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THE EQUITABLE SEPARATE ESTATE AND RESTRAINTS ON ANTICIPATION: ITS MODERN SIGNIFICANCE

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It is frequently assumed that with the enactment of the Married Women's Property Acts, the equitable separate estate doctrine has become obsolete[1] and is at present of historical significance only. It is the object of this article to show that the sweeping generality of this statement is erroneous and to indicate the possibilities of using the separate estate device, together with the restraint on anticipation, as an alternative to spendthrift trusts.

A spendthrift trust creates a right in property held by one person for the benefit of another and contains valid provisions against alienation of the property right either by the voluntary acts of the beneficiary or by acts of his creditors. The basis of the spendthrift trust doctrine is that a donor ought to retain complete freedom in disposing of his property in any way he sees fit, and enforcement of the intention of the donor is emphasized above all other considerations[2]. By the creation of a spendthrift trust, the trust property passes to the trustee, but the power of alienation by the beneficiary of his interest in advance, not being regarded as a necessary attribute of such an interest, a restraint thereon is not felt to be inconsistent with the attributes of complete ownership, although after accrued income is paid over to the beneficiary, spendthrift provisions would cease to operate thereon. The beneficiary takes the whole legal title to the accrued income at the moment it is paid over to him. On the other hand, it is arguable that alienability of an equitable estate is as much an inherent incident thereof as it is of a legal estate. Therefore, a restraint on alienation being contradictory to the grant is repugnant thereto and void. This is the English view[3] which has always disallowed spendthrift trusts on the notion that to allow a person to enjoy the benefits of property without subjecting it to the payment of his debts encourages idleness and promotes fraud. Although the English courts have never permitted a restraint on the alienation of the interests of other beneficiaries of a trust, they have uniformly upheld restraints on anticipation in connection with the separate estate of a married woman, and until

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1. 1 AMERICAN LAW OF PROPERTY § 5.55 (1952); Haskins, *Estate by the Marital Right*, 97 U. PA. L. REV. 345, 351 (1949).
2. Nichols v. Eaton, 91 U.S. 716 (1876).
3. Brandon v. Robinson, 18 Ves. Jun. 429, 34 Eng. Rep. 379 (Ch. 1811).

1935 England expressly continued the restraint on anticipation as part of the Married Women's Property Acts of 1882 and 1893.[4]

The separate equitable estate of the married woman was a device invented by the English courts of equity in the 18th Century to enable women to hold property free from the interference of their husbands. There had for some time been a growing dissatisfaction with regard to the legal attitude toward married women, particularly with reference to married women's property. While the married woman's capacity to hold or receive title to real property was not destroyed by marriage, the fee remaining in her, yet a husband acquired the right to possess and to enjoy the rents and profits of his wife's real estate owned at the time of marriage or acquired during coverture[5]. Owners of property who had married or marriageable daughters and who desired to make inter vivos settlements or provisions in their wills for their daughters wanted to devise a scheme to keep the rents and profits of a wife's land and the title to her personalty out of the control of her husband. There were two instrumentalities at hand to aid in developing such a scheme. In the first place, as a procedural matter, there was nothing to bar interspousal suits in equity.[6] By the late 16th Century, a woman before marriage occasionally entered into a contract with her intended husband providing that she was to have a limited power of disposition over her property; in such cases,

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4. MARRIED WOMEN'S PROPERTY ACT, 45 & 46 VICT., c. 75 (1882); MARRIED WOMEN'S PROPERTY ACT, 56 & 57 VICT., c. 63 (1893).

Section 19 of the Act of 1882 provides that "nothing in this Act . . . shall interfere with or render inoperative any restriction against anticipation."

Section 1 of the Act of 1893 contains a proviso "that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." *Cf.* Pelton v. Harrison, [1891] 2 Q. B. 422.

5. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930),

> At common law, a woman's capacity to hold or receive title to property was not destroyed by marriage, but marriage had important consequences. It gave a man a right to use and enjoy whatever property his wife owned at the time of marriage or acquired during coverture. A husband acquired the right to possess his wife's real estate and to enjoy the rents and the profits thereof, but the fee remained in the wife. His interest was described as 'an estate for joint lives,' since coverture normally could be terminated only by the death of one of the parties, but more accurately, it was an estate for the duration of coverture. If he predeceased his wife, the fee was in her; if she predeceased her husband, the fee went to her heirs, subject to a life estate in the husband by the curtesy if issue had been born alive. The husband had a right to use his wife's choses in action, and to this end to reduce them to possession, after which they became chattels personal. In view of the perishable nature of chattels and the common law denial of estates therein, his right to use these involved such complete dominion as to amount to ownership, and, consequently, marriage was said to give him the legal title by operation of law.

Cf. Rappeport, *The Husband's Management of Community Real Property* (unpublished manuscript, Harvard Law Library 1956, page 9, note 34).

6. See McCURDY, CASES ON DOMESTIC RELATIONS 527-32 (4th ed. 1952) for a collection of relevant cases.

equity might afford relief.[7] In the second place, equity had already developed the trust device.[8] Moreover, toward the end of the 17th Century, whenever a husband, his creditor or assignee sought to invoke the aid of equity to reach the wife's equitable assets, such as property in the hands of a trustee or an equitable chose in action, equity would not afford its aid until an adequate settlement had been made out of the property for the separate use and benefit of the wife and issue of the marriage.[9] This result followed from an application of the principle that "he who seeks equity must do equity," and came to be called the wife's "equity to her maintenance" or "equity to a settlement." Thereafter, the imposition of a condition that a suitable portion of the proceeds be set aside for the separate maintenance of the wife was extended to cases involving the wife's equitable choses in action, even where the husband did not have to invoke the aid of equity.[10] This extension was necessary to avoid collusion between the husband and his creditors, particularly where the creditor was the obligor on the wife's chose.

