emphasized, especially by a creditor nation and by creditors, and if a due regard is had to other duties, all must approve of that emphasis. The second proposition, however, seems a gross exaggeration. When one thinks of the boost to plutocracy given to the possessors of property by those devices of practical exemption from full legal and financial responsibility for business venture failures, known as limited partnerships and corporations, which are, indeed, expressly designed to exempt the limited partners and the shareholders of the corporations from more than a specified partial share of property loss from such failures, the rest of the loss being borne by trusting creditors, he has to smile at the great to-do made over trusts designed by a trustor to give to a favored cestui que trust, for a lifetime or less, out of the trustor's property, to which the cestui's creditors in no way contributed, an income free from interference by such cestui's creditors, whether those creditors were such at the time of the creation of the trust, or first became creditors thereafter.<sup>7</sup> Assurance given to trustors

<sup>6</sup> *Ibid.* ix.

<sup>7</sup> "The donor owes the donee nothing [in money or property] and gets nothing in return; the transaction concerns him and the donee only. The existing creditor has no right to complain if his debtor should acquire a certain interest, which has cost the creditor nothing but which is walled against his [the creditor's] depredation. The subsequent creditor has no right to complain, for he has extended credit with full knowledge of the debtor's protected title . . ." Cothran, J., concurring in *Spann v. Carson* (1923) 123 S. C. 371, 391, 116 S. E. 427, 434.

So, from a slightly different viewpoint, Epes, J., for the court in *Sheridan v. Krause* (1934 — Va. —, 172 S. E. 508, 515, pointed out that "Though it gives lip service to the indisputable principle that a testator is not, unless he has obligated himself to do so, under any obligation whatever to provide for the payment of the debts of his devisee, yet the rule of *Hutchinson v. Maxwell* [(1902) 100 Va. 169, 40 S. E. 655, 57 L.R.A. 384, 93 Am. St. Rep. 944, against spendthrift trusts, but since changed by statute] made it impossible for a testator to provide in his will for the support and maintenance even of a hopelessly invalidated son, whose only source of support has been for years the bounty of the testator, without being forced by law to pay his son's debts as the price of the right to provide for his necessities."

that they may provide spendthrift trusts, whether of limited or unlimited amounts, for those in whom they are interested, is hardly likely to lead them, or to be an important factor in leading them, to accumulate large fortunes. As a matter of fact, it seems as if only trusts of a nonspendthrift type have played any part in the creation of a plutocracy, and that only a minor one. Even such a nonspendthrift trust as that created by Peter Thelluson, who deliberately sought to pile up accumulations through as long a period of lives as he could figure under the rule against perpetuities so that a trust fund of about £600,000 personal property and of real property of an annual value of £4500 to £5000 would grow into a fund of anywhere from £19,000,000 to £32,000,000, failed lamentably of attaining that figure because of the litigation to which the trust gave rise, the vicissitudes of investments and other things.<sup>8</sup> Spendthrift trusts may protect for a lifetime

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<sup>8</sup> See *Thelluson v. Woodford* (Eng. 1805) 11 Ves. 112. It was that trust, under the will of Peter Thelluson which took effect in 1797, that resulted in the passage of the Thelluson Act of 1800 against accumulations, 39 & 40 Geo. III, c. 98, which, with some amendments, is now § 164 of the Law of Property Act, 1925, 15 Geo. V, c. 20.

An editorial in the *London Times* for July 5, 1858, rehearsed the Thelluson case history. It stated that Peter Thelluson, having £600,000 in money and having land of the annual value of £4500 [some accounts say the land was of the annual value of £5000], died leaving three sons and six grandsons. In his will he provided that, when the last survivor of all the nine children and grandchildren should die, the property left by the testator, and its accumulations in the years, should be divided into three parts, and one third be given to the "eldest male lineal descendant" of each of his three sons. Thereupon, said the *Times* editorial, "Persons of an arithmetical and statistical turn of mind calculated that this fund, accumulating at compound interest, could not amount to less than nineteen millions at the moment of distribution, and would very probably reach the tremendous figure of thirty-two millions." But, adds the editorial, many chancery suits were brought about the will, and even after the period for distribution arrived in February, 1856, a suit, pending when the editorial was written, was brought to decide who was the eldest male lineal descendant of one of Peter Thelluson's three sons, one being eldest in point of lineage and another eldest in point of years, a question which the House of Lords settled in favor of the eldest in point of lineage in *Thelluson v. Rendelsham* (1859) 7 H. L. Cas. 429. The years of chancery litigation are mentioned because to them the *London Times* ascribed the fact that at the time for distribution of the estate it was "not much larger than when he [Peter Thelluson] left it." The editorial ended, "It would be fit punishment for that purse-proud, vain, cruel old man, to see that he disinherited his own children only to fatten a generation of lawyers, that he was the dupe of his own subtlety, and that his name, instead of being associated with the foundation of a house of fabulous wealth, is only known in connection with an abortive scheme of vulgar vanity."

The foregoing editorial called forth several letters. One in the *London Times* for July 12, 1858, sought to impute good motives to Peter Thelluson, and one in the *London Times* for July 13, 1858, tried to show that a certain amount of the money which Thelluson left was entrusted to him for investment by French nobles to whom he never accounted. The important thing from our present view is that Peter Thelluson's effort to establish by accumulation an outstanding fortune for his remote descendants was a lamentable failure. Lawsuits accounted for part of that

the receipt by the cestui of as much of the income of an accumulated corpus as the state of the investment market and the business judgment of the trustees will permit, but they are not intended to amass fortunes and they have no such effect.<sup>9</sup> As for the answer to Professor Gray's third proposition, that must be found, if at all, in the considerations advanced in the rest of this paper.

Perhaps there is no better way of starting a reëxamination of the so-called spendthrift trust doctrine than by considering its historical background. It is true that the doctrine is modern American and that its leading opponent, Professor John Chipman Gray, insisted that "spendthrift trusts have no place in the system of the Common Law,"<sup>10</sup> which would seem to be a negation of any common law historical background for the doctrine. There are, however, certain historical things to remember which bear on our problem, and which Professor Gray, even in his moments of kindness, overlooked; as when he declared that "The education and support to which any and every person is entitled at Common Law is an education at the public schools and a support as a pauper."<sup>11</sup> That statement has a false implication and, in addition, lets in the effect of legislation as a modifier of the non-statutory common law and lets in a statutory background of some significance. At the strict nonstatutory common law, and therefore a common law uninfluenced by humanitarian legislation, even a serf was not entitled to support as a pauper or otherwise, but got only what, if anything, it was worth the lord's while or was the lord's pleasure to give him, and, apart from contract, no poor freeman was entitled to support as a pauper or otherwise but got such support, if at all, by an act of private charity or of statutory public provision. As for education at the public schools, that was wholly statutory. Not so long before Professor Gray wrote his harsh pronouncement, last quoted above, the

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failure, but poor investments, depressions, and wars must have played their part in keeping down the estate.

In (1860) 34 LAW TIMES 241, is an item entitled "A Thelluson Will Before Thelluson" which tells about a Dutch estate that by will was to accumulate for 150 years and then be divided, and says that the immense principal of the fund, and the accumulations of 40 per cent a year for 50 years, nearly all disappeared before the end of the one hundred and fifty years, owing to the fact there stated that "The bankruptcy of the East India Company in 1775, the revolution and French invasion in 1795, the loss of colonies and trade, the war taxes, and the disastrous annexations to France, have done their work."

If deliberate attempts to swell great fortunes meet such disappointments, the fear that spendthrift trusts, which have quite a different and inconsistent purpose, will swell them seems quite unfounded.

<sup>9</sup> The demonstration of that fact is perhaps the sole merit of the quotation from STIMSON, *MY UNITED STATES*, in the text *infra* pp. 490-491.

<sup>10</sup> GRAY, *op. cit. supra* note 1 at x.

<sup>11</sup> *Ibid.* xi.

question of whether it was proper to tax the unmarried rich, or the childless married rich, in order to provide school facilities for the children of small taxpayers or of poor nontaxpayers was vigorously debated in the United States. There was a powerful sentiment in favor of leaving education to individual enterprise and to charity. It will be remembered that this sentiment was so strong in Virginia that in 1817 Thomas Jefferson was unable to get passed by the Virginia legislature a bill for primary schools, each to be supported and controlled by voters of the ward in which it was located.<sup>12</sup> The English Charity Schools, when at last they were established, furnished, as a distinct charity, schooling for those who could not otherwise afford it, and it was strictly in accord with common law notions to have that the fact. Other schools for the poor came by the statutory route. It was not a common law man, but, in that degree at least, a socially minded American who spoke of one's being "entitled" to an "education at the public schools." The support of paupers and the education of the masses were not common law but social and charitable in origin, and represented a step toward that Social Republic which was itself so abhorrent to Professor Gray.<sup>13</sup> The disagreeable, hard-hearted, and utterly selfish common law man—only less detestable than his fellow robot, the economic man—has had to yield somewhat to a voluntary charity influence, and to a legislation-supported humanitarianism.

