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The Suspension of the Absolute Power of Alienation

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THE SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION.

IN his NATURE AND SOURCES OF LAW, John Chipman Gray says, "The Common Law has often been reproached with the lack of precision and certainty in its definitions, but, in truth, it is a great advantage of the Common Law, and of the mode of its development by judicial decision, that its definitions are never the matters resolved by the cases; they are never anything but *dicta*. If at the end of the sixteenth, or of the seventeenth, or even of the eighteenth century, there had been definitions binding by statute on the Courts; if the meaning of 'contract', and 'malice', and 'possession', and 'perpetuities' had been fixed, what fetters would have been imposed on the natural development of the Law. And it is the great disadvantage of a code, that practising lawyers and jurists alike are hampered by the cast-iron classification and definitions of a former generation, which, in the advancement of legal thought and knowledge, are now felt to be imperfect and inadequate."[1] Confining the illustration to the word 'perpetuities' the above quotation is so apt to the purpose of this article that it may well serve as a text for it.

By statute adopted in 1828, taking effect in 1830, New York attempted a legislative definition of perpetuity.[2] This definition has been adopted, directly or remotely, in whole or in part, by many other states.[3] It was a premature attempt at definition, and it is intended

[1] GRAY, THE NATURE AND SOURCES OF THE LAW, Ch. I, Sec. 16.
[2] R. S., pt. 2, c. 1, tit. 2, Secs. 14, 15, and 16.
[3] Arizona—REV. STS. OF 1913, CIVIL CODE, Secs. 4679-4681.
California—CIVIL CODE, Secs. 715, 716, 772.
Idaho—I REV. CODES, Secs. 3067, 3072.

here to point out some of the anomalies and inconsistencies which have resulted from it.

Professor Gray states the Rule again Perpetuities as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[4] Independent of statutory modification this would now generally be conceded as an accurate general statement of the rule.[5] From this it appears that only non-vested interests can come within the prohibition of the rule. All present interests are vested. Accordingly neither present estates, nor vested future estates ever come within the operation of the Rule against Perpetuities, whether alienable or inalienable.[6]

Serious question has, however, been raised as to whether or not all future non-vested, or contingent interests, are subject to the rule, it being contended that no alienable interest, even though future and contingent, is within the policy that the rule is intended to subserve.[7]

Indiana—2 BURNS' ANN. STS., Sec. 3998.
Iowa—CODE OF 1897, Sec. 2901.
Kentucky—I KY. STS. (1915), Sec. 2360.
Michigan—HOWELL'S STS. [2nd ed.], Secs. 10636-10638.
Minnesota—GEN. STS. (1913), Secs. 6664-6666.
North Dakota—COMPILED LAWS (1913), Secs. 5287, 5315.
Oklahoma—REV. LAWS (1910), Secs. 6605, 6608.
South Dakota—2 COMPILED LAWS (1913), CIVIL CODE, Secs. 224, 252.
Wisconsin—WIS. STS., Secs. 2038-2040.

Statutes relating to accumulations and statutes relating to personal property only are not included in the above references.

[4] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 201.

[5] London & S. W. Ry. Co. v. Gomm, 20 Ch. Div. 562; In re Trustees of Hollis' Hospital, L. R. [1899], 2 Ch. 540; In re Ashforth, L. R. [1905], 1 Ch. 535; Matter of Wilcox, 194 N. Y. 288, 296; Winsor v. Mills, 157 Mass. 362; SANDERS, USES AND TRUSTS, [4th ed.], Vol. I, p. 196; LEWIS, PERPETUITIES, pp. 163, 164. See, however, CHALLIS, REAL PROPERTY, [3rd ed.], p. 180. Also KALES, "PROBLEMS OF GRAY'S RULE AGAINST PERPETUITIES," 20 HARV. L. REV. 192, 198.

[6] Gray points out in his perpetuities, (3rd ed., Secs. 234-236), that some American cases are not in strict accord with the statement above made, but they are not in harmony with either, the weight of authority, or fundamental theory.

[7] REEVES, REAL PROPERTY, Vol. II, Secs. 956-959; FOWLER, PERSONAL PROPERTY LAW OF THE STATE OF NEW YORK, [2nd ed.], pp. 329-331; FOWLER, REAL PROPERTY LAW OF THE STATE OF NEW YORK, [3rd ed.], pp. 270-276.

This has been approved and acted upon in decision.[8] Even Professor Gray, though arguing for the reasonableness of the extension of the rule to future contingent alienable interests, said, "Since the original purpose of the Rule against Perpetuities was to restrain one mode of tying up estates, it would not have been inconsistent with that purpose to have held that contingent interests, if alienable, did not come within the Rule, but, as will appear in this chapter, the Rule has been extended so as to cover all future interests whether alienable or not, and this extension, though not a logically necessary consequence of the establishment of the rule, is now well settled, and it is a reasonable extension."[9] The decisions referred to have been overruled,[10] and it is believed that this is "a logically necessary consequence" of the policy directing the establishment of the rule.

Let us examine that policy for a moment. Professor Gray has said, as others have said, "The policy of the law is that property should not be taken out of commerce."[11] Unfortunately this tells us little. The word 'commerce' as used in connection with chattels personal ordinarily implies both the exchange in legal rights and the physical transportation of the chattels. The latter sense is that which is stressed when the desirability of commerce is urged. But physical transportation of the subject matter of property in land can occur if at all only within insignificant limits. The only 'commerce' of any extent that can occur in connection with such property consists in the exchange of legal rights. And since it is in connection with interests in land that the Rule against Perpetuities, though applicable to chattels personal, is most frequently applied, it is the

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[8] See cases referred to and discussed in GRAY'S PERPETUITIES, [3rd ed.], Ch. VII.

[9] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 268. See also Sec. 278 where he says, "To subject future contingent interests presently alienable to the Rule against Perpetuities is an extension of the Rule beyond the needs which gave it birth." However, in an article entitled, "Remoteness of Charitable Gifts," 7 HARV. L. REV. 406, 410, he answers the following question in favor of the second alternative, "Is a remote future interest objectionable only because for too long a period there may be no one who can give a good title; or is it objectionable also because the policy of the law does not allow interests so uncertain in value to hamper a present ownership?" See also RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 603 f.

[10] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Secs. 275-277.

[11] RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 603a.

desirability of commerce in property in land that has been in the minds of those engaged in working out the Rule.