Opposed to this background, we have the proposition that equity would follow the law in matters within the compass of the law, and a simple trust was not regarded as giving any greater rights at equity than at law. Moreover, the equity to a settlement did not provide the wife with adequate protection, because, among other things, equity would not impose this condition in cases where the husband had adequately provided for the wife. Consequently, in the beginning of the 18th Century, some bold settlors added a provision in the trust instrument to the effect that the property should be held free from the control or interference of her husband and from liability for his debts, and equity permitted this device to succeed. However, this provision had to be expressly made by the settlor of the trusts to be effectual in preventing the husband from immediately acquiring an interest in her equitable estate.

The original purpose of the doctrine of separate estate in equity being the protection of the married woman from her husband's influence, the device of conveying to the sole and separate use of the wife worked well at the outset. To create a separate equitable estate in the wife, the usual practice was to convey property to a third person as trustee. Though the legal title was in the trustee, the property was regarded as the separate estate of the wife, and the trustee had the duty of carrying out her wishes as to its disposition. Property might also be conveyed to the husband as

7. Avenant v. Kitchin, Choyce cases 154, 21 Eng. Rep. 91 (1581-1582); Palmer v. Keynell, 1 Chan. Rep. 118, 21 Eng. Rep. 524 (1637-1638); 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 310-11 (4th ed. 1935).

8. 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 312-14 (4th ed. 1935).

9. Earl of Salisbury v. Bennet, Skinner 285, 90 Eng. Rep. 129 (K.B. 1691); Lupton v. Tempest, 2 Vern. 626, 23 Eng. Rep. 1010 (Ch. 1708).

10. Lady Elibank v. Montolieu, 5 Ves. Jun. 737, 31 Eng. Rep. 832 (Ch. 1801); Haskins, *Estate by the Marital Right*, 97 U. PA. L. REV. 345, 351 (1949); *But see* Robinson v. Randolph, 21 Fla. 629 (1885).

trustee for his wife's sole and separate use or even to the wife herself.[11] If no trustee were named, the husband's interest at law vested in him as trustee, free from his creditors, and he was required to hold that title for the separate use of the wife.

Both in England and the United States, it was not uncommon for a testator in creating a trust for his children to provide that the interests of the daughters should be held for their sole and separate use, free from the control and interference of their husbands, even though at the time the will was made or at the death of the testator, some or all of the daughters might be young children.[12] Since the equitable separate estate would be operative only during coverture, the provisions as to a beneficiary's separate use would attach when the daughter married, as to that portion of the property of which she had not disposed, but as long as she was unmarried, she might dispose of her interest as freely as if it were not limited to her separate use.[13]

Thereafter, equity decided that it was necessary with respect to equitable separate property to give the married woman an independent personal status and to invest her with the rights and powers of a person who is sui juris. This took the course of building up the power of disposition in respect to the equitable separate estate to the same extent as though the wife were a feme sole. This power to alienate, however, could lead to the defeat of the very object of the married woman's separate estate, because under the husband's influence or coercion, the wife could be prevailed upon to dispose of her property in favor of her husband or his creditors.[14]

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11. Bennet v. Davis, 2 P. Wms. 316, 24 Eng. Rep. 746 (Ch. 1725).

The settlement of property might be made by third persons or the husband himself even during coverture. *Cf.* Shepard v. Shepard, 7 Johns Ch. 57 (N.Y. 1823). Although at common law a direct conveyance from husband to wife would be wholly void, a trust was imposed on the husband for the separate maintenance of the wife. In this case, a direct conveyance by the husband under circumstances indicating that its purpose was for the wife's maintenance was upheld even in the absence of a statement to the effect that the property was to be for her "sole and separate use."

As time went on, the wife's separate maintenance was not expressly mentioned in the conveyances, but they were held valid on the ground that the conveyance was presumed to be for that purpose, since the husband had a duty to support the wife. This is analogous to the situation of resulting uses, where one party conveys to another without consideration and equity presumes a resulting use in favor of the grantor. But where the grantee is the wife, the grant without consideration would raise no such presumption in equity because of the duty of the husband to support his wife. Riley v. Riley, 25 Conn. 154 (1856).

12. Robinson v. Randolph, 21 Fla. 629 (1885); Bridges v. Wilkins, 56 N.C. 342 (1857); Travis v. Sitz, 135 Tenn. 156, 185 S.W. 1075 (1916). *But see* Apple v. Allen, 56 N.C. 120 (1856).

13. The doctrine applied to both real and personal estate. In Pennsylvania, the rule appears to be that a separate estate can be created only if the woman is either married at the time of the settlement or if the provision is made with respect to a particular contemplated marriage. Quin's Estate, 144 Pa. 444, 22 Atl. 965 (1891); Neale's Appeal, 104 Pa. 214 (1883); Hamersley v. Smith, 4 Whart. 126 (Pa. 1839).

14. Hulme v. Tenant, 1 Bro. C.C. 16, 28 Eng. Rep. 958 (Ch. 1778); Pybus v. Smith, 3 Bro. C.C. 341, 29 Eng. Rep. 570 (Ch. 1791); Jones v. Harris, 9 Ves. Jun. 486, 32 Eng. Rep. 691 (Ch. 1804).

In consequence of the failure of repeated attempts by settlors to restrict the full proprietary rights conferred by implication upon a married woman under a gift to her "sole and separate use," Lord Thurlow, acting in a private capacity as a trustee for a marriage settlement, introduced a clause against any anticipation of the income by the wife.[15] Thereafter, this clause became the accepted formula and was recognized in subsequent decisions as imposing a valid restraint upon the married woman's power of alienation, not only as to a life estate, but also as to a fee.[16] Analytically, this may be spoken of as an anomaly upon an anomaly, because the doctrine of jus disponendi as to separate estates in equity is itself an anomaly; a restraint on anticipation where restraints on alienation are not permitted is a further anomaly, but it was a necessary one to carry out the purpose of the settlement.[17] However, in the United States, there is considerable authority to the effect that the power of disposition is derived from the settlor and not from the general powers of an owner. Under this reasoning, a restraint on anticipation is not quite so anomalous as the English doctrine, because the married woman's power of disposition is regarded as only a limited power provided for in the settlement and no more.[18] The effect of the restraint clause in any event was that a married woman could not dispose of nor encumber the corpus of the property under restraint during her coverture, nor could she transfer any rights over future income. Her engagements were binding only upon so much of her income as had fallen due and was payable at the date she

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15. Jackson v. Hobhouse, 2 Mer. 483, 35 Eng. Rep. 1025, (Ch. 1817), wherein it held that the trustees shall from time to time pay the income to such person or persons and for such intents and purposes as the married woman shall, notwithstanding her coverture, direct, but so as the same be not by way of anticipation.

