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Suspension of the Power of Alienation

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T H E S I S.

SUSPENSION OF THE POWER OF ALIENATION ;

WITH SPECIAL REFERENCE TO THE LAWS OF NEW YORK.

-By-

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C O N T E N T S.

	Page.
Introduction	1.
I. What is the "Absolute Power of Alienation".....	3.
II. How long may the Power of Alienation be Suspended	5.
III. When, and on the Creation of what Estates is the Power of Alienation Suspended	9.
Remainders	19.

SUSPENSION OF THE POWER OF ALIENATION ;
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Introduction.

In a commercial country the laws which regulate and preserve the rights of free transmission of property and circulation of wealth are of the highest importance. In proportion as civilization advances and with it trade and commerce, the great fountains of wealth, in the same proportion will the necessity for the free and easy circulation and transmission of property be manifest. Without power of alienation, the value of property to the commonwealth is small indeed. The political necessity that conferred on the owners of property the absolute right to dispose of the whole or a portion of the whole of it would then forbid the exercise of that power in a manner fatal to its enjoyment in all future times or prejudicial to the general interests of society.

The objects of the rules against perpetuities are to preserve and guarantee the free circulation of property to a reasonable extent, and yet afford ample scope for the attention

to personal and family exigencies which it is neither the policy of the laws nor to the interest of society entirely to overlook. With these objects in view, the Legislature of the State of New York have enacted the following provisions :

"The absolute power of alienation shall not be suspended by any limitation or consid tion 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." (1 R. S. 8th Ed. 723, Sec. 15.)

"A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person to whom the first remainder is limited shall die under the age of twenty-one, or upon any other contingency by which the estate of such person may be determined before they attain their full age." (1 R. S. 8th Ed. 723, Sec. 16.)

The absolute power of alienation is suspended, "when there are no persons in being by whom an absolute fee in possession can be conveyed." (1 R. S. 8th Ed. 723, Sec. 14.)

These statutes affect all estates, interests, rights and possibilities of every character which are capable of interfering with the power of conveying the absolute fee in possession, and they impose the only restrictions against tying

up estates which are imposed, except as to estates in remainder. Although these statutes apply to estates in remainder as well as to all other estates, yet there are special statutory provisions which apply to remainders only, and which impose broader restrictions than those imposed on other estates, and for this reason remainders will be considered separately. For a better consideration of these statutes, as written above, this branch of the subject may be divided into three parts by the following questions :

I. What is the "absolute power of alienation" ?

II. How long may the power be suspended ?

III. When, and on the creation of what estates, is it suspended ?

A proper consideration of these questions involves nearly the whole question of the suspension of the power of alienation ; therefore, my article will be devoted principally to their answer in the order as written above.

I. What is the "Absolute Power of Alienation" ?

It may be said that not all estates which are limited to

commence upon the termination of more than two lives are void. On the contrary, an estate may be limited to commence upon the termination of any number of lives, provided that the absolute power of alienation is not suspended. It is, therefore, of the greatest importance to know accurately what is meant by the terms "absolute power of alienation."

The statute provides that the absolute power of alienation is suspended, "when there are no persons in being by whom an absolute fee in possession can be conveyed." (1 R. S. 8th Ed. 723, Sec. 14.) The statutes further provide that all expectant estates are alienable, descendible and devisable. (1 R. S. 8th Ed. 725, Sec. 35.) Now, since all expectant estates are alienable as well as estates in possession, it follows therefore that no matter how many different estates a fee is carved into, whether present or future, vested or contingent, as long as there is in being a representative for each estate, who, if he wishes, is capable of alienating the interest represented by him, there can be no suspension ; for, by the union of all, an absolute fee may be conveyed.

In order that an interest in property may be alienated, it is not necessary that such interest be indefeasibly vested. It is sufficient if the person to whom the interest will pass,

upon the happening of the contingency which vests the interest in the land in him, is in being and capable of alienating; for, by the joining of the two, an absolute indefeasible interest may be conveyed.