The Rule against Perpetuities is a rule of policy founded upon some supposed public benefit justifying, in the cases coming within its scope, the thwarting of an individual desire. What public benefit can result from the exchange of legal rights or interests in land? Undoubtedly the chief benefit consists in the resulting greater utilization of the subject matter of such property.[12] What conditions are essential to the procuring of a high degree of utilization of land? Certainly one essential condition is possession by one whose tenure is reasonably free from hazards beyond his control. Efficient use of land may require a permanent investment of capital which will not be made by one who is uncertain of his tenure. Another essential condition is the ability of the possessor to place another with like permanency of tenure on the land in his stead. For many reasons it may be impossible for the one in possession of land to be able to use it to advantage. In order that such land may be used to capacity, he should be able to dispose of it to another who can. In other words, to secure a high degree of utilization of land, it should be possessed by those having an assured interest with freedom to use at their discretion coupled with the power to convey to others a like interest. This ideal the law has with rare exception attemped to secure.

This condition may be, however, by no means desirable in the view of the creator or grantor of the estate in possession. For various reasons he may wish to impose his will upon the possessor in such a way as to lessen the security of his possession, and to restrict his freedom of use and disposition. The law has refused to permit him to do this except by the creation of a future interest in some form.[13] The power to create future interests of certain kinds having been recognized in the creator and grantors of estates in

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[12] There are possible social interests to be furthered by such freedom of alienation, such as securing a wider distribution of the ownership of land, but it is believed that such interests have had, as compared with those referred to in the text, relatively little influence upon the development of the Rule.

[13] Exceptions to the statement of the text exist in the case of the separate estates of married women, and in the case of spendthrift trusts where recognized.

possession, the question becomes, what limitations will be placed upon the power in the interest of the ideal referred to above?

The limitations eventually imposed were the rules against restraints on alienation and the Rule against Perpetuities.[14] The rules against restraints an alienation and the Rule against Perpetuities alike operate by declaring void future interests because of their tendency to interfere with the freedom of the owner of the estate in possession. The former are directed against future interests, the object of whose creation is the prevention of the exercise by the owner of the preceding estate of his power of alienation.[15] The Rule against Perpetuities is directed against future interests without regard to the object of their creation. But its object is, as is the object of the rules against restraints on alienation, to promote the utilization of land by offering security in possession and freedom of use and disposition, to the owner of the present estate.

A brief review of the course of decision will show the relationship between the rules against restraints on alienation and the Rule against Perpetuities. By the fifteenth century at least it had been held that a condition or limitation intended to restrain the alienation of a fee simple by the owner of it was void.[16] At about the same time the courts were seeking to remove the restrictions placed on the owner of the present estate by the Statute De Donis. They eventually held that the tenant in tail could bar the heirs tail and the reversioners and remaindermen of the rights guaranteed them by De Donis by suffering a common recovery.[17] When it had once been held that an entail could be disentailed in a certain manner, conditions against disentailing in that manner began to be imposed upon grants of such estates. Though conditions against alienation of fees tail had been sustained previously as in accord with the policy of De Donis, when the policy of that statute was reversed by the courts

[14] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 603a.

[15] The rules against restraints on alienation are, of course, wider in their scope than is here indicated. They operate to render void direct attempts by the grantors of estates to render them inalienable by withholding from the grantees the powers of alienation they would otherwise have, as well as indirect attempts to accomplish the same result by imposing a gift over in the form of a future interest to a third person as a penalty. It is the latter effect of such rules that is referred to in the text.

[16] GRAY, RESTRAINTS ON ALIENATION, [2nd ed.], Sec. 19.

[17] DIGBY, HISTORY OF THE LAW OF REAL PROPERTY, [5th ed.], pp. 249-258.

by the approval of disentailing devices in the form of fines and common recoveries the courts began to frown upon efforts of creators of estates to create unbarrable entails. Accordingly conditions against suffering a common recovery or levying a fine were declared void.[18] Such conditions were called perpetuities, and to them the word perpetuity owes one of its first applications in our law.[19]

Such conditions are restraints on alienation in the modern sense. In applying the word 'perpetuities' to them, emphasis is undoubtedly placed upon the condition which would result if they were sustained, and if they should accomplish their purpose. This result would be to secure a fixed devolution of the property regardless of the wishes of the successive owners subsequent to the creator of the estate tail. That fixed devolution was undoubtedly in the minds of the courts when they used the term 'perpetuity.' But the reason they objected to this fixed devolution was for the same reason that they objected to other conditions or limitations restraining the alienation of estates in land, i. e. their tendency to interfere with use and disposition by the owner of the estate in possession.

At about the same time this attempt to revive the unbarrable entail was being frustrated, there was tried the expedient of creating particular estates for life in the first taker with remainder in tail. Since these remainders were usually to unborn persons, they were usually contingent. Because contingent common law remainders were destructible by the owner of the estate in possession, the life estate and remainders were created in use to be executed by the Statute of Uses in hopes that contingent remainders so created would be held indestructible. This device was also called a perpetuity.[20]

It was held, however, that even though created through the operation of the Statute of Uses, contingent remainders were destructible by the life tenant.[21] Hence this device proved unsuccessful. Not, it will be noted, by declaring the future interest void in the first instance, but by subjecting it to the control of the owner of the estate in possession.

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[18] Corbet's Case, 1 Co. 83b; BACON, USE OF THE LAW, Law Tracts, 145; GRAY, RESTRAINTS ON ALIENATION, [2nd ed.], Secs. 75-77; GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Secs. 141a-141c.

[19] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 141e.

[20] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 141c.

[21] Chudleigh's Case, 1 Co. 120a.

But while contingent remainders even though created by way of use had been held to be destructible, it was shortly held that springing and shifting uses and executory devises were not destructible by act of the owner of the estate in possession.[22] Here, then, were interests that obviously should be controlled in some way. The method of control was eventually laid down by Lord Nottingham in the *Duke of Norfolk's Case*.[23] It was that springing and shifting uses, and executory devises must be so limited that the contingency upon which they were limited must occur within a time which was not so remote as to cause any inconvenience. The inconvenience meant is undoubtedly that of the owner of the estate in possession, or perhaps, rather, through him, that of the public, for Lord Nottingham, when asked where he would stop in permitting these interests to be limited in the future, answered that he would stop when any visible inconvenience occurred, where there was any danger of a 'perpetuity.' Naturally enough, however, he did not use 'perpetuity' in the modern sense of a future interest which may not vest within the time permitted by the rule.[24] The definition in this sense presupposes the existence of the Rule. But Lord Nottingham was using the term 'perpetuity' in the sense, or in one of the senses, in which it had previously been used. He said: "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate."[25] The sense in which he used the term 'perpetuity' shows that he had in mind in formulating his Rule against Perpetuities the inconvenience in permitting to exist for too long a time an indestructible interest.

Since the rule as so developed is limited to regulating future interests according to their remoteness of vesting it might appropriately have been called the Rule against Remoteness of Vesting.[26] For the same reason, however, that the devices previously referred to were called 'perpetuities', i. e. that they procured or attempted to

[22] Manning's Case, 8 Co. 94b; Lampet's Case, 10 Co. 46b; Pells v. Brown, Cro. Jac. 590.