16. Tullett v. Armstrong, 4 My. & Cr. 390, 41 Eng. Rep. 152 (Ch. 1839); Baggett v. Meux, 1 Coll. 138, 63 Eng. Rep. 355 (Ch. 1844), *aff'd* 1 Phil. Ch. 627, 41 Eng. Rep. 771 (Ch. 1846).

17. See note 15 *supra*. Lord Thurlow's reasoning was that since a married woman's power to alienate is a mere creature of equity, to the extent to which the settlement constitutes her a feme sole and no further, equity may modify this power of alienation by insertion of a restraint on anticipation.

In Baggett v. Meux, *supra* note 16, the Lord Chancellor said that the object of the doctrine (establishing separate estates) was to give to married women the enjoyment of property independent of their husbands; but to secure that object, it was absolutely necessary to restrain them during coverture from alienation. The reasoning evidently applied to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal; but a court of equity, having created in both a new species of estate, may in both cases modify the incidents of that estate.

For the English rule of jus disponendi, see Taylor v. Meads, 4 De G. J. & S. 597, 46 Eng. Rep. 1050 (Ch. 1865); Picard v. Hine, L.R. 5 Ch. 274 (1869); *cf.* BISHOP, EQUITY 101 and cases cited therein.

18. 1 BISHOP, THE LAW OF MARRIED WOMEN 659; Wallace v. Coston, 9 Watts 137 (Pa. 1839); McConnell v. Lindsay, 131 Pa. 476; 19 Atl. 306 (1890); Thomas v. Folwell, 2 Whart. 11 (Pa. 1836); Lancaster v. Dolan, 1 Rawle 231 (Pa. 1829); Stahl v. Crouse, 1 Pa. 11 (1845)(No power to will where deed contained no power of appointment); McMullin v. Beatty, 56 Pa. 389 (1867); Wright v. Brown, 44 Pa. 224 (1863); Insurance Co. v. Foster, 35 Pa. 134 (1859); Rogers v. Smith, 4 Pa. 93 (1847).

entered into them. However, upon accrual and even without actual receipt of the income by her, it was free from restraint.[19] Any assignment of interest not due and payable was wholly void,[20] and a married woman's interest in a fund subject to restraint was protected even against her own fraudulent acts.[21]

A restraint on anticipation can only attach to equitable separate property, and property is not separate unless it belongs to a woman actually under coverture at the time, although the estate can be created before marriage.[22] When coverture ceases by reason of death or divorce, the restraint falls off and the property can be freely disposed of by the widow or divorcee. When she marries again, it attaches once more to all property not disposed of by her during the period of intervening freedom.[23]

The doctrine of the equitable separate estate is a doctrine built up in general by the great landowners. These were persons accustomed to using solicitors familiar with the technical requirements of settlements to the sole and separate use of a married woman. As a practical matter, the high costs of solicitors' fees precluded individuals with small amounts of property from applying the special separate use trust. One reason for the development of the statutory estate was the undesirability of distinctions based on differences in the amount of property owned by various classes of people. Another reason was an important shortcoming of the equitable separate estate. Under the equitable separate estate, if a trust device was actually employed in the sense that a trustee was specifically named, it avoided some of the difficulties that might otherwise arise. But if the husband was trustee either because so designated or because no one else was specifically named as trustee (which became more and more the case as time went on), equity would impose a trust upon the wife's property interest which the husband acquired at law; nevertheless, the husband having legal title, had a power to defeat the wife's equitable interest by selling to a bona fide purchaser for value. Moreover, if a wife sought redress from one who purported to be a bona fide purchaser or even a mere interloper, she had to bring process by bill in equity. Toward the middle of the 19th Century, equity was becoming very complex and expensive and would not be resorted to if it could possibly be avoided.[24]

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19. Harnett v. MacDougall, 8 Beav. 187, 50 Eng. Rep. 74 (1845).
20. *In re* Brettle, 33 L.J. Ch. 471 (1863).
21. Arnold v. Woodhams, L.R. 16 Eq. 29 (1873), see note 72 *infra*.
22. Tullett v. Armstrong, 4 My. & Cr. 390, 41 Eng. Rep. 152 (Ch. 1839).
23. Hughey v. Warner, 124 Tenn. 725, 140 S.W. 1058 (1911). There is, however, some authority denying revival. See Miller v. Bingham, 1 Ired. Eq. 423 (N.C. 1841).
24. An extra-legal illustration of this situation can be found in the novel "Bleak House" by Charles Dickens, where the case of Jarndyce v. Jarndyce dragged on for twenty years and then was discontinued only because the estate was exhausted by attorneys' fees.

The first object of the Married Women's statutes was to give a married woman a separate position with respect to property matters without the necessity of a settlement to her sole and separate use. Another advantage of the statutory estate in England and many states was that the wife's interest could be protected by ordinary legal actions[25] although some courts have held that, as between husband and wife, the statutes merely created a separate estate, with rights enforceable only in equity.[26] Furthermore, the statutory estate does not insist on any particular form of grant, and since these statutes deprive the husband of the jus mariti and give the wife a legal estate, the husband is no longer in a position to defeat the wife's interest by conveying to a bona fide purchaser.