II. How long may the Power of Alienation be Suspended ?

The period during which the statute allows suspension of the absolute power of alienation is "two lives in being at the creation of the estate", with the single exception that, "a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person to whom the first remainder is limited shall die under the age of twenty-one, or upon any other contingency by which the estate of such person may be determined before they attain their full age." (1 R. S. 8th Ed. 723, Sec. 15, 16.)

In this State the question is not settled as to whether the existence of the certainty that a contingency will happen within two lives in being, as required by the statute, is determined by the facts as they existed at the time of making the will or at the death of the testator. The question turns

upon the construction of the words "the creation of the estate", as found in the statute. Thus, for instance, an estate is limited by will to take effect after the termination of four lives, during which time there is a suspension of the power of alienation. During the time between the making of the will and the testator's death two of the four persons die. Is the term of suspension valid because measured by two lives at the testator's death, or is it void because at the time of making the will if the testator had then died the will would have been void ? The statutory provisions on the subject are as follows : "The delivery of the grant, when an expectant estate is created by grant, and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate." (1 R. S. 8th Ed. 728, Sec. 128.) The English rule, and better opinion, seems to be that the facts as they exist at the death of the testator should be the criterion for determining the validity of the gift. The statute appears to regard only the situation as it exists at the testator's death, for "the creation of the estate" takes place at his death and the lives must be then in being. Besides, this is in harmony with the general principle that a will speaks as of the date of the testator's death.

In all cases the suspension must be bounded strictly by two lives. It is not enough that the provisions of an instrument are such that the suspension may terminate at the end of two lives. The rule is settled that any limitation is void, as in violation of the statute, by which the suspension of the power of alienation will not necessarily, under all possible circumstances, terminate within the prescribed period. The fact that by the happening of subsequent events the suspension would not be beyond two lives would not render the limitation valid, but where a limitation is made to take effect upon two alternative events, one of which is too remote, and the other valid as within the prescribed limits, although such limitation is void, as far as it depends upon the remote event, it will be allowed to take effect upon the happening of the alternate one, as long as it can be determined as to which state of facts will exist within two lives in being.

Although the term must be measured by lives, it need not continue throughout two complete lives, and a suspension for part of a life exhausts the privilege as completely as though an entire life had been named. For instance, a suspension during the minorities of A and B, is a suspension for two

lives.

It is not necessary that a term be measured in every case by lives. Any other measure may be employed. Thus, an estate may be limited to take effect after the lapse of ten years. But in every case there must be a controlling provision that in any event the term must terminate within two designated lives. For example, an estate to the unborn child of A, to take effect after the lapse of ten years, unless sooner terminated by the death of B and C.

The statute further requires that the lives shall be "in being" at the creation of the estate, but it is not necessary that both of the lives be specifically designated at the creation of the estate, as long as both of the lives are in being. There can be no uncertainty, however, as to one of the two lives, and the other must be capable of ascertainment upon or before the termination of the one. There are some cases, however, that the courts hold are not within the reason or policy of the rule that the term shall be measured by lives in being. Thus, in the case of Roberts v. Corning (98 N.Y. 239), it was held that a direction in a will that the sale of the testator's real estate should be made at public auction, after three weeks' notice by publication in newspapers, does

not suspend the power of alienation within the meaning of the statute, but was a mere prudential arrangement to secure a fair sale and prevent a sacrifice. It was not at such suspensions that the statute was aimed.