[23] 3 Ch. Cas. 1.

[24] LEWIS, PERPETUITY, 164.

[25] Duke of Norfolk's Case, 3 Ch. Cas. 1.

[26] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Sec. 2; JARMAN, WILLS, [7th ed.], Vol. I, p. 296, note v.

procure a fixed devolution of property, it was called the Rule against Perpetuities. But, since an attempt to create a 'perpetuity' may be controlled by other rules as well as by, or instead of, the Rule against Perpetuities, confusion with such rules has been caused by the use of the phrase 'Rule against Perpetuities'.

Thus there should never have been any doubt but that the application of the rule was not affected by the alienability of the future interest. An alienable future interest is only slightly less objectionable from the point of view of the owner of the present estate than an inalienable one. This has always been recognized in the application of the rules against restraints on alienation. Thus, in case a grant is made to A and his heirs, but in case he or they should attempt to alien the estate, then to B and his heirs, the gift to B is none the less void as an improper restraint on alienation though B can convey his interest, or though A and B can jointly convey an estate in possession free from a future interest. The law has very sensibly placed less importance upon the fact that they can *alienate* than upon the fact that they probably *will not*. Of course, it is the latter fact that is relied upon to make the device effective. Yet doubt has been entertained as to whether an alienable future interest comes within the operation of the Rule against Perpetuities. It is believed that that doubt would have been much less apt to arise had the rule been called from the beginning the Rule against Remoteness of Vesting.[27]

Also had it been called the Rule against Remoteness of Vesting there could never have arisen any question of its application to present estates. As it is, it has sometimes mistakenly been applied to such interests.[28]

Had it been so called, it is clear that the revisors of the New York statutes would have framed their definition very differently, for, although it is now said that the rule against suspension of the power of alienation now appearing in the statutes of New York and of the states which have adopted the definition of those statutes is very

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[27] "It ought to have been called the Rule again Remoteness; in the old books 'perpetuity' means an inalienable interest and (more especially) a disposition by which land is settled on unborn descendents *ad infinitum*, so as to be inalienable. The two ideas of 'remoteness' and 'perpetuity' are constantly confused at the present day." Charles Sweet: "The Monstrous Regiment of the Rule against Perpetuities," 18 JURIDICAL REVIEW, 132, n. (a).

[28] GRAY, RULE AGAINST PERPETUITIES, [3rd ed.], Secs. 234-246.

different from the common law Rule against Perpetuities,[29] there is no reason to suppose that the revisors intended to alter the fundamentals of that rule.[30]

They submitted to the legislature, in the first instance, certain sections as follows:

> Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.
>
> Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of a life, or lives in being at the creation of the estate, except in the single case mentioned in the next section.
>
> Sec. 16. 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, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their age.
>
> Sec. 17. In every creation of a future estate, the absolute power of alienation shall not be suspended longer than the lives of two persons then in being.
>
> Sec. 18. Successive estates for life shall not be limited unless 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 upon the

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[29] Matter of Wilcox, 194 N. Y. 288, 296.

[30] The object of the revisers is thus stated by themselves, "It is to abolish all technical rules and distinctions, having no relation to the essential nature of property and the means of its beneficial enjoyment, but which, derived from the feudal system, rest solely upon feudal reasons; to define with precision the limits within which the power of alienation may be suspended by the erection of contingent estates, and to reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise." 3 N. Y. R. S. [2nd ed.], p. 571.

death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created.[31]

In their notes to these sections the revisers said:

"The difference between the preceding sections and the existing law, consists in the following particulars:

1. Alienation can not be protracted by mere nominees unconnected with the estate, beyond the period of two lives.

2. No more than two successive estates for life can be created.

3. The period of twenty-one years, after a life or lives in being, is no longer allowed as an absolute term; but the rule is restored to its original object, by being confined to the case of *actual infancy*, which is directly provided for by rendering the disposition defeasible, and allowing another to be substituted during the period."[32]

From this it seems clear, as said before, that there was no intention on the part of the revisers to change the fundamentals of the Rule against Perpetuities. How clearly they comprehended those fundamentals is not certain, however. It is likely that they more or less clearly conceived it as a rule against remoteness of vesting, but failed to comprehend that an alienable future interest is nearly if not quite as obnoxious to the rule as an inalienable one. Thus they say:

"To prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add, that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred. Where the remainder is vested, as where the lands are given to A for life, remainder to B (a person then in being) in fee, there is no suspense of the power of alienation; for the remainderman and the owner of the prior estate, by uniting, may always convey the whole estate. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in Sec. 14."[33]

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[31] See N. Y. R. S. [2nd ed.], p. 570.
[32] 3 N. Y. R. S. [2nd. ed.], p. 572.
[33] 3 N. Y. R. S. [2nd ed.], p. 573.

These sections were adopted by the legislature substantially as proposed with the important exception that in section 15 the words "of not more than two" were substituted for the words "and until the termination of a life, or" so that the section as enacted read: "The absolute power of alienation, shall not be suspended 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 in the single case mentioned in the next section";[34] and section 17 was omitted. The change in section 15 was made at the suggestion of the revisers and section 17 omitted on their further suggestion that it would be rendered unnecessary by the correction in section 15.[35]

The importance of these changes consists in this: Had sections 14 and 15 been proposed in the form enacted it might plausibly have been argued that section 15 did nothing more than prescribe the period beyond which alienation might not be suspended while the test of what constitutes a suspension was to be found in section 14. Further it could be argued that under section 14 the only suspension provided against is that caused by future estates.[36]

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[34] 1 N. Y. R. S., p. 723, Sec. 15.

[35] 3 N. Y. R. S. [2nd ed.], p. 570, Secs. 15 and 17.

[36] In 1896 the Real property Law of the State of New York was subjected to a new revision. In this revision sections 14, 15, and 16 of Art. I, Tit. II, Ch. I, Pt. II, of the REVISED STATUTES were consolidated so as to read as follows: "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 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 person 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." Sec. 32 of the REAL PROPERTY LAW OF 1896, Sec. 32, Ch. XLVI, of GENERAL LAWS. In the report to the legislature of the Commissioners on Statutory Revision who prepared this revision it is said with reference to this section that it is sections 14, 15, and 16 "unchanged in substance, except that the last sentence, which is declaratory of existing law, is new." FOWLER'S REAL PROPERTY LAW OF THE STATE OF NEW YORK, [3rd ed.], p. 1209. Despite the statement that this section leaves the

As will appear later this was actually argued and, had it not been for proof of the form in which the statutes were originally proposed, the argument might have been successful.

