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Suspension of the Power of Alienation

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CURRENT LEGISLATION

Editor—BERNARD E. DOCHERTY

SUSPENSION OF THE POWER OF ALIENATION.—“The common law Rule of Perpetuities grew out of the ordinary usages of the community, and is fitted to them. A will drawn as testators generally wish their wills drawn does not violate the rule. The limit of lives in being is a natural limit. The Rule strikes down only unusual provisions. But the limit of two lives fixed by the New York Statutes is an arbitrary limit. It cuts through and defeats the most ordinary provisions.”¹ Here we have, in the words of Professor Gray, the foremost authority of his time on this most difficult branch of the law, the main criticism which many have found with the New York rules against the suspension of the power of alienation. Bills, having for their purpose the correction of evils which arise from the present laws governing future estates, have been introduced at the present session of the Legislature.² The reform is proposed to be made in the following manner:

Real Property Law, Section forty-two to be amended to read:

“Suspension of the power of alienation. The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate and twenty-one years and nine months thereafter. For the purposes of this section a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority. Lives in being or a minority in being shall include a child begotten before the creation of the estate but born thereafter.”

Section forty-three: This section to be repealed.

Section forty-five: This section also to be repealed.

Section forty-six to be amended to read:

“Contingent remainder on term of years. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance

¹ Gray, *Rule Against Perpetuities* (3rd ed. 1915), p. 567.

² Senate Bills: Nos. 981 and 982, introduced Feb. 23, 1931 and referred to the Committee on the Judiciary.

of a life or lives in being at the creation of such remainder and twenty-one years and nine months thereafter, or on the termination thereof."

Personal Property Law, Section eleven to be amended to read as follows:

"Suspension of ownership. Limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." ³

³ These sections as presently enacted are as follows:

- N. Y. R. P. L., Sec. 42: "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future interest shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority."
- Ibid.*, Sec. 43: "Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created."
- Ibid.*, Sec. 44: (This section would not be amended, but is given here because of the reference made to it in section forty-five.) "A remainder shall not be created on an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate in a term of years, unless it be for the whole residue of such term."
- Ibid.*, Sec. 45: "When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced."
- Ibid.*, Sec. 46: "A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder

At first glance, it would seem that this is merely a substitution of the common law Rule against Perpetuities for the law in its present form. But is this so? The common law Rule against Perpetuities was one against the remoteness of vesting. It settled the time within which a contingent remainder must vest in interest in order to be valid. An interest was considered too remote which depended upon a contingency which could possibly happen after the specified period of lives in being and twenty-one years.⁴ It has been repeatedly urged that suspension of the power of alienation formed no part of the rule,⁵ while, on the other hand, the New York Rule against Perpetuities expressly states that it is a rule against the suspension of the power of alienation. Whether or not it also includes the common law striction against the remoteness of vesting is, to many, a moot question.⁶ In 1909, *Matter of Wilcox*⁷ brought this question to the fore. Chief Justice Cullen, to the consternation of not a few, engrafted the remoteness rule to the suspension of the power of alienation rule, and held as void, a remainder which depended upon a contingency which might not happen within two lives in being. Professor Stewart Chaplin, on whose work Chief Justice Cullen leaned for support of his views, points out that the rule against remoteness has always been the law in New York; that the Revisers⁸ "instead of adopting one drag-net

must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof."

N. Y. P. P. L., Sec. 11: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property, are subject to the rule prescribed in relation to future estates in real property."

⁴ Tiffany, *Real Property* (2nd ed. 1920), p. 591; Gray, *Rule Against Perpetuities*, *supra* note 1 at 185. Professor Gray enlightens this statement by the following example:

A devise to A. for life, remainder to his widow for life, remainder over on the death of the widow. Here, the remainder over on the death of the widow, if contingent until that event is had, because A. may marry a woman who was not born at the testator's death, and the result is not affected by the fact that A. is very old at the testator's death.

⁵ Tiffany, *Real Property*, *supra* note 4, p. 597; Walsh, *The Law of Property* (2nd ed. 1927), p. 569; (1901) 1 Col. L. Rev. 224.

⁶ *Supra* note 5; also Fowler's *Real Property Law of the State of New York* (3rd ed. 1909), p. 276; (1901) 1 Col. L. Rev. 165.

⁷ 194 N. Y. 288, 87 N. E. 497 (1909).

⁸ New York Rev. Stat. of 1828.

provision for the vesting of all future estates by the end of a prescribed period, saw fit to classify future estates in several groups, and then as to each group, to furnish a separate provision, sometimes in the one form, and sometimes in another, which in each case does in fact result in making such vesting compulsory by the end of the prescribed period."⁹ The Court of Appeals, in a case decided subsequent to *Matter of Wilcox*, held that a future estate not limited to vest within two lives in being was void, although the absolute power of alienation was not suspended.¹⁰ It would seem, therefore, that the present rule in New York provides that every future estate must vest in interest within two lives in being, and that the power of alienation cannot be suspended beyond that same period. This, it may be seen, is not the common law rule.¹¹ The suggested changes would affect only the period of time within which the estate must vest and become alienable.