Still other historical background must be noticed, though it was not only not emphasized by Professor Gray, but not even mentioned

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<sup>12</sup> Jefferson had better fortune in his efforts to establish the University of Virginia, since that was in the main for the well-to-do. Even there "He found it necessary, however, to meet the objection that it is unjust to take the property of one man to educate the children of another. He says: 'And will the wealthy individual have no retribution? and what will this be? 1. The peopling of his neighborhood with honest, useful and enlightened citizens, understanding their own rights, and firm in their perpetuation. 2. When his own descendants become poor, which they generally do within three generations (no law of primogeniture now perpetuating wealth in the same families), their children will be educated by the then rich; and the little advance he now makes to poverty, while rich himself, will be repaid by the then rich, to his descendants when they become poor, and thus give them the chance of rising again.'—Letter to J. C. Cabell, January 14, 1818, 'Early History of the University of Virginia,' p. 105.

"It is of advantage to the state to promote higher education because in colleges and universities are formed 'the statesmen, legislators and judges, on whom public prosperity and individual happiness are so much to depend'; in them 'the interests of agriculture, manufactures and commerce' are promoted, and there the 'mathematical and physical sciences, which advance the arts, and administer to the health, the subsistence, and comforts of human life,' are cherished. In a word, by providing for higher education legislators provide for the 'good and ornament of their country.'—The Report of the Commissioners Appointed to Fix the Site of the University of Virginia, Chap. VIII, §§ 3 and 4." ARROWOOD, THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC (1930) 62-63.

<sup>13</sup> *Op. cit. supra* note 1, at x.

by him, namely, the unfairness and oppression chargeable to many creditors. It is true that in the history of the common law some debtors have done atrocious things. But every atrocity by debtors is matched by fully as great atrocities by creditors. For every evasion of debt liability by debtors, there will be found an act of oppression or fraud by creditors. Indeed, the shameful treatment of debtors imprisoned for debt during the centuries when such imprisonment flourished in England, and during the time when it flourished at its worst in the United States, of itself supplies the page that is most condemnatory of creditors in the whole long relation of creditors and debtors.<sup>14</sup> The hard-

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<sup>14</sup> Perhaps the crowning triumph of the common law was not the repeal of the usury laws, but was, instead, the establishment of that highly objectionable imprisonment for debt, which came in mainly through English judge-made rules, though, indeed, it was helped along by statutes. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1926) 231-232.

"The result was that in practically every case a creditor could take his debtor's body in execution. But, if he elected to adopt this remedy, as he usually did, no other mode of execution was open to him.

"Constraint of the debtor's person thus became in England a more general method of execution than in many other countries in Europe. Largely because it was introduced in this indirect [nonlegislative] way, a mode of execution which required, and in most countries received, careful limitation and regulation from the Legislature, was almost entirely unregulated. The results can be read in the pages of Dickens; and, long before Dickens wrote, the abuses and the inadequacy of the different modes of execution known to the common law had aroused attention . . .

"Debtors might be either honest and unfortunate, or dishonest; and in both cases the law was inadequate. To shut up an honest but unfortunate debtor in prison, where he lived on charity or at his own expense, or died of starvation, inflicted much hardship on the debtor without any benefit to the creditor. On the other hand, if the debtor was a dishonest person, who had become insolvent through his own fault, he would very likely be able to secrete some of his illgotten gains, and live in comparative comfort in prison, till he forced his creditors to some sort of compromise." *Ibid.* 231-233.

As to the debtor dying of starvation, Holdsworth quoted part of what Montague, C. J., said in *Dive v. Maningham* (Eng. 1551) 1 Plowden 60, 68, which, more fully set forth, was:

"For if one be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle, and puts them in a pound, for there the owner of the cattle ought to give them meat, and not he that distrained them, no more is the party or the sheriff, who has one in execution, bound to give meat to the prisoner, but he ought to live of his own goods, although he be in for felony, until he be attainted, and this by the course of the common law. For . . . if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment." But Holdsworth points out (p. 233, note 1): "14 Elizabeth c. 5, § 38 [37?] and 39 Elizabeth c. 3, § 13 provided for the assessment of a county rate for the relief of these prisoners; but it would appear . . . that its intervention was not very effective."

Certain it is that prisoners for debt at times did starve to death, and they often fared worse in respect to meat and drink than prisoners for crime, unless, at least, they could afford by begging or otherwise to pay for the right kind of both. The

hearted creditor, it is quite safe to assert, has been more ubiquitous and more pernicious than the unscrupulous debtor. It is curious to have the creditor of a cestui so exalted in position and honor, however devious the way in which he became a creditor or got his judgment, that he must be given even all the property which the trustor has donated from his own earnings with restrictions intended to keep it from the clutches of the beneficiary's creditors. In respect of the property supplied in that way, the creditor is seeking to reap where he has not sown, and to take what he was never meant to have. It is a moral theft, even if in a given jurisdiction it is legally sanctioned. In estimating the position of creditors, one should not forget that many are unjust creditors, however legal their claims; that debtors are often only unfortunate creditors made poor by conditions not their fault;<sup>15</sup>

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horrors to which poor persons imprisoned for debt were subjected have frequently been depicted.

As late as February, 1906, it was said: "As may well be supposed, the consequences of incarceration are, in many cases, disastrous: gone indeed are the horrors of imprisonment for debt, but some of its worst evils are still with us. The wife and children are often forced to seek the shelter of the workhouse; or, to avert this dreaded calamity, the woman, in her husband's absence, chooses rather to become a wanton. Such has been the beginning of many a life of shame. On his release from custody, the man is rarely able to resume his old employment, and it is generally difficult for him to secure a fresh engagement: his home is now broken up and his downfall is complete, while all this ruin has been brought about at the public charge, except in so far as the burden, in the shape of heavy Court fees, has fallen on the shoulders of the injured creditor. . . ."

"At the root of the whole mischief lies a vicious credit system, which must needs yield a rich crop of unsatisfied judgments, for it may be taken as certain that so long as credit can be got credit will be had. However stringent the conditions of detention, useless goods will be successfully foisted on the extravagant and unwary, while the reckless and improvident will ever have recourse to the advertising money-lender for loans which it is not within their power to repay." Atkinson, *Imprisonment for Debt* (1906) 31 LAW MAG. & REV. (Ser. 5) 129, 144-145.

In Van Winkle, *Imprisonment for Debt* (1897) 55 ALBANY L. J. 282, 303, 321, at 325-326, are set forth some of the horrors which such debtors experienced in the American colonies and in the Eastern states of the United States after statehood. New York abolished imprisonment for debt in 1831—the first state to do so. See McADAM, THE ACT TO ABOLISH IMPRISONMENT FOR DEBT, ETC., COMMONLY CALLED "THE STILLWELL ACT" (1880). At page 10 the author says of the abolition: "There was great rejoicing throughout the state on the part of the poor, unfortunate but honest debtors, and on the part of the humane and charitable, and the lawyers as a class were, may be it said to their honor, almost unanimously in favor of some act to abolish imprisonment for debt."

On the extensive modern use, and the legal phases, of imprisonment for debt, see Thomson, *Imprisonment for Debt in the United States* (1889) 1 JURD. REV. 357; Ford, *Imprisonment for Debt* (1926) 25 MICH. L. REV. 24.

<sup>15</sup> "But it is sometimes said that most debtors, who do not pay their debts, are in some degree guilty, and merit punishment. This seems to us not quite true. Some debtors, we admit, are mere swindlers and sharpers. Others have become involved by daring speculations. Some are the victims of extravagance. Others fail from want of skill and judgment in conducting their business. We find in the conduct of

that the families of beneficiaries often have claims in conscience to the benefit of the income supplied by the trustors far superior to those of the creditors who seek to profit by the windfall of that income; that hard and fast rules are not always the best rules; and that perhaps it is time for the doctrine of the divine right of creditors to go on its way to join the doctrine of the divine right of kings.

Another bit of historical background which must not be forgotten also escaped Professor Gray. Underlying his diatribe is a curious historical error concerning the power of a creditor at common law to strip his debtor of assets. He might do so, but only if the debtor did not own choses in action or land, and did not take advantage of his opportunities of evasion in other ways. Attention has been directed to the queer results in mediaeval times of the doctrine of sanctuary and of the rule that an Englishman's house was his castle and not to be broken into to serve civil process. The latter result is detailed in a complaint to King Charles IX of France by some French merchants who had been trading in England.

"The English merchant [they wrote] has this privilege, that when he has bought goods and intends to become a bankrupt—he can retire into his house, or even into his shop, provided that the door is closed with a lock or some harrier; and the bailiff cannot touch his goods, nor can any one disturb him nor demand any account from him, nor arrest him or even talk to him, even though the poor ruined creditors may see the bankrupt in his house, with his wife, his factors and servants, publicly selling their goods in front of their eyes, without being able to attach these goods or any of the debtor's real or personal property."<sup>16</sup>

As for choses in action, not until 1838 did a statute permit money, bank notes, bills of exchange, cheques, or bonds to be seized on execution.<sup>17</sup> As for real property,

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debtors every moral shade, from gross fraud to the slightest negligence and entire innocence. The high degrees of fraud are comparatively rare. Slighter degrees of misconduct are more common. But judged by the current rules of mercantile honesty, we believe the majority of insolvent debtors upright and honorable." Anonymous book reviewer in (1834) 11 AM. JURIST 289, 291.