Let us see what has been the course of decision. For the sake of convenience, the discussion will cover, first, present interests; second, future interests.

To a proper understanding of the application of the legislation previously quoted to present interests, it is necessary to refer briefly to the regulations provided in the New York Revised Statutes on the subject of trusts.

The revisers in the rules submitted regulating trusts were inspired by the following considerations: They seemed to feel that much of the complexity of the law of real property and the uncertainty of titles was caused by the separation of the legal and equitable estates.[37] They proposed a system which, in their words, "will sweep away an immense mass of useless refinements and distinctions; will relieve the law of real property to a great extent, from its abstruseness and uncertainty, and render it, as a system, intelligible and consistent; that the security of creditors and purchasers will be increased; the investigation of titles much facilitated; the means of alienation be rendered far more simple and less expensive, and finally, that numerous sources of vexatious litigation will be perpetually closed."[38]

They proposed to accomplish these results by abolishing passive uses and trusts by more thoroughgoing legislation than the original

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former sections unchanged in substance, had the original legislation been proposed and enacted in this form, it could hardly have been interpreted as applying to any interests other than future estates, an interpretation, of course, much narrower than was given to the sections as they were actually enacted. See CHAPLIN'S SUSPENSION OF THE POWER OF ALIENATION [2nd ed.], pp. 134, 135. FOWLER'S REAL PROPERTY LAW OF THE STATE OF NEW YORK, [3rd ed.], pp. 262, 1167. It, however, seems to be accepted by the courts as the commissioners evidently intended it to be. Herzog v. Title Guarantee and Trust Co., 177 N. Y. 86, 69 N. E. 283; Farmers' Loan and Trust Co. v. Kip, 120 App. Div. 347, 104 N. Y. S. 1092; Bindrim v. Ulrich, 64 App. Div. 444, 72 N. Y. S. 239; Union Trust Co. v. Metcalf, 37 Misc. 672, 76 N. Y. S. 375; Allen v. Litchard, 93 Mis. 197, 157 N. Y. S. 19; In re Ward's Estate, 175 N. Y .S. 654; In re Abbey, 168 N. Y. S. 1047, 181 App. Div. 395, affirming decree in 164 N. Y. S. 934, 98 Misc. 506.

[37] Revisers' Reports and Notes, 3 N. Y. R. S., [2nd ed.], pp. 579-584.

[38] *Ibid*, p. 584.

Statute of Uses, and by allowing active trusts only within very narrow limits. The active trusts which they proposed to permit were the following:

> "(1) To sell lands for the benefits of creditors.
>
> (2) To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon.
>
> (3) To receive the rents and profits of land, and apply them to the education and support, or support only of any person during the life of such person or for any shorter terms, subject to the rules prescribed in the first Article of the Title.
>
> (4) To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first Article of this Title."[39]

Only the third class is of significance for the purposes of this discussion.[40] The recommendation as to this class was adopted as proposed with the exception that the words "or support only" were changed by the legislature to "or either."[41]

Upon later recommendation by the revisers, the statute was amended in 1830 by striking out the words "education and support, or either", and substituting the word "use".[42] So that this provision then stood, "To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this Title."[43]

It was undoubtedly the expectation of the revisers that the authority granted in this section would be exercised in general in the creation of trusts for the benefit of incompetents.[44] With this thought in mind they recommended, and the legislature enacted, the two following sections:

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[39] *Ibid*, p. 579, note to Sec. 56.

[40] The first two being trusts for alienation, a trust created under them could be deemed in no view of the statutes against suspension of alienation, to violate such statutes. Accumulations are regulated by provisions of the statutes other than the general statutes against the suspension of the power of alienation. I N. Y. R. S. 726, Secs. 37 and 38.

[41] Revisers' Reports and notes, 3 N. Y. R. S., [2nd ed.], p. 578.

[42] *Ibid.*

[43] I N. Y. R. S., [2nd ed.], p. 723, Sec. 55 (3).

[44] Revisers' Reports and Notes, 3 N. Y. R. S., [2nd ed.], p. 585.

"Sec. 63. No person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

Sec. 65. Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void."[45]

The interest of a beneficiary of a trust for the receipt of the rents and profits of land is, under the first of these sections, made inalienable, even though not so intended by the creator of the trust. In fact, the creator of a trust under this section can not give to the cestui the power of alienation.[46] He may give to the trustee the power to convey. Except as he does give such power, however, property held upon a trust for such purposes is completely inalienable.

Though, as stated, it was expected by the revisers that the trust ordinarily to be created under this section was a trust for incompetents, it was held that trusts for all persons competent or incompetent were permissible under it.[47] We thus have a legislative command that all trusts for the receipt of the rents and profits of land shall be what would now be called 'spendthrift' trusts, such command long antedating the development of the modern spendthrift trust doctrines. This legislation received a sympathetic consideration by the courts. To such an extent was this true that it was held that the rules there laid down should be applied by analogy to trusts for the receipt of the income of personal property.[48]

The question of the application of the statutes against the suspension of the power of alienation to trusts of this character was the first

[45] FOWLER'S REAL PROPERTY LAW OF THE STATE OF NEW YORK, [3rd ed.], p. 451. I N. Y. R. S., p. 730, Secs. 63 and 65.

[46] Coster v. Lorillard, 14 Wend. 265, 333; Crooke v. Kings County, 97 N. Y. 421; CHAPLIN, EXPRESS TRUSTS AND POWERS, 379; 30 CYC. 1503, n. 1. Compare FOWLER, REAL PROPERTY LAW OF THE STATE OF NEW YORK, [3rd ed.], 500.

[47] FOWLER'S REAL PROPERTY LAW OF NEW YORK, [3rd ed.], 450-451; REEVES, REAL PROPERTY, 497, 498; Liggett v. Perkins, 2 N. Y. 297, 308, 321, 325.

[48] FOWLER'S PERSONAL PROPERTY LAW OF NEW YORK, [2nd ed.], p. 52.

question on the sections relating to real property in the New York Revised Statutes that came before the courts. This was in the well known case of *Coster* v. *Lorillard*.[49] In this case a testator devised certain real estate to trustees, consisting of a brother and twelve nephews and nieces, and to the survivor or survivors of them, in trust to receive the rents and profits and apply them to the use of the twelve nephews and nieces, in equal shares, during their joint lives, and to the survivor or survivors of them so long as any of them should live, and to convey the remainder of the estate, after the death of all of such nephews and nieces, in fee to such of their descendents as should be then in existence. The will came before Vice-Chancellor McCown of the first circuit for construction. He held that, as to the trusts for the lives of the twelve nephews and nieces, it was good even though inalienable, for the reason that the statutes against suspension of the power of alienation applied only to suspension caused by future estates.[50] The reasoning by which this result was reached was that previously suggested.[51] He declined to make any decree as to the ultimate limitation over, because the proper parties were not before the court, but expressed the opinion that they were void as being too remote.