The question now arises as to whether these Married Women's Property Acts have abolished the wife's separate equitable estate, or whether the new powers conferred by the statutes are merely supplementary to those which had developed in equity for a century and a half.[27] One might logically suppose that if a statute purports to change existing equitable estates into legal estates,[28] the creation of future equitable separate estates would be prohibited. However, most statutes do not in terms allude to the equitable separate estate device. A non-spendthrift trust jurisdiction may rule that its Married Women's statute abolishes the equitable separate estate on the theory that a married woman now has an equal status and should be subject to the same liabilities as anyone else. Yet a special trust for married women with the incident of a restraint on anticipation might be permitted on the theory that the statutory estate, despite its advantages, affords inadequate protection against the influence or coercion of the husband.[29] On the other hand, a restraint on a married woman's statutory estate may not be sustained in a non-spendsthrift jurisdiction where married women are put on a substantial parity with others and where such policy is considered strong enough to obliterate the distinction between the validity of restraints on her power of alienation and like restraints on others.[30]

It is submitted that the primary purpose of restraining anticipation of separate estate is to protect the wife from being coerced by her husband into alienating her interest and that protection from the claims of her

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25. English MARRIED WOMEN'S PROPERTY ACTS: 45 & 46 VICT., c. 75 (1882); 56 & 57 VICT., c. (1893); 25 & 26 GEO. 5, c. 30 (1935). Ill. Sess. Laws 145 (1861).

26. 3 VERNIER, AMERICAN FAMILY LAWS 171-85 (1935).

27. Bishop v. Safe Deposit & Trust Co., 170 Md. 615, 185 Atl. 335 (1936). According to a typical statute, the property which the wife holds at marriage or which she afterwards acquires, remains her separate property. See note 26 *supra*.

28. McCarty v. Skelton, 233 Ala. 531, 172 So. 901 (1937).

29. See Bishop v. Safe Deposit & Trust Co., note 27 *supra*.

30. Cropper v. Bowles, 150 Ky. 393, 150 S.W. 380 (1912); Deering v. Tucker, 55 Me. 284 (1867); Brown v. McGill, 87 Md. 161, 39 Atl. 613 (1898); Pacific Nat'l Bank v. Windram, 133 Mass. 175 (1882); Jackson v. Von Zedlitz, 136 Mass. 342 (1884); Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52 (1907).

creditors is merely incidental. The separate estate notion of freedom from control and interference of the husband or husbands during times of marriage is not the same as the purpose of the spendthrift trust designed to protect the cestui from the interference or control of *creditors* for a continuing, uninterrupted period.[31] The English courts have consistently held that no restraint can be imposed on the interest of a beneficiary[32] with the exception of a restraint on anticipation of a married woman.[33] It was felt that the new powers conferred upon the married woman by the statutory removal of her disabilities had not only not dispensed with but had actually increased the need for safeguarding her from the coercion or improvidence of her husband. Although Parliament has declared that the wife's estate shall not be encumbered or conveyed by her husband or seized for his debts, as long as she has the power to encumber her property, she is subject to yield to the persuasion of her husband. It is believed that the fact that the restraint on anticipation was expressly retained by the Acts of 1882 and 1893[34] does not indicate that the equitable separate estate of the married woman would have been abolished without this statutory reservation.[35]

While in many states of the United States there is no statutory authority for use of the equitable separate estate device, this device has not been expressly disallowed notwithstanding the Married Women's statutes. In two jurisdictions, by express statutory provisions,[36] equitable separate estates may still be created, and there is also considerable decisional authority to the same effect.[37]

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31. Boston Safe Deposit & Trust Co. v. Collier, 222 Mass. 390, 111 N. E. 163 (1916) has a typical spendthrift trust provision:

> [E]very payment of income or principle hereinbefore directed or devised to be made shall be made personally to the persons to whom they are devised or upon their order or receipt in writing, in every case free from the interference or control of creditors of such persons, and never by way of anticipation or assignment.

Bateman v. Lady Faber [1897] 46 W.R. 215. This case is often cited for its lively language.

32. Brandon v. Robinson, 18 Ves. 429, 34 Eng. Rep. 379 (Ch. 1811); Younghusband v. Gisborne, 1 Coll. 400, 63 Eng. Rep. 473 (Ch. 1844); Davidson v. Chalmers, 33 Beav. 653, 55 Eng. Rep. 522 (R.C. 1864).

33. See note 25 *supra.*

34. See note 4 *supra.*

35. English MARRIED WOMEN'S ACT (1935) 25 & 26 GEO. 5, c. 30. By the MARRIED WOMEN'S (Restraint upon Anticipation) ACT, 12, 13 & 14 GEO. 6 c. 78 (1949), it is provided that "no restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of the Act."

36. D.C. CODE 30-207 (1951); VA. CODE ANN. 5139 (1942).

37. Fields v. Gwynn, 19 App. D.C. 99 (1901); Hooks v. Brown, 62 Ala. 258 (1878); Richardson v. Stodder, 100 Mass. 528 (1868); Musson v. Trigg, 41 Miss. 172 (1875); Holliday v. Hively, 198 Pa. 334, 47 Atl. 988 (1901); Hays v. Leonard, 155 Pa. 474, 26 Atl. 664 (1893); MacConnell v. Lindsay, 131 Pa. 476, 19 Atl. 306 (1890); Travis v. Sitz, 135 Tenn. 156, 185 S.W. 1075 (1916); Bishop v. Safe Deposit & Trust Co., 170 Md. 615, 185 Atl. 335 (1936). See also: Short v. Battle, 52 Ala. 456 (1875); Sampley v. Watson, 43 Ala. 377 (1869); Snyder v. Webb, 3 Cal. 83 (1853); De Vries

In *Richardson v. Stodder*[38] a devise in trust was made to A. for the benefit of B., wife of C., to her sole and separate use and her heirs and assigns forever. After this devise took effect, B. died leaving C. and their two children surviving. It was held that B., during her coverture, took an *equitable* estate in fee which descended to the children subject only to C.'s tenancy by the curtesy.[39] The court said that the statutes which enable married women to take and hold property to their separate use do not affect the construction of a gift in trust for them, because their statutory right of disposal is not absolute and unqualified, and because the statutes themselves contemplate the necessity or expediency in some cases of the intervention of trustees.