To many, a desirable result of the proposed legislation would be the greater freedom that might be exercised in the making of trusts. In New York, a trust to collect the rents and profits and apply them to the use of a beneficiary, or beneficiaries, for life, or for a shorter term, suspends the power of alienation; for a beneficiary of such a trust is not allowed to convey his interest.¹² In those cases where there have been more than two beneficiaries among whom the income was to be shared, the courts have assumed the fiction of separate trusts, if the deed or will reasonably allowed of such a construction.¹³ This interpretation is applied both to real and personal property.¹⁴ And yet, notwithstanding the use of such a liberal construction, the intentions of numerous settlors are thwarted.

The State recognizes the fact that its citizens should be allowed some restraint in the disposition of their property, and it is submitted that a restraint for a period of one generation does not unduly affect the public interest. "Lives in being" is the measure of one generation. There seems to be no sense or justice whatever in a rule which says that a man may allow income to pass through the hands of two of his children, but that thereafter, the principal that furnished that income must vest in possession, despite the fact that his remaining children, who also figured in the testator's well-thought plans of provision, may be very immature.

⁹ Chaplin, *Suspension of the Power of Alienation* (3rd ed. 1928), p. 289.

¹⁰ *Walker v. Marcellus & O. L. Ry. Co.*, 226 N. Y. 347, 123 N. E. 736 (1919).

¹¹ *Supra* note 5.

¹² N. Y. R. P. L., Sec. 103.

¹³ *Matter of Colgrove*, 221 N. Y. 455, 117 N. E. 813 (1917); *Matter of Horner*, 237 N. Y. 489, 143 N. E. 655 (1924); *Matter of Trevor*, 239 N. Y. 6, 145 N. E. 66 (1924).

¹⁴ *Supra* note 13; also *Central Trust Co. v. Falck*, 223 N. Y. 705, 120 N. E. 859 (mem. op. 1918), *aff'd* 177 App. Div. 501, 164 N. Y. Supp. 473 (1st Dept. 1917).

The relatively small number of cases which reached the court of last resort in this state within the last sixteen years may tend to show that draftsmen are becoming sufficiently adept to avoid the pit-falls;¹⁵ yet, it can in no way be taken as an indication of an attitude of contentment in existing statutory requirements on the part of the community. The court, in its use of the fiction of separable trusts, has applied salve to a cancerous sore, and has effected a partial healing. But the sore remains. It is true that it has been in existence for over a century, but the commercial growth of the State, especially the wonderful attainments of our trust and insurance companies would seem to have focused attention in the last few years upon the laws in question. The presence of these companies, with their large resources, has encouraged people to leave their property in trust. But these companies are ever careful to keep within the bounds laid down by the statutes and the courts, and the result is, that although a trust is created which probably will never be contested, in a great many cases, it does not represent the original and reasonable wishes of the testator.

Perhaps we would arrive at a fuller realization of just what is the distinction in matter of time between "lives in being" and "two lives" if we should refer for a brief moment to a mortality table.¹⁶ Suppose, for purposes of illustration, that there are two children, A and B, endowed for life with an income. There are cross-remainders in favor of each. The ages of the children are ten and twelve respectively, at the date of the testator's death which is the date when the income will commence to run. We learn, on referring to our table, that A, the younger, has an expectation of life of forty-eight and seventy-two one hundredths years, while his brother may look forward to forty-seven and forty-five one hundredths years of continued life in this world. The income, in this case, therefore, will continue for forty-eight and seventy-two one hundredths years, or until the death of A. The trust, of course, is valid both in New York and under the common law. Let us now increase the number of children by one, C, whose age at the testator's death is fourteen. C, according to our table will be the first to die, for the schedule gives him forty-six and sixteen one hundredths years to live. His share of the income will then be equally divided between the others. B will only enjoy this additional income for approximately one year, three and one-half months. After his death, B's original income only, under the New York Statutes, will pass to A, while under the common law rules A would take all. Section forty-two of the Real Property Law prohibits A from taking that part of C's income which was enjoyed by B; although

¹⁵ Finkelstein, *Notes on the New York Rule Against the Suspension of the Power of Alienation*, (1930) 5 St. John's L. Rev. 1 (on p. 3 will be found a list of cases involving suspension that have been decided by New York Court of Appeals since 1914).