On appeal to the court of chancery, all three of the revisers, Butler, Spencer, and Duer, appeared, each representing different interests. All contended that the devise for the lives of the twelve nephews and nieces was not rendered invalid by the statutes against suspension of the power of alienation; Butler,[52] because such statutes affected only future estates;[53] Spencer, because, even if applicable to present interests, the restrictions on alienation in such cases as this, if any there were, were imposed by law, "and if not legal, they do not exist; and if legal, they must prevail"; and because the "restriction is an incapacity in respect to the character of the party which is not engrafted on the estate."[54] Duer, because the incapacity to assign the beneficial interest in a trust for the receipt of the rents and profits and lands is personal and is not engrafted on the estate, the true construction of the statute being that the beneficial

[49] 5 Paige's Ch. 172, 14 Wend. 265.
[50] 5 Paige's Ch. 172, 187-196.
[51] *Supra*, p. 249.
[52] With whom was associated Peter A. Jay.
[53] 5 Paige's Ch. 172, 203-207.
[54] 5 Paige's Ch. 172, 208-209.

interest is not *per se* assignable, but may be made assignable by the testator, and that it had here been made assignable.[55]

The Chancellor,[56] however, held that the statutes applied to all inalienable interests, whether present or future, and from whatever cause the inalienability arose. He held, however, that though the trust for the benefit of the nephews and nieces was subject to the statutes, it was not void, as the trust, properly construed, created a tenancy in common, and as to the individual interest of each, there was not a suspension for a greater length of time than the statutes permitted.[57] To the argument of the Vice-Chancellor that they prohibited suspension by future estates only, he answered by showing the consolidation of the proposed sections 15 and 17, drawing therefrom the conclusion that section 15 should be construed as including the interests intended to be covered by the two proposed sections, and in determining what interests were covered, he held as stated, that all inalienable interests were.

On appeal to the Court of Errors similar arguments were repeated but the court held that the estates created were joint estates, were inalienable for more than the period permitted by the statutes, and were void for that reason.[58]

Since the decision in this case it has been consistently held that trusts for the receipt of the rents and profits of land are subject to the statutory rules against the suspension of the power of alienation.[59]

Let us see what this means. The legislature has established the rule that trusts for the receipt of the rents and profits of land shall be inalienable. Because of the inalienability which has thus been imposed upon the trust, it is declared to be void. Because of a quality annexed to his gift which he probably did not contemplate, perhaps did not even desire, the wishes of the creator of the trust are frustrated, his cestuis disappointed, and his property distributed

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[55] 5 Paige's Ch. 172, 209-213.

[56] Walworth.

[57] 5 Paige's Ch. 172, 213, 218.

[58] 14 Wend. 265.

[59] Douglas v. Cruger, 80 N. Y. 15; Herzog v. Title Guarantee and Trust Company, 177 N. Y. 86; Farmers' Loan and Trust Co. v. Kip, 192 N. Y. 266; In re Walkerly, 108 Cal. 627, 650, 41 Pac. 772, 776; Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510; Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258; Rong v. Haller, 109 Minn. 191, 123 N. W. 471; Penfield v. Tower, 1 N. D. 216.

among those whom he has indicated no desire to benefit. The law has been rather over sensitive to thwarting the intention of the creators of trusts in the interests of the public, but if the legislature ever consciously contemplated such a result as that here indicated, it must be adjudged guilty of a wanton disregard of the intention of the creators of trusts and of the rights of their intended cestuis.

The writer does not believe that the revisers or the legislature ever contemplated any such result. He believes that the revisers when acting as counsel were not inconsistent with themselves as revisers in arguing that the statutes did not require any such result. Had they foreseen the judicial construction to be adopted, it seems inconceivable that they would have proposed any such legislation.

As to the application of the statutory rule to future interests. It has been said repeatedly that the requirements of the statutory rule are satisfied if all having interests may convey by joint or several action in fee simple.[60] In other words, if each interest in the property in question is by itself alienable, there is no violation of the statutory rule.

Let us see how this works out in a concrete case. Take the case previously suggested. A grant is made of Blackacre to A and his heirs, with a proviso that if he or his heirs should ever alienate or attempt to alienate the same, it should go to B and his heirs. The conditional limitation to B would be void under the common law Rule against Perpetuities because it might vest at a time later than permitted by the rule. It would also be void in the jurisdictions where the statutory rule against suspension of the power of alienation prevails because in violation of the rules against restraints on alienation as an improper restraint on the alienability of A's interest.[61] But since A and B could by joint action at any time convey a fee simple, in possession, there would be no violation of the statutes against suspension of the power of alienation.

The object of the statutory rule is said to be to keep real property

[60] Graham v. Graham, 49 Misc. (N. Y.) 4, 97 N. Y. Suppl. 779; Becker v. Chester, 115 Wis. 90, 108, 91 N. W. 87; Buck v. Walker, 115 Minn. 239, 132 N. W. 205; Fitzgerald v. City of Big Rapids, 123 Mich. 281, 283, 82 N W. 56.

[61] CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION, [2nd. ed.], Secs. 129, 130; Greene v. Greene, 125 N. Y. 506, 512; Mandlebaum v. McDowell, 29 Mich. 78, 18 Am. Rep. 61; Van Osdell v. Champion, 89 Wis. 661; Zillmer v. Landguth, 94 Wis. 607.

in the channels of commerce.[62] So vigorous has been the legislative mandate that this condition must prevail that we have seen that it is effective to render void because of inalienability an interest which had been rendered inalienable by another legislative mandate. Now we find it so innocuous that it is not effective to render abortive an attempt to take property out of the channels of commerce forever, leaving the frustration of such attempts to be effected through the operation of rules of policy worked out by the courts in their attempts to procure free alienability of property.

The difficulty here seems to rest largely upon a too literal reading of the statutory definition. It is true that Blackacre *can* be alienated unconditionally and in fee, at any time by its present owners. It is equally true that every probability is against its *being* alienated. B will almost certainly retain the club he holds over A's head in the form of his conditional limitation. It may be because he conceives it his duty to stand guard; if not, the circumstances are such that he will almost certainly demand more for a surrender of his rights than A will be willing to pay. This of course was understood by the grantor in creating the limitation to B, and by the judges when they declared such a limitation void as an improper restraint on alienation.