In *Musson v. Trigg*[40] it appeared that the parties, in contemplation of marriage, entered into an antenuptial contract by which neither was to control, manage or intermeddle with the property of the other. In pursuance of this agreement, the wife conveyed all of her property to X in trust upon the condition that she should "keep, use and enjoy the same to her sole and separate use, or to the use of such persons as she by writing or by last will may appoint." On the question of whether the conveyance created a separate estate in equity notwithstanding the Married Women's Act of 1857, the court held that these statutes which afford

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v. Conklin, 22 Mich. 255 (1871); Mitchel v. Otey, 23 Miss. 236 (1851); Colvin v. Currier, 22 Barb. 371 (N.Y. 1856); Pennsylvania Co. v. Foster, 35 Pa. 134 (1860); *cf.* PERRY, TRUSTS § 677 (1911). *But see* Lindsay v. Williams, 279 Ky. 749, 132 S.W.2d 65 (1939) where it appeared that a testator bequeathed certain money to his granddaughter to be invested in a home "to be deeded to her and her heirs free from the debts and control of any husband she may have and not to be mortgaged or any lien put upon it." Plaintiff sought specific performance of her contract to sell the property so acquired to the defendant. The Kentucky court, in consonance with its rule denying validity to spendthrift provisions, held the restraint void and granted specific performance, although Kentucky courts have upheld restraints reasonable as to time. Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916). See Dollner, Potter & Co. v. Snow, 16 Fla. 86 (1877).

Counsel for the defendant apparently did not allude to the possibility of sustaining the restraint under the equitable separate use doctrine, and the court assumed that the testator intended a fee simple title in the donee as distinguished from an equitable title. This decision, therefore, is not clear authority that the equitable separate estate and restraint on anticipation have been abolished by the Married Women's statutes.

38. Richardson v. Stodder, 100 Mass. 528 (1868).

39. The restraint in this case did not attempt to deprive the husband of curtesy, and it is generally held in accord with this case that the husband is entitled to curtesy. This result is believed sound, inasmuch as the policy of protecting the wife against the husband would seem to be satisfied by preventing him from obtaining an interest in her property during her lifetime and need not be extended for the benefit of her heirs. Appleton v. Rowley, L.R. 8 Eq. 139 (1869). This reasoning, however, has not generally been applied where by the terms of the trust it has been attempted to exclude the husband from curtesy and the weight of authority permits curtesy to be expressly excluded. Rautenbush v. Donaldson, 13 Ky. L. Rep. 752, 18 S.W. 536 (1892); McCulloch v. Valentine, 24 Neb. 215, 38 N.W. 854 (1888). Where the husband is the settlor, it has been held to raise a rebuttable presumption of intention to release his claim to curtesy. Rigler v. Cloud, 14 Pa. 361 (1859); Jones v. Jones, 96 Va. 74, 32 S.E. 463 (1899).

40. Musson v. Trigg, 51 Miss. 172 (1875). The court also said that at common law the mere intervention of a trustee clothed with the legal title (where the equitable title in the wife was not limited to her separate use) would not prevent the marital rights (jus mariti) of the husband from attaching to the wife's equitable interest.

separate legal estates to married women do not interfere with equitable estates which arise out of settlements on a feme covert by deed or devise, nor were they intended to abolish or abridge such estates.

Hooks v. Brown[41] presented the case of a devise to a married woman for life with remainder on her death to go to the issue of her marriage with her then husband. The devise declared that the property should not be subject to his debts and directed him as trustee to appropriate the rents and profits for "the use and benefit of his wife and children." The court said that the Married Women's statutes have no reference to or effect upon equitable separate estates. They reasoned that these statutes affect only estates made separate by operation of law.

In *MacConnell v. Lindsay*[42] it appeared that a testatrix bequeathed certain real estate to the separate use of her adopted daughter. The Married Women's statute limited a wife's power of disposition of her statutory estate by requiring a joinder by the husband in any mortgage or conveyance of her real estate. The defendant with whom the wife had contracted to sell the property refused to accept her sole deed on the ground that she could not make a good title. It was contended that the trust should no longer be sustained, the reason for it having been removed, for the statute relieved the wife's real estate from the common law rights and control of her husband. The Supreme Court of Pennsylvania, in rejecting this argument, held that since the Act of 1887 a settlement of land for the separate use of a married woman was still subject to the same rules of equity as before. The court reasoned that inasmuch as the Act was passed for the benefit of the wife, it was an enlargement and not a dimunition of her rights. The joinder provision would therefore apply only to the separate statutory estate of the married woman, as distinguished from her separate equitable estate which had always existed only in equity.[43]

In *Hays v. Leonard*[44] the court in affirming its earlier position emphasized that while the Married Women's Acts were effectual to eliminate the legal control of the husband over the wife's estate, they did not weaken his influence over her.

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41. Hooks v. Brown, 62 Ala. 258 (1878). The court cited an earlier Alabama case to the same effect. Short v. Battle, 52 Ala. 456 (1875). The court also noted that the statement that the property given is not to be subject to the debts of the husband will not of itself create an equitable separate estate, because it does not import an exclusion of the husband's title, but only one of the incidents thereof. Moreover, the court stated that had there been an attempt to restrain anticipation, it would have been sustained.

42. MacConnell v. Lindsay, 131 Pa. 476, 19 Atl. 306 (1890).

43. The court held that the Married Women's Acts did not affect the right of a married woman to a settlement of her estate upon herself. The case also distinguishes between a restraint on anticipation and a spendthrift trust in that a separate use trust for a married woman does not fail because the will creating it names no trustee.

