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Perpetuities in Wisconsin: Will the rule be construed merely as one against suspension of alienation or likewise against remoteness of vesting?

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NOTES AND COMMENT

Perpetuities in Wisconsin: Will the rule be construed merely as one against suspension of alienation or likewise against remoteness of vesting?—The task of speculating whether or not the Supreme Court of Wisconsin will be governed at all by the New York case of *Matter of Wilcox*[1] is no easy one. Perhaps no other realm of Wisconsin law is in a more chaotic condition at the present time than that relating to the rule against perpetuities,—especially insofar as personal property is concerned and in view of the recent amendment to the Wisconsin statutes.[2]

Originally, section 230.14, Wisconsin statutes 1925,[3] provided in effect that any future estate that shall suspend the absolute power of alienation beyond the statutory period[4] shall be void; and that such power of alienation was suspended when there were no persons in being by whom an absolute fee in possession could be conveyed. As amended in 1925, the added provision declares that limitations of future or contingent interests in *personal property* are subject to the rules prescribed in relation to future estates in real property.

Concisely, the query is whether or not this statute together with section 230.15[5] repeals the entire common law rule or whether the court can go further and declare that the statutes being in derogation of the common law, and the rule against perpetuities not being in terms or by necessary implication repealed, the common law rule against perpetuities is still in force in Wisconsin.

Harking back to the origination of Wisconsin law, we find that sections 230.14 and 230.15[6] were enacted in 1849. Resorting to the common law, the celebrated *Duke of Norfolk's* case[7] (1682) stands out as the first case where the rule against perpetuities was applied; there it was decided (though mere dictum) that a contingent future limitation which must necessarily vest within a period of lives in being was good. But throughout the common law and up until 1882, remoteness of vesting was confused with questions of alienability. However, *Thellusson v. Woodford*,[8] decided in 1805, appeared to cling to the suspension of alienation rule insofar as the court held that no matter how many lives were involved, so long as they were in being and capable of being ascer-

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[1] 194 N. Y. 288, 87 N. E. 497.

[2] Sec. 230. 14, Wis. Stats.

[3] Formerly sec. 2038.

[4] Two lives in being at the creation of the estate and twenty-one years thereafter (sec. 230.15) subject to the exception of charitable devises and the exception mentioned in sec. 230.16.

[5] Formerly sec. 2039.

[6] Then Ch. 56, secs. 14 and 15 and slightly modified since, but not in a manner to affect the discussion here.

[7] 3 Ch. Cas. 1, 22 Eng. Reprint 931.

[8] 11 Ves. 112, 8 Rev. Rep. 104, 32 Eng. Reprint 1030.

tained, the vesting of a conditional limitation might be postponed until the termination of the life of the longest liver. The natural conclusion would therefore be that the legislators enacted sections 230.14 and 230.15 with a view to the common law and as that was rather unsettled, and though they themselves might have been more or less confused, they settled any dispute and clearly intended that the law applicable in Wisconsin should be against suspension of alienation only.

London & South Western Ry. Co. v. Gomm,[9] decided in 1882, was the first case in which this question was really specifically involved. There, the English court declared without reservation that the rule against perpetuities was one of remoteness of vesting and not of suspension of alienation. In the meantime, however, both Wisconsin and New York had enacted statutes governing the situation as to real property and as interpreted by their respective courts, the rule was firmly established that the rule of perpetuities was against suspension of alienation only.[10]

But the paradox was then created by the New York court in *Matter of Wilcox, supra,* decided in 1909. There, the New York court completely reversed its stand and declared that regardless of prior authorities to the contrary, a limitation which created a remote future interest by way of a conditional limitation, which interest, however, did not render the property subject thereto inalienable, *was void for remoteness.*

Now then, the Wisconsin statutes, with one real exception,[11] are in almost perfect accord with those of New York and the question arises as to the effect this New York decision will have on the Supreme Court of Wisconsin. Before this New York case was decided, there was no question but that the law in Wisconsin was against the suspension of alienation.[12] This is true even though the rule was established through what is known as more or less dictum.[13] In all of the Wisconsin decisions, it might be argued that the decision of this specific point was not essential to the dispositions of the respective cases. Nevertheless, it is firm proof of the stand adopted by the Supreme Court of Wisconsin,

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[9] 20 Chanc. Div. 562, 51 L. J. Ch. 30, 30 Wkly. Rep. 620.