In dealing with the statutory test of what constitutes an absolute suspension of alienation, or in the words of the statute, a suspension of the absolute power of alienation, the courts have proceeded as though they were dealing with a statement of abstract truth rather than with a rule of policy founded upon economic considerations. They have been satisfied with a purely theoretical possibility of alienation, and have not concerned themselves with the policy the statute was intended to subserve. Had that policy been clearly perceived, it is believed that it would have been seen that it requires free alienability by the owner or owners of the present estate and

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[62] "In respect to Rule I, concerning suspension of the absolute power of alienation, the main purpose is to confine within specified limits the period during which property may be so tied up that it can not come upon the market, or cannot be freed from its special character as an 'estate' or 'fund' and restored to the status of ordinary property owned outright by individuals who can sell or spend it." CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION, [2nd ed.], Sec. 21; "The primary purpose of the statute limiting the right to alienate realty is not to prevent perpetuities, but to prevent unduly removing property from the field of business transactions." Becker v. Chester, 115 Wis. 90. (Quotation from the syllabus by Marshall, J.)

that the absolute power of alienation is suspended, when the owner or owners of the present estate can not convey an absolute fee in possession.

The courts are perhaps not to be criticised too much for their interpretation of the statutes, for it was an interpretation to which the definition of perpetuity upon which the statutes were framed were subject. Even under the common law rule, it has been held at times that the rule had no application to alienable future interests, regardless of their remoteness.[63]

This is due, as has been pointed out, to the fact that such definitions have been carried over from a time when 'perpetuity' was used in the sense of an unbarrable entail. It was defined in this way by Lord Nottingham in the *Duke of Norfolk's Case*,[64] as previously quoted: "A perpetuity is a settlement of an estate or interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment." It was defined in the same sense in the slightly earlier case of *Washbourne* v. *Downes*,[65] where, in determining that a tenant of an equitable estate tail could bar the entail, it was said, "A perpetuity is where, if all that have interest join, and yet can not bar or pass the estate. But if by the concurrence of all having the estate tail may be barred, it is no perpetuity." Of course in referring here to "all that have interest" only those interested in the present estate were intended to be referred to. Yet it has been understood in the wider sense of including those having future as well as those having present interests. Even Saunders, writing before the adoption of the New York Revision, so understood it, and therefore insisted that it was wrong.[66] But unfortunately others who understood it in the same sense failed to see that, so understood, it was wrong. Among these have been the interpreters of the statutes against suspension of the power of alienation. In general,

[63] GRAY, RULE AGAINST PERPETUITIES, Ch. VII.

[64] 3 Ch. Cas. I.

[65] 1 Ch. Cas. 213.

[66] He says: "It is said in the case of Washbourne v. Downes, 1 Cha. Ca. 23, 213, that, 'A perpetuity is where, if all that have interest join, yet they can not bar or pass the estate;' and in the case of Scattergood v. Edge, 1 Salk. 229, that 'every executory devise is a perpetuity so far as it goes; i. e. an estate inalienable though all mankind join in the conveyance.' But these definitions of a perpetuity are not accurate. If an estate be limited to the

it has been assumed by those interpreting those statutes that they express the common law as it stood at the time they were first adopted, and that the common law was satisfied if all having interests could convey. Thus in *Becker* v. *Chester,* Marshall, J., said, "Note the complete harmony between the language of *Washbourne* v. *Downes* and the statute: "A perpetuity is where, if all that have interest join, and yet can not bar or pass the estate. But if by the concurrence of all having the estate tail may be barred, it is no perpetuity." "Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."[67]

To the general view that the rule laid down by the New York Revised Statutes is against suspension of alienation only, there was among writers and courts little dissent prior to the year 1891. In that year appeared a book by Mr. Stewart, CHAPLIN ON SUSPENSION OF THE POWER OF ALIENATION.[68] In this work the view was advanced that the Revised Statutes laid down two rules, one against the suspension of the absolute power of alienation, the other against remoteness of vesting. The fact that Mr. Chaplin's views have gained recognition in the Court of Appeals of New York gives them great significance. To make clear his position and the writer's comments upon it, it is necessary to quote the relevant sections of the New York Revised Statutes:[69]

> "Sec. 7. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.
>
> Sec. 8. An estate in possession, is where the owner has an imme-

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use of A and his heirs, but if B should die without heirs of his body, then to the use of C and his heirs, the limitation to C and his heirs would be void, as tending to a perpetuity. Yet C might, no doubt, release or pass his future estate; and with the concurrence of the necessary parties, the fee-simple might be disposed of, before there was a failure of issue of B. A perpetuity may, with greater propriety, be defined to be a future limitation, restraining the owner of the estate from aliening the fee-simple of the property, discharged of such future use or estate, before the event is determined, or the period arrived, when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." SANDERS, ESSAY ON USES AND TRUSTS, [4th ed.], vol. I, p. 196.

[67] 115 Wis. 90, 109.

[68] A second edition appeared in 1911.

[69] The sections quoted are from Part II, Ch. I, Art. I.

diate right to the possession of the land. An estate in expectancy, is where the right to possession is postponed to a future period.

Sec. 9. Estates in expectancy, are divided into,

1. Estates commencing at a future day, denominated future estates; and,
2. Reversions.

Sec. 10. A future estate, is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.

Sec. 11. Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

Sec. 12. A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

Sec. 13. Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.

Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

Sec. 15. The absolute power of alienation, shall not be suspended 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 in the single case mentioned in the next section.

Sec. 16. 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, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age.

Sec. 17. Successive estates for life shall not be limited, unless 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 upon the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created.

Sec. 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of

such estate, unless such remainder be in fee; nor shall a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term.

Sec. 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named, as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

Sec. 20. 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 of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

Sec. 21. No estate for life, shall be limited as a remainder on a term of years, except to a person in being, at the creation of such estate.

Sec. 22. Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue," shall be construed to mean heirs or issue, living at the death of the person named as ancestor.

Sec. 23. All the provisions contained in this Article, relative to future estates, shall be construed to apply to limitations of chattels real as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

Sec. 24. Subject to the rules established in the preceding sections of this Article, a freehold estate as well as a chattel real, may be created, to commence at a future day; an estate for life may be created, in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article.

Sec. 25. Two or more future estates, may also be created, to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.

Sec. 26. No future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.

Sec. 27. A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law."

Mr. Chaplin accepted the usual interpretation of sections 14 and 15, i. e., that they prohibit only a suspension of the absolute power of alienation and contain no prohibition against remoteness of vesting.[70] But he contended that as to 'remainders' the sections immediately succeeding those named together with section 16 established a second rule, one against remoteness of vesting beyond the statutory period.