44. Hays v. Leonard, 155 Pa. 474, 26 Atl. 664 (1893).

In *Holliday v. Hively*[45] land or the proceeds thereof were bequeathed to a married woman for her sole and separate use, independent of her present or any future husband. Thereafter, the wife, having elected to take the land rather than the proceeds thereof, purported to mortgage it to the plaintiffs, who were now seeking to foreclose. Although there was no express restraint on anticipation in the will, the court, in reversing the trial judge, held that since the appellant had no powers of disposition beyond those conferred by the instrument creating the trust, she had no power to mortgage the property during coverture. Here, not only was the jus disponendi not given by the will, but the statutory silence was also treated as a prohibition.

In *Fields v. Gwynn*[46] it appeared that the deed of settlement on a married woman expressly excluded the husband from any interest in the estate conveyed and provided that the estate could not be disposed of by deed, will, or any other mode of alienation or anticipation. The court held that a deed of trust of such estate by the wife and her husband to secure the payment of their joint promissory note was void. It reasoned that the Married Women's Act[47] did not by *implication* prevent the creation of a valid equitable estate with a restraint on anticipation in the wife not within the common law rule avoiding genéral restraints on alienation.[48]

In *Travis v. Sitz*[49] and *Bishop v. Safe Deposit & Trust Co.*[50] the above decisions are approved and the acts removing the disabilities of coverture in respect to married women have no effect upon the equitable separate estate and the restraint on anticipation.

The question of whether or not the separate estate trust has been rendered useless by the Married Women's legislation may arise in jurisdictions which do not permit spendthrift trusts as well as those which do.[51] In a jurisdiction which does not permit spendthrift trusts, the survival of the separate estate notion may depend upon the above distinction between a restraint on anticipation, which was designed to protect

45. Holliday v. Hively, 198 Pa. 335, 47 Atl. 988 (1901).

46. Fields v. Gwynn, 19 App. D.C. 99 (1901). This case preceded the express statutory provisions for the creation of equitable separate estates. See note 36 *supra*.

47. MARRIED WOMEN'S ACT OF 1869, R.S.D.C., §§727-29.

48. Counsel for appellants contended that the Married Women's Act not only abolished any restraint upon alienation contained in a settlement upon a married woman, but also the settlement of the equitable estate itself.

49. Travis v. Sitz, 135 Tenn. 156, 185 S.W. 1075 (1916); see note 30 *supra*.

50. Bishop v. Safe Deposit & Trust Co., 170 Md. 615, 185 Atl. 335 (1936).

51. The validity of the restraint on alienation prior to the Married Women's statute had been recognized in Arkansas, Florida, Georgia, Kentucky, North Carolina, South Carolina, Texas, Virginia, West Virginia, and in the Federal Courts. See Hauser v. St. Louis, 170 Fed. 906 (8th Cir. 1909). Annot. 28 L.R.A. (N.S.) 426 (1910).

It is arguable that even if the separate estate in equity is not abolished by a particular married women's statute, the effect of the statute in altering the legal status of a married woman has removed the reason for further equitable jurisdiction. Consequently, equity might voluntarily relinquish a jurisdiction which it would not have assumed as an original question, had it felt the married women's remedy at law to be adequate.

a married woman from her husband, on the one hand and a spendthrift trust, which was designed to protect a cestui from his creditors without special regard to marital status, on the other.

An alternative to a spendthrift trust[52] which has been adopted in England by statute[53] is the protective trust.[54] This involves a provision that upon an attempted alienation of the beneficiary's interest, voluntary or involuntary, the original trust terminates and is superseded by a discretionary trust for the support of the beneficiary.

One might assume that the protective trust as an alternative to the spendthrift trust would afford even greater protection to a married woman than the restraint on anticipation, for the protective trust has the advantage of continuous protection throughout the life of the married woman, which does not cease upon discoverture.[55] However, in a very important class of cases, the protective trust cannot be substituted for the restraint on anticipation. In a marriage settlement where a power of appointment is given to one or both of the spouses to appoint the trust property to the

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52. Other alternatives to spendthrift trusts: 1. Foreign trusts — establishment of a trust to be administered in another state which recognizes the validity of spendthrift trusts. On usual conflict of laws principles, the place of administration or "seat" of the trust governs. (As to a trust res consisting of realty, the law of the situs governs.) 2. Discretionary trusts — where it is provided that payments to the beneficiary shall be made at the discretion of the beneficiary or a third person, including the discretionary power to withhold from the beneficiary all payments or beneficial use. 3. Provisions for forfeiture upon involuntary alienation. 4. Trusts for support where, although no restraint is imposed, the beneficiary's interest is limited to the particular specified purpose, and neither the cestui, his creditor or assignee can compel payment except for support. 5. Personal trust — where the interest of the cestui is of such a personal nature as to be unavailable to anyone else — *i.e.*, land in trust with a provision that the cestui shall occupy it as a home, or benefits awarded under a Workmen's Compensation Law. Alexander & Co. v. Owens, 4 Ky. L. Rep. 621, 11 Ky. Opin. 898 (1883); Surace v. Danna, 248 N.Y. 18, 161 N.E. 315 (1928). 6. Inseparability of Interests — where the fact that there are several beneficiaries treated as a unit results in the inability of any one (or combination of them less than the whole unit) or his creditor to alienate his interest. 7. An express provision that the beneficiary is not to receive his interest in the trust unless he is financially solvent. Hull v. Farmers' Loan & Trust Co., 245 U.S. 312 (1917). 8. State statutes may provide that the proceeds of an insurance policy payable in installments to the beneficiary may be made inalienable.

53. TRUSTEE ACT, 15 GEO. 5, c. 19, § 33 (1925). The statute is merely declaratory of the common law, for it is expressly provided that nothing contained therein should operate to validate any trust otherwise invalid.

54. 1 BOGERT, TRUSTS AND TRUSTEES § 221 (1935); *In re* Spencer, 1 Ch. 533 (1935).

55. Section 169 of the Law of Property Act, 1925, gives the court power to remove a restraint on anticipation in a proper case. Unlike the restraint on anticipation, property subject to a protective trust cannot be disposed of during periods of discoverture.