<sup>16</sup> Treiman, *Escaping the Creditor in the Middle Ages* (1927) 43 L. Q. REV. 230-234.

<sup>17</sup> "The common law rule was, that, under the writ of *fi. fa.*, the sheriff could only seize such things as he could sell (*Legg v. Evans*, 6 M. & W. 36, 41) . . ." WILLIAMS, *PERSONAL PROPERTY* (18th ed. 1926) 113.

"Debts, being considered as mere rights of action, could not formerly be taken in execution of a judgment obtained against the creditor. But when they are secured by some cheque, bill, note, bond, specialty or other security, the Judgments Act, 1838, provides that under the writ of *feri facias* the sheriff may seize not only money and bank notes, but also the securities above mentioned, and may sue upon them in his own name upon the arrival of the time of payment; but the sheriff is not bound to sue, unless indemnified in the manner prescribed by the Act from the costs of the action. And now, under provisions of the Common Law Procedure Acts, 1854 and 1860, since embodied in the Rules of the Supreme Court, 1883, the Court has jurisdiction to order that all debts owing or accruing to a judgment debtor may be attached [by garnishment] to answer the judgment." *Ibid.* 268.

"From the thirteenth year of Edward I., one-half (Stat. 13 Edw. I c. 18) and since the year 1838 the whole (Stat. 1 & 2 Vict. c. 110, s. 11), of a man's freeholds has been liable to be taken *in execution of a judgment* for debt or damages against him; the creditor having the right to hold the land so taken till his claim be satisfied out of the profits, and being enabled of late years to obtain a sale of the property and payment out of the proceeds. See stats. 1 & 2 Vict. c. 110, s. 13; 27 & 28 Vict. c. 112, ss. 4-6."<sup>18</sup>

As for personal property of the debtor, so great was the respect of the law for the right of immunity of the person from other than imprisonment that jewelry and wearing apparel actually worn and personal property held in the hand could not be seized.<sup>19</sup> And most extreme of all, perhaps, was the rule that if the creditor imprisoned his debtor for the debt, the creditor thereby became deprived of all other process for collection.<sup>20</sup> It must have been maddening to certain creditors to see their debtors in the debtors' prisons spending money and displaying property which, because imprisonment was an exclusive remedy, could not be reached!

Now we are ready to come closer to our specific problem of the spendthrift trust. At once it becomes necessary to say a few words about the common law doctrines of forfeitures on alienation. To our surprise we notice that the common law tolerated, and perhaps welcomed, forfeitures on alienation designed to defeat creditors. From what is sometimes said about spendthrift trusts, one might be led to believe that the common law abhorred any and every defeat of creditors. So far, the leading common law nations have been creditor nations, and naturally they have been strong champions of the duties of debtors to creditors. One might have expected, therefore, that the common law would insist that the duty to pay creditors should prevail over a provision for a forfeiture of an interest in the event that the owner of the interest became indebted and his creditors levied on that interest preparatory to selling it, but such was not the legal development. Even a creditor-nation common law state, then, may contemplate with equanimity the defeat of creditors of individual debtors by a clause forfeiting certain interests of the individual debtors upon attempted involuntary alienation by creditors, whenever third persons attach such forfeiture clauses to the life interests vested by them in the debtors. Forfeitures of estates for years and for life are allowed where there is attached to the estate a condition or conditional limitation for insolvency or bankruptcy of the one having the interest, or for the seizure of the interest on attachment or execution or for other proceeding to

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<sup>18</sup> WILLIAMS, REAL PROPERTY (21st ed. 1910) 81. For later legislation, see *ibid.* (24th ed. 1926) 321-326.

<sup>19</sup> For an American case decided on this common law idea, see *Mack v. Parks* (Mass. 1857) 8 Gray 517.

<sup>20</sup> See *supra* note 14.

subject the interest to the payment of a debt.<sup>21</sup> It seems that it is not so much that the common law wants creditors paid whether or no, but that it is opposed to having debtors refuse to pay creditors and still retain the property. No doubt the common law has been forced by statute to contemplate some violation of its preferences, because there are statutory exemptions from execution, statutory denial of access by creditors to trusts created for the indebted cestuis by others, etc., but it does not voluntarily do so. It is something to know that the real cause of distress to the common law is not that creditors go unpaid, but rather that they go unpaid when the debtors have property out of which they ought to be paid.

The next thing to notice is the archaic nature of the legal argument for the common law attitude. "Necessary incidents" or "inseparable incidents" of property interests and "repugnancy" of restraints or of other objectionable conditions are the notions on which the common law hinges its denunciations of such restraints or conditions, yet spendthrift trusts, both those created by equity decisions and those established by statutes, have shown that what the common law calls "necessary" and "inseparable" and "repugnant" are not really such, but are merely a common law judge's, or an English Chancery judge's, overstatement of preference.<sup>22</sup> As a matter of fact, as Professor Gray of course clearly recognized, whether forfeitures of any particular kind shall be recognized, and whether restraints on alienation, voluntary or

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<sup>21</sup> GRAY, *op. cit. supra* note 1, §§ 78-80, 101. See also, *Hartwell v. Mobile Towing & Wrecking Co.* (1924) 212 Ala. 313, 102 So. 450; *Scott v. Ratliff* (1918) 179 Ky. 267, 200 S. W. 462; *In re Luscombe's Will* (1901) 109 Wis. 186, 85 N. W. 341.

The common law permits conveyances on conditions precedent which do not violate the rule against remoteness of vesting and do not violate any special rule, such as the rule, recently repealed by statute in England, against gifts to unborn children of unborn children under conditions which would not violate the rule against remoteness of vesting. Trusts of that sort are not treated as spendthrift trusts even though the condition precedent is that the cestui is not to take until he becomes financially solvent and able to pay all his debts apart from the trust fund. *Hull v. Farmers Loan & Trust Co.* (1917) 245 U. S. 312.

<sup>22</sup> See *Miller, J.*, in *Nichols v. Eaton* (1865) 91 U. S. 716, 725. That is, of course, strikingly apparent in those few jurisdictions where, under the influence of the chancery spendthrift trust, the law judges have come to recognize even restraints on the alienation of a legal life estate (*Christy v. Pulliam* (1855) 17 Ill. 59; *Pulliam v. Christy* (1857) 19 Ill. 33; *Springer v. Savage* (1892) 143 Ill. 301, 32 N. E. 520; *Albin v. Parmelee* (1904) 70 Neb. 740, 98 N. W. 29), and even such restraints on a legal fee. *Hinshaw v. Wright* (1928) 124 Kan. 792, 262 Pac. 601, (1928) 13 *CORN. L. Q.* 461, (1928) 41 *HARV. L. REV.* 920. The action of those jurisdictions, however, is probably not in the interests of orderliness of theory. Any recognition of restraints an alienation should be in equity only, where discretion may be exercised and modifications may easily be made. At law, the old rule against restraints on alienation should be maintained. On that old rule, see *Clark v. Clark* (1904) 99 Md. 356, 58 *Atl.* 24; *Kerns v. Call* (1918) 82 W. Va. 78, 95 S. E. 606, *L. R. A.* 1918E 568; GRAY, *op. cit. supra* note 1, §§ 105, 113, 134, 278.

involuntary, or both, shall be permitted, are purely questions of humanity and of wise public policy. Accordingly, in this discussion, the old-fashioned language of the reports will be dismissed and the question of policy confronted.<sup>23</sup>

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<sup>23</sup> "That it shall be alienable by and subject to the debts of its beneficial owner is not an essential element of any estate (legal or equitable, for years, for life, or in fee simple) in the sense that it is a logical impossibility for such an estate to exist without these incidents. Wherever it is held that such provisions are invalid, upon final analysis it will be found the true reason for the holding is not that such provisions are repugnant to or inconsistent with the estate granted or given, but that it is deemed to be against public policy as it is declared by the common and/or statute law to permit them to be attached to the estate in question. The only sense in which they are repugnant to or inconsistent with the estate given is that the law, for reasons of public policy, prohibits the making of such provisions an element or incident of the estate given. If the Legislature should declare that any estate (legal or equitable, for years, for life, or for the duration of a fee simple) might be given to a donee subject to such provisions, the courts would have no trouble in upholding it." *Epes, J.*, for the court, in *Sheridan v. Krause*, *supra* note 7, at —, 172 S.E. at 514.

Curiously enough, some of the English judges are not sure that there is even a question of policy. In 1904 some of them faced the problem in connection with the Scottish alimentary trusts—a form of spendthrift trust like that which exists in California and New York. As the 1931 Supplement to STROUT'S JUDICIAL DICTIONARY states, at p. 47, "By the law of Scotland, a person may create a life interest in favour of another person, and may declare it to be 'Alimentary,' in which case, if it does not exceed a reasonable provision for the donee, then (whether the donee be male or female) there is a restraint on alienation and the diligence of creditors is excluded."