For the purpose of examining the application of the rule against remoteness of vesting, called by him Rule II, he divided 'remainders' into three classes, according as they were limited upon estates for years, for life, or in fee.[71] He found the source of his rule as applied to 'remainders' limited upon estates for years in sections 24 and 20;[72] as applied to 'remainders' limited upon estates for lives in sections 17, 18, and 19;[73] and as applied to 'remainders' limited on a fee, in sections 24 and 16.[74]

To the mind of the writer there is nothing in the form of the Revised Statutes, nor in the notes of the revisers, to justify this derivation of a rule against remoteness of vesting. Referring to the sections quoted above, it seems clear that they naturally arrange themselves into three groups. Sections 7 to 13 inclusive are definitive in nature; sections 14 to 23 inclusive are restrictive; while sections 24 to 27 inclusive are permissive. Sections 14, 15, and 16 were intended to lay down a narrower rule against perpetuities than the common law rule. Sections 14 and 15 restricted the common law limit of 'lives in being' to 'two lives in being.' Section 16 though permissive in form was intended also in a restrictive sense as it was intended to limit the period of twenty years to the case of an actual infancy. Sections 18 to 21 inclusive were intended to subject the creation of specified future estates, some of which were not within the prohibition of the common law rule, nor of the statutory rule,[75] to restrictions not existing at common law. These were in further-

[70] SUSPENSION OF THE POWER OF ALIENATION, Secs. 62-65.

[71] *Ibid*, Sec. 318.

[72] *Ibid*, Sec. 319.

[73] *Ibid*, Secs. 320-322.

[74] *Ibid*, Secs. 338-340. Criticism of the views presented by Mr. Chaplin may be found in an article by Mr. George F. Canfield, "The New York Revised Statutes and the Rule against Perpetuities," 1 COL. L. REV. 224, 228.

[75] See particularly sections 17, 18, 19, and 21, where, under certain conditions, the creation of vested future estates is prohibited.

ance of the general principle that the power of imposing restrictions on the alienability of the fee by the creation of future estates should be curtailed more than it had been at common law. Section 23 subjected chattels real to the provisions of the article in which the sections quoted are found, i. e., the article on the Creation and Division of Estates.

Having imposed by these sections restrictions on the creation of future estates in favor of public welfare, the revisers then sought to abolish other restrictions previously existing not required by any rule of public policy, but resulting from technical rules of the common law, or at least to make clear that they no longer existed.[76]

Naturally they intended that the privileges thus granted or secured should be subject to the restrictions previously imposed and they sometimes specifically so provided.[77] Thus in section 24 after providing that a fee might be limited on a fee, on a contingency, they added "which, if it should occur, must happen within the period prescribed in this Article."

It has been generally agreed or assumed that the qualification added nothing in legal effect; that it only made express what would otherwise have been implied. Still it does provide that the contingency upon which the second fee may be limited must occur within the statutory period. This is in form a prohibition against remoteness of vesting. How can this be reconciled with the view that the statutory rule applies only to inalienable rather than to contingent

[76] Thus the following technical rules of the common law were expressly abrogated by section 24; a freehold could not be limited to commence in the future. TIFFANY, REAL PROPERTY, Sec. 119; Buckler v. Hardy, Cro. Eliz. 585. An estate for life could not be created in a term of years and a remainder limited thereon. GRAY, PERPETUITIES, Secs. 71a, 807, 808. A contingent remainder could not be created expectant upon a term of years. TIFFANY, REAL PROPERTY, Sec. 123; CHALLIS, REAL PROPERTY, 93. A fee could not be limited in derogation of a previously granted fee. TIFFANY, REAL PROPERTY, Sec. 119.

[77] Section 17 provides that when a contingent remainder is limited on a term of years it must vest in interest within two lives. To the mind of the writer such a case would have been covered by sections 14 and 15, had those sections been construed as intended by the revisers, and such section was, therefore, from their point of view, superfluous. But contingent remainders could not be created on terms of years, at common law. The Revisers proposed to allow them to be so created, sec. 24. It was, therefore, natural that they should specifically subject them to the rules applicable to contingent remainders generally.

interests? Those who adopt the view that the statutes provide a rule against suspension of alienation only, such rule being found in sections 14 to 16, either pass this provision over without comment or assume that it refers merely to statutory rule as so understood.[78] To the writer, who believes that sections 14 to 16 were intended to lay down a rule against remoteness of vesting, it seems clear that the provision merely refers to the rule as intended to be established by those sections. Mr. Chaplin however argued, as stated above, that this provision was intended to establish a rule against remoteness of vesting of 'remainders' limited upon a fee, and with the other sections, referred to above, relied upon by him established a general rule against remoteness of 'remainders.'

Mr. Chaplin's rule against remoteness extended only to 'remainders'. This means remainders in the statutory sense, not in the common law sense. Now remainders are nowhere defined in the Revised Statutes. This in itself is suggestive of the view that the revisers did not intend anything to turn on the question whether a certain future estate was or was not a remainder. However, they used the term 'remainder' frequently in the statutes. And in section 11 they provided: "Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name." It is apparent that, as so used, the term "remainder" comprehends what were previously known as vested remainders, contingent remainders, shifting uses, and also executory devises where, at least, the latter were limited in defeasance of another estate created by the same will. This leaves, of the future estates as defined by the statutes, only what were previously called springing uses and possibly such executory devises as are not limited in defeasance of another estate limited by the same instrument. If 'remainder' as used in Mr. Chaplin's rule is to have the same meaning as that here suggested, we have the absurdity of a rule against the remoteness of vesting of shifting uses without having a similar rule with respect to springing uses. This, apparently,

[78] FOWLER, REAL PROPERTY, 282; REEVES, REAL PROPERTY, 622, n. a. See George F. Canfield, "The New York Revised Statutes," 1 COL. L. J. 224, 300, where the writer says that it would seem that the statute should be interpreted as though it read, "A fee may be limited upon a fee provided that it does not occasion a suspension of the power of alienation beyond the period prescribed in this article." See also instructive comment by Professor Edward H. Warren, 30 CYC. 1518, n. 81.

led to the suggestion by Mr. Chaplin in the second edition of his book that perhaps eventually the courts would apply this rule to all future estates, either by analogy to the rule with respect to remainders or by so construing the statutes as to read 'remainders' as synonymous with 'future estates'.[79]

In the *Matter of Wilcox*[80] the Court of Appeals of New York accepted Mr. Chaplin's view. In that case personal property was limited over upon an event that might occur at a more remote time than two lives in being. The interest so limited was at all times alienable. The New York statutes provide: "The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator.[81]

"In all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first Chapter of this Act, in relation to future estates in land."[82]

The court held that, in determining whether or not an alienable executory limitation in personal property suspended the absolute ownership of personal property, it was necessary, in view of the above statute, to determine whether or not the statutes contained a rule against remoteness of vesting, as, "if it were established that the sole statutory restriction on the power to create estates in realty was that the creation of such estates shall not suspend the absolute powers of alienation beyond the prescribed period, there would be force in the position that the absolute ownership of personal property was not suspended when there were persons in being, no matter in what manner or what the nature of their interests, who acting conjointly could transfer an indefeasible title."[83]