III. When, and on the Creation of what Estates is the Power of Alienation Suspended ?

When the statutes against the suspension of the power of alienation were first enacted it was thought that they applied only to future contingent estates, and it was so stated by the Revisers in their notes, but in the case of Everitt v. Everitt (29 N. Y. 39), the court recognized two ways in which there might be a suspension. The Judge, in the opinion, says : "The suspension, which it is the purpose of the statute to limit, may be effected by one of two methods,-- either by providing for the creation of future estates, to take effect upon the happening of some prospective event, the occurrence of which is essential to the vesting of such future estate, or by conveying the estate to trustees upon some authorized trust." Later, in the case of Radley v. Kuhn (97 N. Y. 35),

Judge Rapello shows that there is a third way by which there may be a suspension of the power of alienation ; viz. by the creation of an estate subject to a power in trust which temporarily prohibits a sale where the title is vested in persons who are not able to convey the land and thus destroy the power. These three methods of suspension have now become well recognized in the cases, and will be considered in their order.

First, suspension occasioned by future contingencies. The statutory provisions as to contingent estates are as follows : "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." (1 R. S. 8th Ed. 723.) There are thus two cases in which the estate is contingent : 1st, where the uncertainty is as to the person ; and, 2d, where the uncertainty is as to the event. In the last case, although the event is uncertain, yet the person who, either personally or by his heirs as such, will take the remainder if it ever vests at all, is ascertained. Now it has been seen that expectant estates are alienable, and that

the test in every case is whether the person who will eventually come into possession of the estate upon the happening of the contingency is in being. If he is, then there is no suspension of the power of alienation ; for, as the persons are in being and ascertained who, if the contingency happens, will take either personally or by their heirs as such, these persons may convey to the same person to whom the holders of the vested estates also convey, and the common grantee would thus receive an absolute fee. As to contingencies of the ~~first~~ second class, however, it is readily seen that they are, from the necessity of the case, inalienable. As long as the person who will take the estate upon the happening of the contingency is unascertained, there is no one who can release his interest and thus convey an absolute indefeasible fee.

The next class of cases is suspension occasioned by express trusts. In this class, suspension arises only from the fact that alienation is forbidden by the instrument creating the trust, or by statute. Section 55, Title 2, Chap. 1, Part II, of the Revised Statutes provides that express trusts may be created for the following purposes :

"1. To sell land for the benefit 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 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 against the suspension of the power of alienation.

"4. To receive the rents and profits of land and to accumulate the same for the purposes and within the limits prescribed in Article I."

In the first class of trusts allowed by statute, as written above, it is obvious that there can be no suspension of the power of alienation, unless the donor of the power of sale expressly stipulates that the land shall not be sold until after the lapse of a prescribed period. If the power of sale is postponed by the terms of the instrument, it should not be postponed beyond two lives in being, and should be limited expressly upon lives. But not every trust to sell property which is to be exercised after a definite term is an illegal restraint upon alienation. When a beneficiary under a power is also vested with the title to the real estate <u>as heir</u> or devisee, he may, before the power has been or could be exercised, convey the real estate by warranty deed, and thus de-

feat or annul the power of sale.

In trusts of the second class it becomes important to distinguish trusts to pay annuities, which do not occasion suspension, and a trust to apply an income, which belongs to the third class and which always occasions suspension. From a consideration of the cases, the distinction seems to be as follows : Where a trustee is directed to receive the rents and profits and apply or pay them over as such, the trust belongs to the third class. But where he is directed to pay a specific sum of money as such, and not as rents and profits, and whether in one lump sum or in successive specified lump sums, the trust belongs to the second class and the gift is either a legacy in the usual sense or an annuity, according to circumstances.

Trusts of the third class invariably occasion suspension of the power of alienation, for their very purpose and essence is that the property shall not be alienated. It is to this effect that the statute provides that "no person beneficially interested in a trust for the receipt of the rents or profits of lands can assign or in any manner dispose of such interest." (1 R. S. 8th Ed. 730, Sec. 63.) Also, in speaking of the same trust, the statute provides that "when 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." (1 R. S. 8th Ed. 731, Sec. 65.) It follows that all trusts to which these provisions apply necessarily suspend the absolute power of alienation.