Such a trust, because valid in Scotland, where it was created, was enforced in England in *In re Fitzgerald* [1904] 1 Ch. 573, where a majority of the Court of Appeal gave full effect to a Scottish alimentary trust provision as against the beneficiary's voluntary transfers to creditors, with a clear intimation that it would do so as against attempted involuntary transfers. Against the argument that it was against English public policy to do so, Cozens-Hardy, L.J., said: "It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English Court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act, 1871, and to the observations of the Court of Appeal on that statute in *Gathercole v. Smith* (1881) 17 Ch. D. 1. Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer . . . In my opinion it is impossible to disregard this 'alimentary provision' on the ground of public policy." And Vaughan Williams, L.J., said: "The English law, in so far as it refuses to give effect to provisions which affect to control the rights of disposition which are attached to an absolute transfer of property, does not seem to me to be a matter regarding 'public order or good morals.' It is, I think, merely a logical development from legal definitions adopted by the English law. But it is true that in its application this law has been made the means of protecting creditors, and yet I do not think that in a country which allows restriction on anticipation in respect of the

Now to come to the spendthrift trust.<sup>24</sup> Why has the spendthrift trust doctrine had such a vogue in the United States? The judicial explanation seems to be that a donor of property ought to be able to keep the donee's creditors from seizing it sooner or later and thereby defeating the gift. It is believed that the courts have not been wholly candid in that explanation. No doubt the reason given has been a factor, and indeed an important factor, in influencing court action,<sup>25</sup> but unquestionably it has not been the sole factor. With respect to the separate use for married women, no doubt an important factor in chancery action was the feeling that the wish of the trustor that the property which he specifically provided for his daughter or other woman relative should be free from any anticipation of income by her and from any possible defeat of the provision for her by her husband or

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separate property of a wife, it can possibly be said that to enforce a provision in a Scotch contract inconsistent with this law would be contrary to public order and good morals, even though the result might be to defeat the just rights of a creditor."

To add to Cozens-Hardy, L.J.'s list, in 14 HALSBURY, LAWS OF ENGLAND (1st ed. 1910) § 172, p. 94, the following debt payments are cited as protected from attachment: "(1) wages of seamen, or of servants, labourers or workmen; (2) pay of officers in the public service, including officers of customs; (3) certain pensions payable out of public funds, including police and old age pensions; and (4) maintenance due from a husband to his divorced wife."

<sup>24</sup> "The subject of spendthrift trusts commands the attention of every possessor of property. To the man of wealth it provides a way by which he may make suitable provision for the maintenance and support of another, and yet secure the fruits of his toil from the improvident acts of the object of his bounty. To the reckless and extravagant beneficiary, it offers a means of being saved from himself. . . .

"A spendthrift trust may be defined as a settlement of property in trust for a beneficiary, other than the donor, and so limited that it cannot be alienated by way of anticipation, or be subject to seizure by the creditors of the beneficiary, in advance of its payment to him." Brown, *Spendthrift Trusts* (1902) 54 CENT. L. J. 382, 383.

There is an occasional suggestion, if not holding, that the beneficiary's interest may be voluntarily assignable by him and yet the restraint on involuntary alienation constitute a valid spendthrift trust. *Boston Safe Deposit & Trust Co. v. Luke* (1915) 220 Mass. 484, 108 N. E. 64. But except where statutes provide otherwise (*cf. Binns v. La Forge* (1901) 191 Ill. 598, 61 N. E. 382) nearly all the courts assume that the restraint must be against both voluntary and involuntary alienation for a spendthrift trust to exist. See Griswold, *Reaching the Interest of the Beneficiary of a Spendthrift Trust* (1929) 43 HARV. L. REV. 63, 74-78.

<sup>25</sup> In *Lynch v. Lynch* (1931) 161 S. C. 170, 174, 159 S. E. 26, 28, Dennis, J., whose opinion below was adopted as that of the supreme court, said that in most of the United States "the validity of spendthrift trusts, either with or without a provision for a cesser, has been sustained, not out of any special anxiety of the law for the protection of the impecunious beneficiary, but rather to protect the donor's right of property, and the right to choose the object of his bounty." So, in *In re Morgan* (1909) 223 Pa. 228, 230, 72 Atl. 498, 499, Stewart, J., declared that "It is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law; it has regard solely to the rights of the donor. Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone." See also *Estes v. Estes* (Tex. Civ. App. 1923) 255 S. W. 649, 650-655.

by his creditors was a natural one calling properly for chancery assistance in its fulfillment. That was particularly evident when before marriage the woman established the separate use for herself with her prospective husband's knowledge and possible consent.<sup>26</sup> But in addition, unquestionably, an equally potent reason must have been the pitiable state of hundreds of married women whose husbands, under the legal rules applicable to the married woman's property of various kinds, had each appropriated his wife's personal property in possession (except for a small amount of paraphernalia), reduced her choses in action to possession, realized upon her chattels real, and appropriated the rents and profits of her freehold property, without even supporting her. So, too, in these later times it must often have happened that various beneficiaries of so-called spendthrift trusts were actually incompetent to look after their affairs or were actually spendthrifts, though family pride or inadequate legislation stood in the way of obtaining a judicial decree to that effect and of obtaining the appointment of a guardian or committee, and their defenseless state must have had its influence in the decision that so-called "spendthrift trusts", better called protective trusts, established for them by others, must be enforced.<sup>27</sup> Certainly the need of protection for the beneficiary, at least to the extent of keeping him from becoming a public charge, would seem to be one of the fundamental grounds for the judicial or the statutory establishment of "spendthrift trusts", just as it was one for such establishment of a separate use for married women.

Unfortunately for the good of the spendthrift trust doctrine, and for its more general adoption in what seems to the writer to be its preferable form, in spite of the prejudice aroused against it by Professor Gray, and in spite of the necessary admission that such preferable form is not ideal, the need of the protection for the cestui was not stressed in the spendthrift trust cases, but the supposed freedom of the donor to protect his own acquired property from the creditors of his donee was emphasized, with the result that in many jurisdictions the creators of spendthrift trusts were permitted to provide for the beneficiaries of such trusts, regardless of their real needs or their best good, incomes of any amount—no matter how large—free from the claims of the beneficiaries' creditors. Had the need of the beneficiaries for protection been emphasized, it would easily have been made to appear that often only a reasonable amount of income should be freed from the claims of the creditors. In respect to the separate use for

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<sup>26</sup> For an example of such a happening, see *Lloyd's Banking Co. v. Jones* (1885) 29 Ch. D. 221.

<sup>27</sup> *E. g.*, see *Cummings v. Corey* (1885) 58 Mich. 494, 502-503; *cf.* *Tolland County Mutual Fire Ins. Co. v. Underwood* (1883) 50 Conn. 493.

married women, naturally any amount of property could be settled to such use, since the protection was only given against her husband and his creditors, and since the property being all hers in equity and good conscience, if not at law, he and they could not be deemed properly aggrieved by the separate use clause, at least so long as the husband was allowed to have curtesy consummate in her equitable estates of inheritance. But in respect to spendthrift trusts, creditors of the beneficiaries of such trusts may have proper grievances if excessive incomes are provided for their debtors by spendthrift trust provisions while the creditors go unpaid. Had the need of the beneficiary, and not the prideful and lordly disposition of the donor, been the professed judicial ground of the spendthrift trust, the protected income from the amount settled on such trusts would have been kept, with certain exceptions, within only a reasonable income limit fixed by the judges or by the legislature. That was not the openly accepted judicial ground, however, and it was only certain legislatures that forced either the reasonable income limit, or the outside principal or annual income limit in their states. The reasonable income limit exists in New York and a few other states.<sup>28</sup> The outside annual income legislative limit exists in two forms: (1) an annual income fixed sum amount,<sup>29</sup> and (2) the amount of income from a maximum amount of principal.<sup>30</sup>

It is true that, even in its reasonable income form, the spendthrift trust has its opponents. Professor Gray, in his classic preface, denounced exemptions from execution as well as spendthrift trusts, because of the tendency of such protections to debtors and beneficiaries

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<sup>28</sup> Other states are California, Connecticut, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Wisconsin. See 2 POWELL, CASES ON TRUSTS AND ESTATES (1933) 859 n.

It is true, of course, that logically California need not follow New York except in respect to trusts of real property (see Note (1933) 21 CALIF. L. REV. 142, 144-146), but naturally, like New York, it will treat alike spendthrift trusts of realty and spendthrift trusts of personal property. A district court of appeal case already has done so. *In re Edwards' Estate* (1932) 126 Cal. App. 152, 11 P. (2d) 678.

<sup>29</sup> *Bank of Union v. Heath* (1924) 187 N. C. 54, 121 S. E. 24; N. C. CODE ANN. (Michie, 1931) §1742.