¹⁶ American Table of Mortality.

from the figures given above, it may be seen that B will predecease A by only a period of approximately one year, three and one-quarter months. The New York Statutes, in effect say to this testator: "You must not suspend the power of alienation of that part of the principal which produces the income that would pass from C to B, by allowing A to enjoy it for a period of one year, three and one-quarter months. That would be inimical to commerce." One is led to believe that Section forty-two, which has the same reason for its existence as has the common law Rule against Perpetuities—the advancement of commerce unhindered by restraints¹⁷—is unduly severe in this instance. Of course, if A were much younger than B, there would be a suspension for a longer period during the third life; but even if we should take ten and thirty-five as being their respective ages, the prolonged suspension would last for less than seventeen years. Surely, this cannot be considered as being so serious an extension as to necessitate the preclusion of the trust as to the part in question. The additional suspension as to each part would, in every case, be measured by the difference in expectancy of life between the youngest beneficiary and the second owner of the income, regardless of the number of beneficiaries.

Professor Finkelstein, in a recent and most convincing article,¹⁸ has decried the need for a change in the present laws. It is his belief that the purposes of the community and of testators, as a whole, are being served, and that "while a few wills have failed that would probably have been sustained under the common law rule, the situation is not sufficiently serious to justify a wholesale revision of our rules against the suspension of the power of alienation." And that "no doubt a carefully planned scheme of curative legislation designed to put the fiction of separate trusts on a basis of positive law would remove many obstacles that now make the drafting of wills a treacherous escapade." Our respect for the views of Professor Finkelstein is illimitable, for we fully realize that they are the result of years of deliberation upon the subject; and yet, despite the fact that it was he who conducted us through the tortuous labyrinths of vested and contingent remainders, the thought remains that a change in the existing statutory scheme is to be desired. What is there to recommend the period of two lives? It disregards the number of persons presently alive towards whom the testator feels beneficently disposed, either through motivation of duty, kindness, or of charity. It subverts the intentions of the most cautious, and it is heedless of the insignificant betterment of the public weal resulting from its exactions. The measurement of "lives in being" on the other hand, is so graduated as to be commensurate with the reasonable designs of the average benefactor and the welfare of the state.

¹⁷ Chaplin, *Suspension of the Power of Alienation*, *supra* note 9, p. 283; Gray, *Rule Against Perpetuities*, *supra* note 1, p. 99.

¹⁸ Finkelstein, *Notes on the New York Rule Against the Suspension of the Power of Alienation*, *supra* note 15 at p. 10.

The extension of the period of "lives in being" by the addition of twenty-one years does not seem to have the same foundation of reasonableness to recommend it, and could very well be discarded. The extirpation of sections forty-three and forty-five, and the alteration proposed for section forty-six are, of course, necessary, they being adjunctive sections to section forty-two in that they carry out the scheme introduced by the Revisers to limit the suspension to two lives in being. The recommended change in the Personal Property Law would have the effect of placing trusts of personal property on a par with those of real property. Such a change would be in accord with recent enactments seeking uniformity in the disposition of estates of decedents.¹⁹

BERNARD E. DOCHERTY.

PRELIMINARY EXAMINATION TO DETERMINE COMPETENCY OF CONFESSION AS EVIDENCE.—"The law sedulously guards against the introduction of irrelevant or incompetent evidence, by which the rights of a party may be prejudiced."¹ The reason for this is not difficult of comprehension. A litigant may reasonably demand that a Court or jury determine the merits of his action, after hearing only that evidence which is germane to the issue. Testimony which is irrelevant, or worse, incompetent, serves no useful purpose at a trial. Too often does but the mere allusion to testimony, which the Court declares incompetent, create an impression on the minds of the jurors which will react prejudicially against a litigant. Inevitably the infusion of prejudice tends to deprive him of the fair and impartial trial which the law accords all litigants. With unflinching diligence our Courts must observe and follow "the meticulous rules of evidence by which it is designed to have a case determined only on first hand evidence bearing exclusively and directly on the issues involved."²

While it is stated generally that the rules with regard to the admission of evidence are to be applied in civil and criminal cases, alike, yet in criminal cases the necessity always exists for a more rigid enforcement of these rules.³ Professor Wigmore has stated that:

"In criminal charges, the higher degree of caution always exercised by the law in favor of the accused prompts to a greater strictness in excluding suspicious testimony."⁴

¹⁹ N. Y. Decedent Estate Law (1930).

¹ *Williams v. Brooklyn Elevated Railroad Co.*, 126 N. Y. 96, 103, 26 N. E. 1048, 1049 (1891).

² (1930) 4 St. John's L. Rev. 192.

³ Wharton, *Criminal Evidence* (10th ed. 1912), p. 47, Sec. 24b.

⁴ 2 Wigmore, *Evidence* (2nd ed. 1923), p. 140, Sec. 822.