The feeling of the proponents of the emancipation of women is that a married woman no longer needs protection from the "kicks or caresses" of her husband and therefore that all disabilities of coverture should be entirely done away with. However, this extreme view has not been accepted, and although restraints on anticipation were abolished by statute (see note 35 *supra*), the statutory protective trust has been preserved on the theory that if a woman requires any protection at all, it is not during coverture, but during the emotionally unstable period of widowhood, and the restraint on anticipation is removed at the very time when the woman needs protection most.

issue of the marriage, it would be possible, under the equitable separate estate doctrine, to appoint a share in favor of a daughter without power of anticipation. Such restraint would be effective although no express power to impose it is mentioned in the settlement. On the other hand, the protective trust would not be available in such a case because inherent in this device is a grant of discretionary power to the trustee to decide to whom the income is to be paid after the happening of the event which terminates the original trust.

The donee of the power would thereby be delegating a power to the trustee which is conferred upon him personally by the settlement, and it is well settled that the donee of a power cannot delegate it.[56] Moreover, it may be felt undesirable in a non-spendthrift jurisdiction to permit a restraint on alienation which is primarily designed to protect a married woman, to operate when a woman is unmarried. On the other hand, the restraint on anticipation attaches only during marriage and is lifted during periods of discoverture.

Another possible advantage of the restraint on anticipation over the protective trust as an alternative to spendthrift trusts involves restraints which may last until a time more remote than the period of the rule against perpetuities. The rule against perpetuities does not prevent the creation of estates to endure for a period greater than that prescribed by the rule so long as the estate vests within the period of the rule. The question then arises as to whether a restraint on alienation may be imposed which might be effective beyond this period. In England, it is well settled that the restraint on anticipation in certain situations offends the perpetuities rule.[57] Although Jessel, the Master of the Rolls, unwillingly followed this rule in *In re Ridley*[58], he argued that the restraint on anticipation was an equitable exception to the general rule against inalienability of property. Hence, there did not appear to be any reason not to extend this exception to such a restraint applied to an interest otherwise valid under the rule against perpetuities. Moreover, the English cases hold a restraint on anticipation valid when it is imposed upon the interest of a woman born at the time of the vesting of the trust, although a member of a class which might have included persons born after that

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56. *In re* Boulton's Settlement (1928) Ch. 703. That the delegation of the power vitiates the appointment. *cf.* Williamson v. Farwell (1887) 35 Ch. D. 128.

57. *In re* Game, (1907) 1 Ch. 276; Trustees Executors and Agency Co. v. Jenner, 22 Vict. L.R. 584 (1897); *In re* Boyd, 63 L.T.R. 92 (1890); *In re* Errington, (1887) W.N. 23; Cooper v. Laroche, L.R. 17 Ch. D. 368 (1881); *In re* Ridley, 11 Ch. D. 645, Jessel (1879) M.R.; *In re* Cunynghame's Settlement, LR. 11 Eq. 324 (1871); *In re* Teague's Settlement, L.R. 10 Eq. 564 (1870); Armitage v. Coates, 35 Beav. 1, 55 Eng. Rep. 794 (Ch. 1865).

58. *In re* Ridley, see note 57 *supra*.

time.[59] The precise question has not yet been decided in any American jurisdiction. But Gray has said[60] that "the validity or invalidity of the restraint with respect to the perpetuities rule must be determined with reference to the character of the estate itself. For instance, whether it is to a married woman, and has nothing to do with the time the interest begins . . . a future estate, not in itself too remote, can be subjected to the same restraints to which a present estate can be subjected . . . that is, the same restrictions which are good on present estates should be held good on future estates."

On the other hand, discretionary trusts, of which protective trusts are but one variety, have been held wholly void when they may extend beyond the period of the rule, although they commence at a time which is not too remote.[61]

Thus, in a jurisdiction not permitting spendthrift trusts, where it is desired to avoid a harsh rule against perpetuities, this result can be attained by sustaining a restraint on anticipation.[62]

Another incidental advantage of a restraint on anticipation over a protective trust is that it may prevent the operation of the equitable doctrine of election where property is willed to a woman. The doctrine provides that where a deed or will professes to make a general disposition of property for the benefit of a person named in it, a prerequisite to the acceptance of a benefit under the will is that such person conform with its provisions and renounce every right inconsistent with them. Thus, the beneficiary must either accept or reject the instrument as a whole. The rationale of the doctrine of election is that the intention of the donor is presumed to be that his deed or will shall be wholly effective, and the only way in which this intention can be carried out is by forcing an election. However, the presumption is rebuttable by any indication of a contrary intention of the settlor or testator. This may be either an affirmative expression by the author of the instrument that the doctrine is not to

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59. *In re* Game (1907) 1 Ch. 276; *In re* Ferneley's Trusts (1902) 1 Ch. 543; Herbert v. Webster, 15 Ch. D. 610 (1880); Wilson v. Wilson, 5 Jur. N.S. 1076, 28 L.J. Ch. (n.s.) 95 (1858) Wood, V.C.

60. GRAY, RULE AGAINST PERPETUITIES, 437a, 437b, 438 (3d ed. 1915). This view also appears in the second edition (1895); *But see* GRAY, RESTRAINTS ON ALIENATION (1883) and GRAY, RULE AGAINST PERPETUITIES 436 (1st ed. 1886), where he had earlier approved the English rule, on the theory that a restraint on alienation in itself amounted to a series of successive gifts, and that subjecting a gift to such a condition was as obnoxious to the rule as any other.

61. Bundy v. United States Trust Co., 257 Mass. 73, 153 N.E. 340 (1926); Andrews v. Lincoln, 95 Me. 541, 50 Atl. 898 (1901); Moore v. Moore, 6 Jones Eq. 132 (N.C. 1860); *In re* Benyon-Winsor, 143 L.T. 178 (1917); *In re* Bernard's Settlement, (1916) 1 Ch. 552, 558; *In re* de Sommery, (1912) 2 Ch. 622, 632; *In re* Blew (1906) 1 Ch. 624; *cf.* 142 L.T. 343 (1917); GRAY, RULE AGAINST PERPETUITIES, 246, 410a, 439-442a (3d ed. 1915).