<sup>30</sup> See (1920) 7 VA. L. REV. 235. The Virginia statute provides that any trust estate "not exceeding \$100,000 in actual value" may be held "upon condition that the corpus thereof and income therefrom or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them; but no such trust shall operate to the prejudice of any existing creditor of the creator of such trust." Professor Gray expected the Virginia courts to adopt the spendthrift trust doctrine (GRAY, *op. cit. supra* note 1, at iv), but in 1902 they repudiated that doctrine in *Hutchinson v. Maxwell*, *supra* note 7, only to have the above statute of 1919 force it on them. *Dunlop v. Dunlop's Ex'rs* (1926) 144 Va. 297, 132 S. E. 351. Now the Supreme Court of Appeals of Virginia applies the statute sympathetically. See *Sheridan v. Krause*, *supra* note 7.

to make them weaklings,<sup>31</sup> and he especially denounced the New York form of the spendthrift trust because of the snobbish attitude of some of the New York courts in considering it proper to allow more income free from creditors for "a gentleman of high social standing, whose associations are chiefly with men of leisure, and who is connected with a number of clubs" and who must have income "sufficient to maintain his position according to his education, habits and associations," than must suffice a man "who has lived simply and plainly."<sup>32</sup> No doubt there has been a certain amount of indefensible diversity in the New York decisions, some of them being clearly discriminatory and snobbish,<sup>33</sup> but that diversity has come about largely through the

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<sup>31</sup> "An effect, and at the same time a cause, of the state of mind which favors spendthrift trusts appears in the statutes by which large amounts of property are exempted from execution. . . . In several of the states property, real and personal, to the amount of thousands of dollars, is exempt, and the exemption laws are gloried in as calculated 'to cherish and support in the bosoms of individuals those feelings of sublime independence which are so essential to the maintenance of free institutions.' A community which has accustomed itself to look with complacency on a man holding ten or twelve thousand dollars' worth of his own property, and leaving his debts unpaid, is not likely to be troubled by a man's having a life interest under a trust which his creditors cannot reach." GRAY, *op. cit. supra* note 1, at vii. See, also, *ibid.* § 263 and n. 1.

In New York a spendthrift trust of the New York type is treated as an exemption from execution and so diminishable by statute without impairing the obligation of contracts. *Brearley School v. Ward* (1911) 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912 B 251.

<sup>32</sup> GRAY, *op. cit. supra* note 1, at xi.

<sup>33</sup> By the New York statutes, voluntary alienation by the cestui was prohibited, and yet creditors were allowed by involuntary alienation to reach the excess over the amount of income of trusts "necessary for the education and support of the person for whose benefit the trust is created." By another statute, which amended in 1903 a code provision, not exceeding 10 per cent of the income—even of that income necessary for education and support—can be reached by judgment creditors by garnishment.

The New York courts started out to fix income necessary for the education and support of the beneficiary on the reasonable basis of the amount required for the beneficiary "taking into view his condition in life, his health, and other circumstances and the condition of his family, if any he have," which was stated in those words by way of dictum in *Scott v. Nevius* (1857) 6 Duer 672, 676. Unfortunately, however, a few New York decisions were indefensible. Professor Gray naturally enlarged on the most extreme. GRAY, *op. cit. supra* note 1, at xi and §§ 294h, 294c. With the exception that *Demuth v. Kemp*, stated by him, was later disposed of by the court of appeals by affirming, exclusively on a procedure point, the dismissal of the action (*Demuth v. Kemp* (1916) 216 N. Y. 757, 111 N. E. 1036), an ending to the case which left the discussion of the station in life theory by the appellate division (*Demuth v. Kemp* (1913) 159 App. Div. 422, 144 N. Y. Supp. 690) mere dicta, the New York cases are set out in part II of Clark, *Spendthrift Trusts in New York, Needed Reforms in the Law* (1914) 9 BENCH & BAR (N. S.) 59-68. Mr. Clark, because of those decisions, urged that the New York statutes be amended to fix the exemption at \$3000, which had been suggested as a suitable maximum by the New York Court of Appeals in a dictum in *Brearley School v. Ward*, *supra* note 31, and which, with the 10 per cent which could be reached under the code amendment by

wrong theory that the trustor's wishes are the important thing and through an over-emphasis on those wishes and on his supposed knowledge and approval of the scale of living of the beneficiary. The New York courts may be expected to take a saner view in respect to variations of income. If only those courts would make the real needs of the beneficiaries and not the intent of the trustor the vital thing, sound decisions might almost always be looked for.

In a democracy and when human needs are being measured, it is in general undesirable to treat one man by judicial decision better than another without sufficient reason for the discrimination, but at times some variation is unavoidable. Individual human needs vary considerably. For generations distinctions in necessities have been drawn in respect of infants. A necessary for one infant is a luxury for another. So divorce courts in awarding alimony have properly fixed one amount for one wife and a different amount for another. The wealthy and the less wealthy have differing claims and needs and there is no excuse for courts not giving that fact a reasonable recognition by making proper but fair diverse provisions for those varying needs. The objection to any award for the support of one person should not be that it varies from the award made to another, but that, if such is the fact, it varies for no sufficient reason or varies more than any reason for variation will justify. No doubt, as Professor Gray pointed out, a few indefensible decisions have been made in the enforcement of spendthrift trusts, but where statutes have not prevented rationality, most of these have probably resulted not, as he thought, from snobbishness, but from the wrong theory that, because the trustor supplied the trust property, his intent must prevail to the extent of enabling the spendthrift beneficiary in New York to live as nearly as possible as he has been accustomed to do, and in Massachusetts, for example, to have all the trust income, no matter how much it amounts to, free from interference by creditors until after the beneficiary receives it.

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garnishment, would make the maximum trust income exemption from involuntary alienation for any beneficiary, \$2700 (see Clark, *op. cit. supra* at 114-118), while leaving the whole income restrained from voluntary alienation. Though he may be right that an income of \$2700 a year is enough for the sane and adult person who is without dependents, whose case alone seems to concern Mr. Clark (see *ibid.* at 118), any statute or decision should go farther and allow some additional sum, say \$600 a year, for each dependent of the cestui and, in the discretion of the proper court, some further sum for each dependent actually requiring a still greater reasonable expenditure to be made on him. For special circumstances to be considered, see *Magner v. Crooks* (1903) 139 Cal. 640, 73 Pac. 585. If only the courts will use common sense in applying it, the rule of the dictum in *Scott v. Nevius*, *supra*, is the fairest. But, of course, if they will not use common sense, a sufficiently variable maximum exemption rule should be adopted.

While spendthrift trusts may be condemned to the extent that they exceed a reasonable amount of income, how many of such excess incomes are provided by such trusts? The probability is that there really are very few of them. Most spendthrift trusts probably are for amounts which provide only fairly reasonable incomes for beneficiaries who need protection from others.<sup>34</sup> No doubt one whose ideal is the rugged but selfish common law man who, theoretically, always stood on his own feet and unaided defied fate to do its worst will be impatient with those who have not the same ruggedness and standing ability, and no doubt many of the creditor class will always be irritated, if not shocked, by any protection for debtors through spendthrift trusts and through exemptions from execution. But those who have weathered a world depression in which great numbers of men, without any fault of their own, have been engulfed in financial ruin, and who have aided in the establishment or continued functioning of free-bed hospitals, of orphan asylums, and of all sorts of other charitable agencies for the refuge or assistance of the misfits, the weak and suffering, the aged, etc., of society, may properly be expected to take a more humane view and to appreciate the fairness of permitting some of the actually and of the possibly weak, and even some of the strong, to be protected by reasonable provision made to keep them from becoming dependent on private or public charity.<sup>35</sup> After all, even the best planned spendthrift trusts have to face the hazards of shrinkage or depletion by business depressions, etc., and it may be doubted that even the largest of such trusts in a jurisdiction which does not limit the size of incomes which are to be free from interference by creditors, have done any but a small amount of harm to the social fabric.<sup>36</sup> It probably will be found, when

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<sup>34</sup> A case like *Congress Hotel Co. v. Martin* (1924) 312 Ill. 318, 143 N. E. 838, 33 A. L. R. 562, where, in accordance with an Illinois statute, the court was compelled to deny a creditor who had a claim of \$6,724.16, access to a beneficiary's trust income which that year was \$171,737.36, is a startling statutory exception. The Illinois statute makes all trust income, whether labeled spendthrift or not, inaccessible to creditors unless the trust was established by the beneficiary for himself. How much, if any, of the creditor's claim was unjust does not appear, since the statute made the agitation of that question unnecessary, and whether the creditor was ever paid, in whole or in part, cannot be known. On its face, the conduct of the debtor seems indefensible. It seems a relatively rare happening.

<sup>35</sup> For an interesting discussion, see Bartelme, *Spendthrift Trusts* (1894) 50 ALBANY L. J. 6.