[10] *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87; *Robert v. Corning,* 89 N. Y. 225; being the leading cases in the respective jurisdictions.

[11] Sec. 24 of the New York statutes, corresponding to sec. 230.23 of the Wisconsin statutes, coincides insofar as the Wisconsin statute goes but has certain added provisions not found in Wisconsin.

[12] *Becker v. Chester,* supra. The rule was followed in *In re Will of Kopmeier,* 113 Wis. 233, 89 N. W. 134, *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, *Williams v. Oconomowoc,* 167 Wis. 281, 166 N. W. 322; then *Becker v. Chester* was preceded, to the same effect, by *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, *De Wolf v. Lawson,* 61 Wis. 499, 21 N.W. 615, and *Harrington v. Pier,* 105 Wis. 495, 82 N. W. 345.

[13] In *Becker v. Chester,* the dictum that the common law rule against perpetuities was not in force in Wisconsin, was dissented from by Chief Justice Cassoday insofar as the inclusion of personal property was concerned. However, the Justice appeared to realize that the remedy rested solely with the legislature when he said, " . . . . in the hope that the legislature may do something to relieve the state of Wisconsin from being the only state in the Union where personal property may be given in trust for a private purpose and rendered inalienable for all time."

not only during one instant personnel but throughout the history of law in Wisconsin.

The rule providing for the inclusion of personal property can in no wise affect the situation, except possibly to urge the imperativeness of a change to the rule against remoteness of vesting. Now, the rule must either be against suspension of alienation as to both real and personal property, or against remoteness of vesting as to both. Both are included in the same section of the statutes and logic alone suffices to establish this conclusion.

Will of Smith,[14] decided in 1922, would seem to dispel any thought of Wisconsin being influenced, at least immediately, by *Matter of Wilcox*. Here the court, again inferentially, declared that the policy of the state was against suspension of alienation only and supported itself by the decisions noted previously.

However, even supreme courts are not endowed with the aura of infallibility. The New York court reversed itself (but as to real and personal property alike) and as the better reasoning seems to lie with Justice Cassoday's dissent in *Becker v. Chester, supra,* it would not be surprising to see the Supreme Court of Wisconsin reverse its stand when the proper case is presented. The amendment to section 230.14 which included personal property in the "perpetuity" statute should act more or less as a wedge in presenting the opposite view for the court's perusal. However, in the absence of additional legislation, it *seems* that whatever stand is taken, the rule will have to be applied both to real and to personal property alike.

J. O'B.

Criminal Law: Remarks of District Attorney in final plea as prejudicial error.—In the instant case[1] the defendant, a barber in the city of Superior, was indicted for taking indecent liberties with little girls lured into his shop by promises of candy and small amounts of money. The district attorney in final argument to the jury made two statements which are the basis for this appeal to the Supreme Court: "The defendant is sending little girls down the primrose path to hell, oustide of the indecent liberties involved in this case"; and "Defendant's counsel has said that there was another way of handling this case, and I say the only other way was to kill him."

The Supreme Court in its review of the case speaks of the general rule as follows:

> Considerable latitude must be permitted in oral argument, and much is left to the discretion of the trial judge to determine whether an improper statement was made under such circumstances that it might be excused, mitigated, or even justified.

However in this case, the remarks as quoted were held to be prejudicial error, notwithstanding the fact that the trial judge directed the jury to disregard them. In Justice Stevens' opinion we find:

> The district attorney represents the commonwealth, a commonwealth which seeks justice only. It is as much the duty of the district attorney to see that no

[14] 176 Wis. 494, 186 N. W. 180.

[1] O'Neil v. State, 207 N. W. (Wis.) 280.