62. On principle, the rule against perpetuities would be equally inapplicable to a spendthrift trust. See GRAY, RULE AGAINST PERPETUITIES, note 60 *supra*.

apply or an implication from the nature of the gift or other circumstances in the instrument.

A person electing to take under the will or deed must transfer his property in compliance with the instrument before he may take the property which is given him. But if he chooses to keep the property which the instrument attempted to take from him, to the extent that those who would otherwise have taken his property are deprived of a benefit by his election, they are compensated out of that which he would have taken under the deed or will.

The English courts have held that a restraint on anticipation annexed to property given to a married woman is sufficient indication of an intention that the property so given is exempt for purposes of compensation if she elects to take against the instrument.[63] This necessarily precludes an election since there is no fund out of which compensation can be ordered. If the property were allowed to be used for compensation, the restraint on anticipation would be defeated to the extent to which the property was so used.[64]

Since the only material point is the settlor's intention as indicated by the restraint on anticipation, the English court[65] has held that the suspension of the restraint when the woman is unmarried is immaterial, since the testator's intention, as construed from his language, and the legal effect of that same language are two entirely different things.

In some spendthrift jurisdictions, there may be a failure to distinguish between a restraint on the alienation of the separate property of a married woman and the spendthrift trust, and a tendency to treat them in the same manner.[66] Although in most circumstances these two devices have very similar consequences, it may be vital to distinguish between them in at least two types of situations.

In the first place, an unqualified or general restraint on the alienation of an estate in fee simple, as distinguished from a restraint on use, is universally held void, and by the weight of authority even a partial restraint limited as to time or persons is void.[67] Therefore, even in a state where a spendthrift trust is permitted, an attempted restraint on alienation may

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63. *In re* Vardon's Trusts, 31 Ch. D. 275 (1886) involves a marriage settlement, but the principle in the case of a will is the same.

64. For an extreme application of this principle, see Robinson v. Wheelwright, 6 De G.M. & G. 535, 43 Eng. Rep. 1342 (Ch. 1856), where it was held that the court had no power to interfere for the purpose of alienating lands devised with a restraint on anticipation, although by another will, property of far greater value was devised to a married woman upon condition of her so alienating it.

65. Haynes v. Forester, S.J., 257; L.J. 72; L.T. 334.

66. Even where it is recognized that their origins were quite distinct; Reid v. Safe Deposit & Trust Co., 86 Md. 446, 38 Atl. 899 (1897); Ewalt v. Davenhill, 257 Pa. 385, 101 Atl. 756 (1917).

67. GRAY, RESTRAINT ON THE ALIENATION OF PROPERTY, §§ 278, 279 (2d ed. 1895).

be invalid if no trust is created by the deed or will. Where it is not expressly provided that the gift is on trust or if no trustee is named, it is held that there is no spendthrift trust.[68] On the other hand, where there is a restraint on anticipation of an equitable separate estate, the trust does not fall because no trustee is named.[69]

Secondly, it is quite uniformly held that a spendthrift trust created by a person for his own benefit is invalid as against subsequent creditors, independent of statute or the law of fraudulent conveyances.[70] Although the common law rule prohibits one from putting his property beyond the reach of his creditors, even though he is solvent, statutes in the insurance field[71] exempting the value of life insurance from the claims of the insured's creditors indicate that it may be desirable to modify this rule. The courts of equity under the separate estate doctrine recognized the right of a woman to settle an estate on herself which would be free from her own creditors during coverture,[72] and it has been held[73] that this right is unaffected where the separate estate and the statutory estate are coexistent. The exercise of this right would permit a woman to safeguard property accumulated by her own effort, as well as property accruing from previous marriages.

If a realistic balance is sought between the property emancipation and the protection of a married woman, particularly in respect to her husband and his creditors, and in respect to herself when widowed, the use of the equitable separate estate with its restraint on anticipation device (still possible in many jurisdictions) merits serious consideration.

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68. Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52 (1907), holding that a person who is sui juris cannot, even as against subsequent creditors, settle his property in trust to pay the income to himself for life and the corpus to his heirs or appointees by will, although he expressly states that the instrument shall be irrevocable; Schenk v. Barnes, 156 N.Y. 316, 50 N.E. 967 (1898); Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135 (1891); *contra*, Thomas v. House, 145 Va. 742, 134 S.E. 673 (1926).

69. See notes 11 and 43 *supra*.

70. The principle that a transfer in trust for the benefit of the settlor which hinders or delays existing creditors may be avoided as a fraudulent conveyance and the property reached by such creditors, applied to any transfer, in trust or otherwise, independent of spendthrift trusts in one's own favor. See GLENN, FRADULENT CONVEYANCES (1931).

71. New York Insurance Law, § 55a, exempt even though the insured retains the power to change the beneficiary or to collect the surrender value.

72. Monday v. Vance, 92 Tex. 428, 49 S.W. 516 (1899); Beckett v. Tasker, 19 Q.B. 7 (1887); *In re* Glenville, 31 Ch. D. 537 (1886); Sawyer v. Sawyer, 28 Ch. D. 605 (1885); Thomas v. Price, 46 L.J. Ch. 762 (1877); Wainford v. Heyl, L.R. 20 Eq. 324 (1875); Arnold v. Woodhams, L.R. 16 Eq. 33 (1873); Clive v. Carew, 1 Johns & H. 199, 205, 70 Eng. Rep. 719 (Ch. 1859).

73. MacConnell v. Lindsay, see note 43 *supra*; Musson v. Trigg, see note 40 *supra*; Lord Eldon, in Jackson v. Hobhouse, note 15 *supra*, observed that if the rule were otherwise, husbands desiring to defeat the restraint would only have to exercise their marital influence in such a manner as to induce their wives to commit fraudulent acts. See note 21 *supra*.