<sup>36</sup> The unnecessary prejudice created by Professor Gray has stood in the way of a fair discussion of even unlimited amounts put in spendthrift trusts for various near relatives by the trustor. Nobody knows how many spendthrift trusts have been created or for whom. It would seem probable that spendthrift trusts in the main have been created for the trustor's widow, for other women relatives or dependents of the trustor, for subnormal persons more or less incompetent, or for inexperienced young people who may mature late so as to seem to need, until they are twenty-five or thirty years old, protection against business sharks. Trustors in general do not

a proper survey is undertaken, that the beneficiaries of spendthrift trusts, even when not required by tradesmen and others to pay cash, have paid, in general, those bills which ought to be paid. Not all creditors deserve to be paid, though no spendthrift trust antagonist likes to concede that, and probably not many spendthrift trust beneficiaries refuse to pay those who ought to be paid. It has always been true that many inconsiderate rich have treated their tradesmen's bills in a way not to be justified even though such rich were not spendthrift trust beneficiaries. While such rich may be permitted to run up bills, it is hardly likely, in these days of credit ratings, that spendthrift trust beneficiaries will be allowed to run up bills unless their reputations for paying their bills justify the credit.

When one reflects upon the intemperance of Professor Gray's tirade against exemptions from executions and against spendthrift trusts, one realizes how far we have gone in the direction of social betterment. If only the courts had shown more sense in shaping the spendthrift trust doctrine, first by restricting the so-called spendthrift cestui's protection against his creditors to only a reasonable amount of support for himself and his dependents (except, perhaps, that the trustor's wife, and his women relatives inexperienced in business, and his children, might be allowed larger incomes<sup>37</sup>), and, second, with the possible

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create trusts with the intention either of increasing the number of weaklings or of showing vindictiveness toward future creditors of the beneficiaries. There would seem to be no serious public policy reason why a trustor, not acting in fraud of his own creditors, should not give from his separate estate as large an amount as he wishes in spendthrift trust for his widow inexperienced in business, the income to be paid her for her life (and certainly there would seem to be even less reason to object to his limiting the spendthrift trust income to a reasonable provision for her), and for his similarly inexperienced women relatives and dependents, nor why he should not do the same for his male children until, at least, they reach an age when they will be reasonably sure to be mature. If it really is the crowning triumph of the common law that it succeeded in inducing the repeal in some places of usury laws—something which seems to many of us a reproach and not a triumph—it is certainly not a crowning or any sort of triumph of that law that widows and other women inexperienced in business who are left unrestricted life insurance money should be despoiled of it by the rapacious as quickly as the insurance companies tell us is usual. The fundamental assumption made by the opponents of the so-called spendthrift trust doctrine,—and known by such opponents to be quite contrary to fact,—that all creditors are praiseworthy, is particularly false where the widows and the fatherless young are concerned. To assert that it is necessarily snobbishness for such persons to be supported by such spendthrift trust provision as their previous station in life calls for, or even in far better state, is ridiculous. The whole subject needs rationalization. If particular judges display snobbishness, the answer is to get new judges of the right kind, instead of throwing widows and orphans to the financial wolves. In connection with other legal doctrines foolish legal decisions have been made without anybody thinking that the doctrines themselves should be thrown overboard on that account. Why cannot an equally sensible view be taken of foolish spendthrift trust decisions?

<sup>37</sup> See note 36, *supra*.

exception just noted, by figuring that reasonable amount conservatively in view of what ought to suffice for him and his dependents during the time when his creditors have to go unpaid—if only the courts had so reasoned, social betterment would have been served still more. No longer, in most places, may the creditor throw his honest debtor into debtors' prison; and if the debtor has a spendthrift trust created for him by another, and if the trust fund survives in sufficient amount, no longer may the creditor force the spendthrift trust beneficiary debtor and his dependents into the bread line or into the poorhouse. If only the debtor is not allowed to have too much while the creditor goes unpaid, what harm is done? We are accustomed to speak of there being normally only two or three generations from shirt sleeves to shirt sleeves, thereby in substance stating that, in general, the time is short between the creation of fortunes and their dissipation. What is the harm if some part of these fortunes is allowed to assist in keeping some members of the family out of the poorhouse for their lives? Or, to take a more common situation, the life insurance companies have statistics showing the pitifully short time, on the average, that widows receiving unrestricted life insurance money from policies on the lives of their dead husbands manage to retain such money. Why should it not be possible to provide adequate spendthrift trust protection for them against emotional appeals for money and against persuasively presented poor investments, so that they may be kept from becoming dependents on relatives or inmates of poorhouses?

It is true that Professor Gray thought the ultimate effect of exemptions from execution, spendthrift trusts, etc., would be that we should become a nation of weaklings, and Professor Richard B. Powell has recently quoted<sup>38</sup> against spendthrift trusts some casual and impressionistic remarks by Mr. Frederic J. Stimson<sup>39</sup> to show that the spendthrift trust has been responsible for the commercial decline of Boston. Unfortunately, Professor Powell did not quote the passage in full, and so failed to reveal that, apparently, the attack was not against spendthrift trusts, but against all family settlement trusts of the rich. Indeed, Mr. Stimson showed such small comprehension of spendthrift trusts as to assert that they do not exist in New York and to date their beginning in Massachusetts in 1830, which was approximately the New York statutory date, though they did not gain judicial sanction in Massachusetts until 1882, when the case of *Broadway National Bank v. Adams*<sup>40</sup> was decided. Here is a word for word quotation from part of the book:

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<sup>38</sup> 2 POWELL, *op. cit. supra* note 28, at 847 n.

<sup>39</sup> STIMSON, *MY UNITED STATES* (1931) 76.

<sup>40</sup> 133 Mass. 170.

"The next most notable cause of Boston's commercial (I am so far speaking only of that) decline is the 'spendthrift trust' decision of Massachusetts courts. (It is not the law in New York or elsewhere.<sup>41</sup>) Somewhere about 1830<sup>42</sup> they decided that a man could tie his children's inheritance up, either by deed or will, so that they could not spend or risk the principal, so that they could make no contract in favor of their creditors which would be binding on their trustees, so that they could not risk their capital in a new enterprise or indeed embark it in any business. Immense wealth had been accumulated in Boston in the first sixty years of the republic: instead of trusting their sons and sending them out at their own risks with all their argosies upon life's seas (as they themselves had done), they distrusted their ability (and this distrust by Boston of the ability of her sons ran through all the post-Civil War times, and in many other ways, as we shall see) and had them all trustee. No new enterprise could be undertaken by them, for under that court decision they had no capital to risk. Perforce they became coupon-cutters—parasites, not promoters of industry—with the natural results to their own characters. Hence the John M. Forbes type of Bostonian came largely to an end. It was as if the argosies of Venice had been realized and the proceeds placed with Shylock at four per cent. Shylock took no risks, and the Boston Bassanio, bored, spent his four per cent in elegant living—to do him justice, greatly promoting art, charity, public service—but the consequences were disastrous to a Venetian commercial supremacy; and business down-town was left to smaller men, with narrower traditions, taking retail but not wholesale risks. So supine are they that Boston shippers will not complain when, under New York order, they have to ship goods by rail from Boston to New York to be loaded there for Argentina, though the very steamer which takes them to Buenos Aires discharged its cargo in Boston (for Boston still has an import trade) and lay there a week in sight of the Boston man's warehouse. He may not load it there, but must pay tribute to the New York railroad and contribute his own mite to the greatness of New York's harbor by sending his shipment by rail to New York.

"And thus, placing all the young intelligentsia under financial guardianship, the natural consequences ensued in other ways. The French *rentier*, however saving, is notoriously an inadventurous person in business. Indeed, the superior energy and initiative—even the imagination—of the British, though 'but a nation of shopkeepers,' may be ascribed to this. The effect of making Boston's youth, of its best tradition and education, mere four per cent men, was to choke off their own energies and largely divorce business and the Brahmins. True, they were replaced, in the down-town stores and counting-rooms, by some fresh country stock; as, in law or city politics, Harvard has been led by Dartmouth. New Hampshire swarmed into the Hub like the Scots into London. But, however sharp and clever, it may be questioned whether something of the broad vision, almost idealism, in the enterprises of the old Boston merchants, mill-founders, railroad-builders, was not lost in the exchange. Of course, there were notable exceptions; also many sons of the old Boston families moved upon New York, as the New Hampshire

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<sup>41</sup> At the most this only means that New York has a different type of spendthrift trust from Massachusetts.