It determined that there was to be found in the statutes relating to real estate a rule against remoteness of vesting. The argument of the court is as follows: The common law rule was a rule against

[79] SUSPENSION OF ALIENATION, [2nd ed.], Secs. 304-305.
[80] 194 N. Y. 288.
[81] REV. ST., Part II, Ch. IV, Title IV, sec. 1.
[82] REV. ST., Pt. II, Ch. IV, Tit. IV, sec. 2.
[83] 194 N. Y. 288, 300.

remoteness. The statutory rule found in sections 14 and 15 is a rule against suspension only. The revisers were men of great erudition, and it must be supposed that they understood the common law rule, and, therefore, knew that sections 14 and 15 established a different rule. Section 17 prohibiting the creation of successive life estates to more than two persons in being showed that, at least in this respect, limitations on the power to create future estates other than the provision that they should not suspend the power of alienation were intended.

Sections 18 to 24 inclusive with their elaborate and minute restrictions on the creation of remainders were impossible to understand if the revisers intended to establish the single rule that the power of alienation should not be suspended for more than two lives in being. Particularly is this true of Section 24. The court says: "Section 24, already quoted, concludes, 'and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article,' i. e. within two lives in being. This statutory authority for limiting a fee upon a fee is necessarily exclusive; otherwise, why should the statute declare that the contingency *must* occur within the specified period? It has no necessary connection with the provision restricting the suspension of the power of alienation. It is under this provision that the present case would fall if it were real estate."[84]

The case of *Matter of Wilcox* is obviously revolutionary.[85] The rule against suspension of alienation had varied from the common law Rule against Perpetuities in two significant respects. It forbade the creation of inalienable present estates, where such inalienability might exceed two lives in being, while it permitted the creation of alienable contingent future estates at however remote a period they might vest. *Matter of Wilcox* now establishes a rule against the remoteness of vesting of 'remainders' even though alienable, which, because of the limit to two lives in being, is more stringent than the common law rule.

The rule laid down in *Matter of Wilcox* has been followed recently by the New York Court of Appeals and applied to a future estate which can not be called a 'remainder' except as 'remainder'

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[84] 194 N. Y. 288, 299.

[85] See case commented on in FOWLER'S REAL PROPERTY LAW, [3rd ed.], 276-289; 22 HARV. L. REV. 543; 9 COL. L. REV. 368.

may be construed to include all future estates. The case referred to is *Walker* v. *Marcellus & Otisco Lake Railway Co.*[86] In this case the grantor conveyed, in effect, as construed, an estate in fee to take effect whenever she, the grantor, should cease to occupy a certain lime kiln upon the premises, and to use the same for the purpose of burning lime. She had ceased to use the lime kiln, and the assignee of the grantee being in possession sought to hold possession by virtue of the limitation in the deed.[87] The court repeated the substance of the argument of *Matter of Wilcox* as follows:

> "The revisers, however, had something more in mind at least with regard to certain future estates than merely the prohibition of restrictions on alienation. As an illustration a remainder might not be limited on more than two successive life estates. They well knew that every executory device or springing use was then required to be so limited that the contingency upon which they depended must happen within a time measured by lives. They were aware of the definition of a springing use; that it depended on no prior estate. Yet they intended to cover the entire ground as to the creation and division of estates. Their design was to simplify, not to complicate, the transfer of real estate—to restrict, not to extend, the limitations which a grantor might impose upon it. With all this in mind they provided that a freehold estate might be created to commence at a future day and that a fee may be limited on a fee on a contingency which must occur, if ever, within a time measured by lives."[88]

It then proceeded to deny the validity of any distinction between "remainders" and other future estates respecting the question of remoteness of vesting in the following language:

> "Technically a springing use, or what is now its equivalent, does not come within this definition. It does come within its object and purpose. Had the determinable fee been

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[86] 226 N. Y. 347.

[87] The facts were that the original grantee had entered upon the land before the assignment and destroyed the kiln. The court below held that the grantee or its assigns could not take advantage of a discontinuance of use caused by the grantee itself. 179 App. Div. (N. Y.) 313.

[88] 226 N. Y. 349.

> granted, not excepted, no question would arise. It is inconceivable that the revisers intended to make a distinction between two classes of cases, the effect of which is substantially identical. It must be that in speaking of a fee limited on a fee they had not in mind the technical distinction of the early conveyancers. They were considering future estates and their desire was that when such estates depended upon a contingency they should vest in possession within a reasonable period. Their language should, therefore, be so construed as to carry out their intention. When they speak of a fee limited on a fee in this connection they refer to the grant of any future fee which may arise on a contingency which limits a prior fee however such result is brought about."[89]

That the views taken by the New York court in these cases will be followed by those states which have adopted the New York Real Property Code seems hardly likely, yet seems no more unlikely than that New York would do so seemed a few years ago. Some of the statutory provisions especially relied upon by the New York court are, however, not found in all of such states, so there is to this extent less reason to be found by them for adopting the New York rule against remoteness.[90]

Under the law as it now stands in New York, assuming that the cases referred to represent the present state of the law, the effect is to render the statute prohibiting a suspension of the power of alienation chiefly effective in invalidating trusts, which in turn have been

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[89] 226 N. Y. 350.

[90] This is particularly true of that part of section 24 of the New York Revised Statutes especially relied upon in the Matter of Wilcox, i. e., the provision that, "a fee may be limited on a fee, on a contingency, which, if it should occur must happen within the period prescribed in this article." This provision appears in the section corresponding to section 24 of the New York Revised Statutes in the states of California (CIVIL CODE, Sec. 773), Montana (1 REVISED CODES, Sec. 4493), North Dakota, (1 COMPILED LAWS, Sec. 5316), and South Dakota (CIVIL CODE, Sec. 253). It has been omitted from the corresponding sections in the states of Arizona (CIVIL CODE, Sec. 4689), Indiana (2 BURN'S ANN. STS., Sec. 3995), Michigan (COMPILED LAWS, Sec. 11, 542), Minnesota, (GENERAL STATUTES, Sec. 6674), and Wisconsin (WISCONSIN STATUTES, Sec. 2048), while Oklahoma (GENERAL STATUTES, Sec. 5437), omits that part requiring that the contingency, "if it should occur, must happen within the period prescribed in this Article."

made inalienable by statute. It is to be hoped that if in other jurisdictions we are to have a rule against remoteness of vesting from the statutes, it will be found in sections prohibiting suspension of the power of alienation rather than in the sections relied upon by the New York courts, and, if so found, that it will be determined that it is the only rule to be found in the statutes.

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