Trusts of the fourth class must conform in every respect to the general provisions of the statute authorizing such accumulations, and must begin within the time permitted for the vesting of future estates. Accumulations of the rents and profits of land for the benefit of minors, to be paid to them upon their reaching their majority, occasion a suspension of the power of alienation during the period of such accumulations. But in the case of Radley v. Kuhn (67 N. Y. 35), where a direction was made in a will to accumulate a certain gross sum to be paid to the beneficiaries upon their attaining their majority, the court held that it did not render the estate inalienable, for the interest of the cestui que trust was assignable, the trust being for the payment of a sum in gross. The court said : "Where the sole object of the trust is to pay a sum in gross, by collecting and accumulating rents, etc., to a specific amount, the cestui que trust may release

or assign. The case come within the last part of the following statute : "No person beneficially interested in a trust for the receipt of the rents and profits of land can assign or in any manner dispose of such interest ; but the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." (1 R. S. 8th Ed. 730, Sec. 63.)

A third class of cases in which there is a suspension of the power of alienation is where estates are subject to powers in trust which temporarily prohibit a sale, and where the title is vested in persons not able to convey the land and thus destroy the power. "A power is an authority to do some act in relation to lands or the creation of estates therein which the owner granting or reserving such power might himself lawfully perform." (1 R. S. 8th Ed. 723.) Powers are either beneficial or in trust. They are beneficial when no person other than the grantee has by the terms of the creation any interest in its execution. They are in trust when any person or class or persons other than the grantee of such power is designated as entitled to the proceeds or other benefits to result from the alienation of the lands, according to the power. Every power in trust, unless its execution or non-

execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested. (1 R. S. 8th Ed. 734, Sec. 94, 95, 96.)

In beneficial powers there are statutory provisions as to such powers, by which the exercise of such a power may be compelled for the benefit of creditors. This is true, even where future estates are limited to take effect in the event that the power was not exercised by the beneficiary. Or, again, the beneficiary may at any time exercise the power himself. If the beneficiary is only empowered to sell less than a fee, then he and those in whom the fee is vested may convey an absolute fee. It is thus obvious that in powers of this kind there can be no suspension of the power of alienation.

It would seem that whenever under a power in trust the beneficiary is also vested with the title to the real estate, as the heir or devisee, he may, before the power has been or could be exercised, convey the real estate by warranty deed and thus defeat or annul the power of sale. Thus, in the case of Hetzel v. Barber (69 N. Y. 1), a woman gave by will a certain piece of real property to her two daughters ; the

husband was authorized to sell and convey it, and in case of sale was directed to invest the daughters' portions of the proceeds and keep the same invested, to be paid to them, with the accumulations of interest, when they severally reached the age of twenty-five years. Before the daughters reached the age of twenty-five years, but after they had attained their majority, they deeded away the property for an adequate consideration. The court held that as there was no limitation on their right to convey, and as upon such conveyance they ceased to have any interest in the execution of the power which was created solely for their benefit, and which could only thereafter be executed for the benefit of the defendant, the conveyance extinguished the power and a subsequent conveyance in execution of it would be inoperative, for the beneficiaries had ceased to have any interest in the power, and as the power could be exercised only for their benefit, when their interest ceased the power became annulled. Thus it is seen that in powers of this kind, although the donee is instructed not to sell until the lapse of a definite period, still there is no suspension of the power of alienation, for there are persons in being who can convey an absolute fee.

A general power of sale will not occasion suspension, for

by the terms of the power an absolute fee may be conveyed at any time. Where there is a power to sell lands and to pay over the proceeds to a trustee at some future time, if the trust is one where the cestui que trust cannot alien his interest in the trust, it is obvious that during the period before the funds are paid over to the trustee, as well as afterwards, the power of conveying an absolute fee is suspended. So that if a power of sale was directed to be exercised after the lapse of a fixed future time, and was not limited by lives, such power would be illegal as against the statute forbidding perpetuities. Also, where there is a power to sell and to pay over the proceeds to persons to be ascertained in the future, until such persons are ascertained, an absolute fee cannot be conveyed ; for the persons beneficially interested can not release their interests until it can be ascertained just whom those persons will be.