<sup>42</sup> While there was a dictum in *Branan v. Stiles* (Mass. 1824) 2 Pick. 460, suggesting a spendthrift trust of an equitable fee, it was at that time so extreme that nobody took it seriously, and nobody but Mr. Stimson seems ever to have claimed that spendthrift trusts existed in Massachusetts until after the dictum in *Nichols v. Eaton* (1875) 91 U. S. 716, or until about the time when *Broadway National Bank v. Adams*, *supra* note 40, declared them valid.

and Maine men had moved on Boston. In the eighties and nineties there were far more New Englanders than Knickerbockers at the head of 'big business' in New York; and in politics as well . . ."<sup>43</sup>

In the first place, these statements of Mr. Stimson are mere guesses. There is no evidence that spendthrift trusts have weakened strong characters or kept them from developing. Moreover, the argument of Mr. Stimson seems to be directed against all trusts and not merely spendthrift trusts, though he makes that uncertain by using the words "spendthrift trusts", yet making the extraordinary assertion that such trusts are "not the law of New York or elsewhere"! Because a class of caretakers known as trustees manage the fortunes entrusted to them, he seems to say, the beneficiaries become weak or at least have no opportunity and no incentive to do other than receive trust income. That may be any man's guess, but so also may be the view that the strong will make their way even against the handicap, if it be a handicap, of life incomes. In a world where women rarely worked, the fact that women trust-annuitants did not work meant little. In a world where men in general worked, and in view of the apparent circumstance that many strong men's sons have lacked their fathers' strength and initiative, even when no trust funds, let alone spendthrift trust funds, have handicapped the sons, it is not strange that many men, lacking their fathers' abilities and with sufficient incomes provided for them, passed their time in ease and, where possible, in luxury. The loss to business, if any, may have been the gain of art, literature, and general culture, in spite of the doubts expressed by Mr. Stimson. But, apart from that, if he is right that the best business ability of Massachusetts migrated to New York, the country as a whole was no loser. It is very much to be doubted whether trusts in general, or even spendthrift trusts, whether or not providing only a reasonable income, have been a really deteriorating influence upon those who, without such trusts, would not have deteriorated, though a conclusion in respect to that is anybody's guess. At the most the case of Mr. Stimson against trusts in general, and even that against the spendthrift trust, is unproved. Mr. Stimson apparently concedes so much, for he seems to think that Massachusetts has suffered from income trusts but that New York has not. Yet trusts in general have flourished in New York, and spendthrift trusts with only a reasonable amount of income free from the interference of creditors, were known there for generations before Professor Gray's day.

Almost invariably in legal history, incorrect legal premises have led to incorrect results, and the so-called spendthrift trust doctrine is no

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<sup>43</sup> STIMSON, *op. cit. supra* note 39, at 76-78.

exception to that statement. On the contrary, that doctrine is an outstanding illustration of the bad consequences of faulty premises. The very name "spendthrift trust" is the outcome of the faulty premise that a trustor, just because he is furnishing the trust property, is entitled to provide that the beneficiary's creditors shall not be paid out of it except to the extent that trust income actually reaches the hands of the beneficiary, and thereafter is voluntarily paid over by the beneficiary or is seized by proper process. A premise like that, once accepted and stretched to its fullest extent, leads to the conclusion that the trust property may be of any amount, and that the income for the beneficiary made free from interference by creditors may be as lavish as the trustor pleases, even if it be so lavish that only spendthrifts could get rid of it. It is the spendthrift trust doctrine in that unadulterated form that has been the subject of the most severe criticism, and that kind, indefensible as it is except as applied to a very few classes of beneficiaries, has had its bad influence in jurisdictions where the legislature has sought to restrict the exemption to a reasonable income.

And that brings us, at last, to the problem of the man who realizes that he is a spendthrift and who tries to protect himself from ultimately becoming dependent on charity or on the public for support by creating for himself a spendthrift trust. If there is anything in the argument that the beneficiary's need should affect the attitude of the court, then such a beneficiary's need should be met, provided there is no fraud on his existing creditors, that is, provided that he keeps out of the trust assets sufficient to discharge his existing debts. No doubt there is, on the one hand, a danger of defrauding future creditors that must be guarded against; but that is wholly a problem of intent, which may be ascertained, and we are assuming an intent that is legitimate. On the other hand, after the recent experiences of the United States with so-called high-powered salesmanship, there seems clearly to be a grave need that society shall protect those persons who are unable to guard themselves against objectionable importunity and against being thrown to the wolves that infest our society. Nevertheless, since they themselves provide the property to be used for their own reasonable support, free from the claims of their future creditors, and since their protection against such creditors is to be justified only to the extent that sound public policy dictates, it would seem only fair to make each trustor-beneficiary demonstrate his peculiar need for protection—his actual and not merely possible inability to fend off the human vultures seeking to gorge upon his substance. In addition it may be proper to require him, through recorded notices of the trust and through information supplied to commercial agencies and other bodies which furnish

credit reports to business people, to spread the news of his self-established spendthrift trust so as to put reasonably cautious future creditors on their guard. Whatever the precautions required to be taken to prevent fraud on future creditors, once they are taken, the "easy mark" should be allowed to assure himself enough spendthrift trust income to keep him at least out of the poorhouse, not so much for his own sake, perhaps, as to save society the expense of his support, and, perhaps, to prevent the ruin of a life which might become of real value to the state.

Undoubtedly, court sanction of the creation by the actual spendthrift or self-recognized incompetent of a spendthrift trust for himself would be something new at the common law and in equity because of its wide departure from the *laissez-faire* of that common law which equity usually "follows." But that is only because the law has not yet faced properly the problem of preventing creditors and others who prey on the weak from stripping the weak of everything they possess and thereby throwing them on the public, or on private charity, for support. No doubt it was a great departure from the common law for the American communities to tax persons able to pay to provide schooling for those children whose parents, unaided, could not provide it. No doubt, as Professor Gray argued, it was quite inconsistent with the common law for a debtor to have a considerable amount of exempt property—in large measure made exempt for the protection of the debtor's wife and children—while his creditor remained unpaid. No doubt bankruptcy statutes are also contrary to the spirit of the common law. But so are the many public institutions where the physically and mentally unfit, the infirm and the aged, are supported and clothed at the public expense. Humanitarian considerations have at least fully as much in their favor as has the ruthlessness of an uninterfered-with struggle for existence in society where the physically weak and the mentally unfit are exterminated. Human life has higher values than the selfishness and the cruelty of the common law could comprehend, and always we have to rise above the common law to attain altruistic ends.<sup>44</sup>

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<sup>44</sup> If a statute forbids a trustor to create a trust for himself that will be valid against subsequent creditors, as does the NEW YORK PERSONAL PROPERTY LAW (1897) § 34, then, of course, a trustor is forbidden to create a spendthrift trust for himself, whatever his need. His only remedies, if he has any, will lie in guardianship of one kind or another. Even if the trustor may not create a spendthrift trust for himself, the fact that he attempted to do so and, in addition to the spendthrift trust attempted to be set up for himself for life, created such trusts in remainder for others, will not affect those others unless the conveyance in trust for them is in fraud of his existing creditors. *Benedict v. Benedict* (1918) 261 Pa. 117, 104 Atl. 581. See Behrends, *Liability Under Trusts to Creditors of Trustor* (1929) 3 So. CALIF. L. REV. 75, criticising what seems, perhaps, to be a contrary holding in *McColgan v.*

It is quite orthodox for law-school teachers to speak disparagingly of the so-called spendthrift trust doctrine, whether that doctrine be unlimited in its scope or be restricted, as in California and New York, to a reasonable income provision for the particular beneficiary. Part of the odium is caused by the unfortunate name, which was designed to prejudice the hearer. The writer of this brief apology does not seek to defend the doctrine in its unlimited form, except in reference to very specially chosen beneficiaries, but he does support it in its California

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Walter Magee, Inc. (1916) 172 Cal. 182, 155 Pac. 995, Ann. Cas. 1917 D 1050. That case is considered on another point later in this footnote.

For a careful collection of the authorities, see Griswold, *Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor* (1930) 44 HARV. L. REV. 203. "If spendthrift trusts are to be tolerated at all, we may well question the soundness of a rule which allows a man to hold the bounty of others free from the claims of his creditors, but denies the same immunity to his interest in property which he has accumulated by his own effort. But, as we have seen, it is well settled by the cases that a man may not validly create a spendthrift trust for his own benefit." *Ibid.* at 222.

For some cases holding that a trustor may not create a spendthrift trust for himself, see *McColgan v. Walter Magee, Inc.*, *supra*; *Wenzel v. Powder* (1904) 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; *Forbes v. Snow* (1923) 245 Mass. 85, 140 N. E. 418; *Stephens v. Moore* (1923) 298 Mo. 215, 249 S. W. 601; *Schenck v. Barnes* (1898) 156 N. Y. 316, 50 N. E. 967, 41 A. L. R. 395; *Ghormley v. Smith* (1891) 139 Pa. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565; *Nolan v. Nolan* (1907) 218 Pa. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369; *Rienzi v. Goodwin* (1915) 249 Pa. 546, 95 Atl. 259; *cf. De Rousse v. William* (1917) 181 Iowa 379, 164 N. W. 896.

*McColgan v. Walter McGee, Inc.*, *supra*, went farther and allowed the creditor to reach the interest of the remainderman under the trust also, who happened to be the trustor's wife. That the latter holding was in error unless the trust was in fraud of the trustor's existing creditors and unless the remainderman's interest was needed to pay off those existing creditors, both of which things were left uncertain in the report of the case, see *Behrends, loc. cit. supra*. The trust was established in 1905 and the creditor obtained his judgment in 1908.

