1892

Perpetuities (With a Special Reference to New York)

William B. Daley
Cornell Law School

GRADUATION THESIS.

WRITTEN FOR DEGREE OF L L.B.

PERPETUITIES

(WITH SPECIAL REFERENCE TO NEW YORK)

WILLIAM BAILEY DALEY.

CORNELL UNIVERSITY SCHOOL OF LAW.

1892.

C O N T E N T S .

P E R P E T U I T I E S .

The term perpetuity is applied to an illegal suspension of the power of alienation, or to grants of property wherein the vesting of an estate or interest is unlawfully postponed. The doctrine of perpetuities, as it is called, is one of the most intricate and unsettled branches of the law. It is a cantena of judicial decisions upon the many attempts to so convey property that persons may have the beneficial enjoyment of it without being able to convey it away, or subject it to the claims of their creditors.

These attempts have been ingenious and subtle but the courts, and in modern times,the Legislature, have been prompt to detect and to defeat all such attempts, and to allow the power of alienation to be suspended only for a limited period. Nevertheless, even in recent times, scarcely a case involving the construction of a will arises for judicial determination, in which the question of

illegal suspension is not involved; and it is often difficult to tell when the power of alienation is suspended.

In the Duke of Norfolk's Case, (3 Ch. Cases, 19) the judge said:- "The power of alienation is suspended, where, though all who have interest should join in the conveyance, yet they could not bar or pass the estate." This definition has been substantially adopted in the Revised Statutes.

The attempt by the great Nobles and Lords of early Englandto have their lands descend to their heirs, uninterrupted by and regardless of the rights of the Crown, and of creditors and others, and the resistance of this attempt by the courts, is an interesting conflict in the study of this subject. The first attempt was by a limitation , whereby a fee was restrained to some particular heirs of a person exclusive of others. But this attempt to create a perpetuity was immediately thwarted by the judges, who by a subtle line of reasoningheld that such a gift was a gift upon condition; that it should revert to the donor, if the donee had no heirs of his body. They, therefore, called it a fee simple on conditiontthat he had issue; and observed that when any condition was performed, it was thenceforth entirely gone and the thing to

which it was before annexed became absolute, and wholly unconditional, so that when the grantee had issue, his estate was supposed to become absolute by the performance of the condition, and he might then alien his land, and , therefore the power of alienation was suspended only during the life of one person in being at the longest.

The next attempt was by act of Parliament, the statute of Westminister the Second, (commonly called the statute 'de donis conditionabilis') which paid a greater regard to the will and to the intentions of the donor than to the propriety of such intentions, and enacted that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue if there were any; or if none, should revert to the donor.

Many and great inconveniences arose because of the suspension of the power of alienation allowed by this statute. Bacon, Coke and Littleton have condemned the act, and declared that the true policy of the common law was thereby overthrown; but the people were powerless to effect an appeal, and the judges, while abhoring the perpetuity thus created, were incapable of devising any subterfuge, and about two centuries later in the reign of

Edward lV. (Taltarums case Co. Litt. 19b) by a bold and unexampled stretch of the power of judicial legislation, the judges openly declared the application of a common recovery to be a sufficient bar to an estate tail, and their determined attacks soon rendered the statute null . The wise policy and foresight of the early judges in prevent- all such attempts is borne out even at the present day.

Estates tail were introduced in this country with the other parts of the English jurisprudence; and Kent states that they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or a common recovery. In New York estates tail were abolished by statute as early as 1782.

The history of executory devises presents an interesting view of the stable policy of the common law judges who abhorred perpetuities. The statute of entails having been evaded by means of common recoveries,; and provisions and conditions not to alien, with a cesser of the estate on any such attempt by the tenant, having been declared invalid as a means to recall perpetuities; the judges looked upon executory limitations as a resort to attain the same object, and they were permitted with great caution. In the case of Pells v. Brown, (Cro. Jac. 590.) an

executory devise of the fee upon a contingency not exceeding one life was allowed,,and it was held that it could not be barred by a recovery, but was silent as to executory bequests of chattels. The limits of an executory devise were gradually enlarged, however, and extended to any number of lives in being; then to any number of lives in being and the period of gestation to reach a posthumous child; and lastly the doctrine was finally settled and determined by precise limits and the period of twenty one years to lives in being, and the period of gestation was held allowable and also applicable to a chattel interest.

The rule against perpetuities did not apply to the creation of remainders. The only restriction imposed upon the limitation of a contingent remainder at common law is that there can be no limitation to the unborn child of an unborn person. A contingent remainder could at any time be destroyed by the tenant of the particular estate by a fine or recovery in case of an estate tail, or by feoffment or fine in the case of an estate for life; and therefore the power of alienation was not suspended according to the weight of authority.

By the rules of the ancient common law there could

be no future property to take place in expectancy, created in personal goods and chattels, because it was thought that personal property was of too transitory a nature, and liable to loss and destruction , and also that the exigency of trade required its free circulation, as otherwise it would put a stop to the freedom of commerce. But an exception was made in the case of last wills and testaments; for a man might by testamentary gift give the use of personal property to a man for life, and after his death to a third person absolutely. But later this distinction was disregarded, and a person might create such a remainder by either deed or will. where an estate tail in things personal was given to the first,or any subsequent possessor it vests in him the total property,and no remainder over was permitted on such a limitation; for the judges were ever watchful of an attempt to suspend the power of alienation, and condemned this as tending to a perpetuity as the devisee or grantee in tail of a chattel has no method of barring the entail, and therefore the law vested in him at once the entire dominion of the goods.