The courts have held that powers may be created for the express purpose of obviating a suspension of the power of alienation, which otherwise would exist if the power was not created. For instance, if an estate should be created which would suspend the power of alienation beyond the statutory period, and if in connection with the creation of such an es-

tate an untrammelled power is also granted to another, under which the property involved may at any time be absolutely alienable, it cannot be said that there are no persons in being capable of conveying an absolute fee.

Remainders.

As has before been mentioned, the statutes against illegally suspending the power of alienation extend to all estates, rights, interests and possibilities, and impose the only restraint upon the disposition of property that is imposed, with the single exception of remainders. I will now consider the definition of "remainders", and what additional requirements are imposed in estates of this kind.

A remainder is a future estate in lands which is preceded and supported by a particular estate in possession, which takes effect immediately upon the determination of the prior estate, and which is created at the same time and by the same conveyance. (Tiedeman on Real Property, p. 311.) If the future estate does not take effect in possession immediately upon the expiration of the prior estate, it is not a remain-

der, nor is not considered as such under the statutes we are about to consider.

The statutory provisions in regard to remainders are as follows :

"A contingent remainder shall not be created on a term of years, unless 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." (1 R. S. 8th Ed. 724, Sec. 24.)

"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 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 estate had been created." (1 R. S. 8th Ed. 724, Sec. 17.)

"A fee may be limited on a fee upon a contingency, which if it should occur must happen within the statutory period." (1 R. S. 8th Ed. 724, Sec. 24.)

"A contingent remainder in fee may be created upon 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." (1 R. S. 8th Ed. 723, Sec. 16.)

It will be noticed that these statutes require that the other remainder shall "vest" within the statutory period, instead of providing that the "power of alienation" shall not be suspended. It thus becomes important to ascertain what vesting satisfies the statute. There are three ways in which the term is used :

1. Vested in possession. An estate is in possession where the owner has an immediate right to the possession of the land. (1 R. S. 8th Ed. 723.)

2. Vested in interest, where there is a present fixed right to an estate to be enjoyed in the future. For example, an estate to A for life ; the remainder to B, in fee.

3. A vested right to a contingent estate. Here the estate in question is not in itself vested at all, either in possession or interest. The estate is contingent, but the right to take it in possession, if it ever does vest at all, is a vested right.

Vesting in interest is the requirement which the statute imposes. The remainder may, however, vest either absolutely or defeasibly ; either form of vesting in interest is sufficient. If it is defeasibly vested, the defeasance clause must be limited to take effect within the statutory period, otherwise it will be of no effect and will vest absolutely.

It will be seen that the requirements as to remainders are broader than the provisions against suspension of the power of alienation, for the reason that all that is required in order that the alienation shall not be suspended is that there be persons in being who are capable of joining and conveying an absolute fee ; a vested right to a future contingent estate would be sufficient to give the party having such interest a power to alienate or release his interest. But in remainders, a vested right to a contingent estate is not sufficient ; it must be vested in interest within the statutory period in order to satisfy the statutes. As regards successive life estates, however, the rule is still more strict, for simply vesting is not enough. Here the statute absolutely forbids more than two successive life estates, even though all the estates are vested in interest.

The term during which the vesting of remainders may be

postponed is two lives in being, with but one single exception, which allows an additional measure of the term, and that is where a contingent remainder in fee is created on a prior remainder in fee. This extension of time is limited to but one case, and that is where the preceding fee is itself a remainder which has been limited, either to an infant or to a person unborn, and such remainder has taken effect after the vesting has already been postponed for two lives. Now, without special authority by statute, the vesting must after such a limitation have been absolute, but the statute comes in and provides that where such a remainder is given to a minor, a further limitation may be made, to take effect in case the person to whom the first remainder is limited shall die under the age of twenty-one, and that such further limitation shall be valid.

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