The nearest to a judicial suggestion, though on the court's part not consciously so, that an actual spendthrift may under certain carefully guarded circumstances establish a spendthrift trust for himself, is probably found in the case of *Rehr v. Fidelity-Philadelphia Trust Co.* (1933) 310 Pa. 301, 165 Atl. 380. There the trustor created a trust under which the income was to be paid to herself for life, as a spendthrift trust, with a clause against revocation, the remainder to go as disposed of by her will, or, in default of a testamentary disposition, to be distributed to her next of kin. Later the trustor filed a bill to have the trust declared null and void, but the Supreme Court of Pennsylvania held against termination on two grounds, namely, (1) that the spendthrift trust clause was enough to sustain the trust, and (2) that there was no proof of consent by the next of kin to the termination. As is pointed out in substance in (1934) 43 YALE L. J. 342, 343, if the spendthrift trust for the trustor is not valid, there is no use in refusing to terminate the trust on the first ground, as the only restraint on him then will be against voluntary alienation and, if he really is a spendthrift, he will proceed to use his interest as a basis for credit and the creditors thus acquired can reach that interest. In the article just cited, at pp. 342 and 344, the second ground of the decision is also questioned. If that second ground is unsound, the case provides some slight weight in favor of at least an actual spendthrift's privilege of establishing a spendthrift trust for himself.

reasonable income form, where common sense is shown in determining the reasonable income in view of the fundamental needs of the cestuis, and in that form he thinks it should be carried farther than it has been so far carried by any court, so that one who is actually a spendthrift and who knows that he will be an easy prey for designing persons who seek to tempt and impose upon wasters, may create such a reasonable income spendthrift trust for himself, so long as, and to the extent that, his spendthrift trust is not in fraud of existing creditors or a subterfuge used with fraudulent intent to enable him to speculate to the detriment of future creditors.

The spendthrift trust is chiefly an American innovation, though the English Trustees' Act of 1925 supplies an approximation to the California and New York form of it under the name of Protective Trusts,<sup>45</sup> and

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<sup>45</sup> TRUSTEE ACT, 15 GEO. V (1925) c. 19. "33—(1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called 'the principal beneficiary') for the period of his life or for any less period, then, during that period (in this section called the 'trust period') the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—

"(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

"(ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

"(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

"(b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity as the case may be; as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

"(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

"(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside."

A careful comparison of the foregoing statutory provision with GRAY, *op. cit.* *supra* note 1, § 167j, will disclose that the Act seems to vary from the rules set forth by Gray in respect to the rules set forth in § 167j 5 and § 167j 6. The change is in the respect that the trustees, having a discretion to apply the income for the benefit of the cestui or for the other interested parties specified, may apply it for the main-

though, in Scotland, what is virtually the California and New York form of it is well known under the name of Alimentary Trusts.<sup>46</sup> In the married women's separate use cases, the English Chancellor refused to apply the rule that equity follows the law in respect of a use designated for a married woman free from the interference or control of her husband. The reasons for that refusal have met with complete approval, and the Married Women's Separate Property Acts, both in England and in the United States, have taken the additional step of making the legal rules conform to the Chancellor's more enlightened equity notions. The many American courts of chancery jurisdiction which recognized spendthrift trusts have thereby refused to follow in equity the legal rule as to restraints on the alienation of life estates,<sup>47</sup> and in some states, even in respect to restraints on alienation of fee simple interests.<sup>48</sup> Moreover,

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tenance or support or otherwise for the benefit "of the cestui in the absolute discretion of the trustees and without their being liable to account for the exercise of such discretion."

On the face of the statute there still remain the questions:

(a) If the trustees, purporting to act under their discretion to apply the income "or otherwise," actually pay it to the cestui, must they account to creditors under either voluntary or involuntary assignments for any payments made to the cestui?

An American case, in which the special trust provisions of the will and the statute combined presented substantially the provisions in the English statute, says that the trustee may pay the support money to the cestui, providing the trustee pays him only what is reasonably necessary for his support and maintenance. See *Sheridan v. Krause*, *supra* note 7.

(b) Do the words "or otherwise for the benefit" remove the seeming restriction in the other words specifying that the income shall be held "upon trust for the application thereof for the maintenance or support," so as, under (ii), to make protective trusts of unlimited amounts of income possible?

Probably "or otherwise for the benefit" has no such strong meaning or effect as is asked about in question (b).

Even if both questions (a) and (b) should be answered in the negative, the Trustee Act section has settled the question considered in Gray's § 167j 6 against Gray's contention there. Since, under the statute, the trustees may apply the income for the cestui's maintenance and support, carefully chosen trustees will do so, and, in consequence, they might as well be allowed to pay that income to the cestui himself. Gray's position in his § 167j 6 would seem to require going to that extent, now that, apparently, the trustees may apply the income for the maintenance and support, at least, of the beneficiary without having to account to the creditors.

<sup>46</sup> See note 23, *supra*. See also MacKay, *Alimentary Provisions* (1913) 25 JURID. REV. 290.

<sup>47</sup> The typical spendthrift trust is, of course, a restraint on an equitable life interest.

<sup>48</sup> Only a few jurisdictions recognize spendthrift trust restraints on equitable fee-simple interests. See *Wallace v. Foxwell* (1911) 250 Ill. 616, 95 N. E. 985, Note (1913) 7 ILL. L. REV. 445; *Hopkinson v. Swain* (1918) 284 Ill. 11, 119 N. E. 985; *Boston Safe Dep. & Trust Co. v. Collier* (1916) 222 Mass. 390, 111 N. E. 163, Ann. Cas. 1918 C 962; *Haskell v. Haskell* (1920) 234 Mass. 442, 125 N. E. 601.

Yet, "There is no substantial difference between giving a donee an equitable fee-simple estate in real property or an equitable estate of like duration in personal property subject to a spendthrift trust for his support and maintenance during his

in some states the refusal has met with statutory approval, while, as a result of chancery refusal in that respect, in a few states the law has recognized such restraints on legal life estates,<sup>49</sup> and in at least one state the law has recognized such restraints on legal fee simple estates.<sup>50</sup> Law professors who are given to championing excessively the common law may deplore all that and say with Professor Gray, of the common law system, that its foundation was "justice, the idea of human equality and of human liberty," and that "the general repeal of usury laws was the crowning triumph of the system."<sup>51</sup> But those of us whose ardor for the common law is tempered by an appreciation of its harshness and even cruelty may well advocate help and protection for persons who need to be aided. A society which is coming to recognize that it has a responsibility to its members over and above that met by bread lines and by the poorhouse may well permit those who have property to provide by trusts, whether called "spendthrift" or "protective" or "alimentary" or some better name, for those living persons who at the time need, or some day may need, such provision, a proper income free from the interference of the beneficiary's creditors. It would seem as if only a failure on the part of the courts to place the argument for

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life and giving the same property to a trustee to be held in trust for him during his life upon the same spendthrift trust, with remainder to him upon termination of the trust. Any difference between the two things is a metaphysical refinement. Where property is given to a trustee to be held for the support and maintenance of a person for a term of years free from his debts and power of alienation, with remainder in the accumulated income and the corpus of the property to the cestui que trust at the end of the trust period, he is given an equitable fee-simple or absolute equitable estate in the property as much as if the spendthrift trust had been for life with remainder to him (*i. e.*, his estate) at his death.

"Where a spendthrift trust is for the life of the cestui que trust, the property is not tied up any longer or any more completely where the remainder passes at his death as a part of his estate than it is where the remainder at his death is devised to another person or reverts to the creator of his estate. So far as the creditors of the cestui que trust are concerned, they are better off where the remainder passes as a part of the estate of the cestui que trust than they would be if it passed to another. In the first case they have the opportunity of ultimately getting their claims paid in whole or in part. In the latter case they have no chance of getting them paid.

"Where it is held not to be against public policy to permit a spendthrift trust of any particular nature to be created for the life of a cestui que trust with remainder in the trust property to another, we are of opinion that there is no substantial reason for holding it against public policy to uphold the same spendthrift trust where the estate given the donee is such that the remainder in the trust property passes at his death as a part of his estate. And we hold that an equitable fee-simple or absolute equitable estate may be given to a person subject to any spendthrift trust for his benefit for his life, or a lesser period, which, under section 5157, would be good if the remainder in the trust property were given to another." *Epes, J.*, for the court, in *Sheridan v. Krause*, *supra* note 7, at —, 172 S. E. at 517.

<sup>49</sup> See cases cited in note 22, *supra*.

<sup>50</sup> See *Hinshaw v. Wright*, *supra* note 22.

<sup>51</sup> *GRAY, op. cit. supra* note 1, at viii-ix.

such trusts on the right ground, or to use common sense in figuring a reasonable income in the particular case, stands in the way of the proper administration of such trusts by the courts and their almost universal approval. Even Professor Gray had to concede:

"My modest task has been to show that spendthrift trusts have no place in the system of the Common Law. But I am no prophet, and certainly do not mean to deny that they may be in entire harmony with the Social Code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic."<sup>52</sup>

What he failed to acknowledge, and perhaps to see, was that the common law system itself could be improved, was actually being improved, and may be still further improved by the partial replacement of harshness and selfishness by kindly and intelligent treatment and by a reasonable amount of altruism applied to unfortunate debtors. "Spendthrift trusts" do not deserve condemnation; they should receive instead, on their merits, a more sensible and sympathetic application.

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<sup>52</sup> *Ibid.*, at x.