The rules against perpetuities put, as we see, a limit upon the postponement of the vesting of property; but it did no more, therefore, it was competent for a

testator to create a trust for the accumulation of the income of propertyfor the full period of any number of lives in beingand twenty one years thereafter, as was done in the celebrated case of Thelluson v. Woodford, (4 Vessey 247) Here the will of Thelluson arose for construction . He had devised the bulk of his immense property to trustees for the purpose of accumulation during the lives of his three sons , and of all their sons who should be living at the time of his death, or be born in due time afterwards, and during the life of the suvivor of them, and upon t he death of this last to go,to the eldest male lineal descendant of his three sons etc.. The court held that this will was valid under the rules applicable to executory devises. This decision occasioned the passage of a statute(39 & 40 Geo. lll.)prohibiting any settlement of property for accumulation of property for any longer term than the life of the settler and the period of twenty one years from his death; or the minority of any living , or en ventre sa mere at the time of his death; or the minority of any person who would be beneficially entitled to the profits under the settlement if of full age.

Other schemes to create perpetuities were devised, as by an executory trust directing estates for life to

unborn children, to be so constituted as to make them tenants for life, and to let in the issue to take as purchasers;(Humberston v. id. 1 P. Will. 322.) and by a power of revocation, to be excercised upon the birth of each ten ant in tail, and to substitute strict settlement; (Spencer v. Duke of M., 5 Bro. P. C. 592.) These and many other attempts to numerous to mention arose for judicial investigation and were crushed by the judges.

The only case in which a perpetuity could be successfully created at common law was by establishing a trust for a charitable purpose. Such trusts, if they did not originate in the statute of 43 Elizabeth, were at least assured and regulated by it. These trusts , although they do tend to a perpetuity, are allowable in Englandat the present day.

Having shown the application and extent of the rule against perpetuities at common law, I will now examine the present New York law upon this subject. In New York the rule against the suspension of the power of alienation is more stringent than at common law or in most of the States.

The general fundamental rule in regard to real estate is, that 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 inbeing at the creation of the estate, with one exception ; where a contingent remainder infee 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 ,or upon any other contingency by which the estate of such persons may be determined before they attain their full age. A suspension of the absolute power of alienation for a certain term not measured by lives however short is void , as until my youngest daughter is twenty five , or for three years . But it was held in Benedict v. Webb , (98 N.Y., 460.) that a suspension for a minority is a suspension for one statuory life.

The absolute power of alienation is suspended where there are no persons in being by whom an absolute fee in possession can be conveyed; that is , there must be persons in being who by combining the several estates , rights, interests or contingencies that they represent can, if they all wish to, patch together an absolute fee. Whenever any future estate , right, interest or possibility can be released and thus extinguished, its existance does not operate to suspend the absolute power of alienation ; but the statute is not aimed at a

case where a person is incapable of alienating because of infancy, lunacy etc.

In contingent estates, where the uncertainty is as to the persons who are to take, there is obviously a suspension of the power of alienation; but where the uncertainty is as to the event and the personswho if the contingency happens will take are in esse and ascertainable the estate is alienable, for these persons, and the owner of the particular estate may comvey to a common grantee who would receice an absolute fee . As for instance if an estatebe givento A for life with renainder to B in fee provided he has children living at A's death, but if he does not then to C . Here there is a contingent remainder in B depending on an uncertainty as to, an event yet the absolute power of alienation is not suspended as B and C may assign their interest to A, who may then convey an absolute fee. The court , however, are careless in constantly stating that where the future estate is contingent the power of alienation is suspended, which is not correct in every case as has been shown, nevertheless they apply the real test of alienability above given to the facts of each case as it arises without consi ering whether it is contingent or not and no harm is done.

The delivery of the grant, where an expectant estate is created by grant, and where it is created by devise the death of the testator, is deemed the time of the creation of the estate; and the instrument creating the estate must be drawn, so that the suspension must inevitably terminate within the statutory period. It is not enough that the provisions of a given instrument are such that the suspension may terminate within the requirements of the statute. Moreover, if the terms are such as to indicate a suspension for more than two lives in being, still, if under all of the circumstances of the case, the absolute fee must become alienable within two lives in being, it is valid. As for instance, where a testator devised certain land to his wife, and her heirs in trust, to receive the rents and profits to apply them to the use of, or pay to, each of his seven children, in equal portions, during their respective lives. In this case there would seem to be an unlawful suspension, but there is not; because, if the cestui que trust survive the trustee, the whole estate being inalienable during her life, on her death must vest in the cestui que trust by descent as her heirs at law and as a person cannot be trustee for himself, the trust

must then cease. A merger results, and the estate is inalienable only during her life.

The exception to the rule, that the power of alienation shall not be suspended for more than two lives in being, is simple and needs little explanation. It applies to all cases where there is allready a remainder in fee, limited to an infant or person not in being, and it says, in effect, that regardless of whether that remainder may itself continue contingent till the end of the two lives or not, in either case a future and contingent remainder may be limited to vest, in case of the termination of the prior remainder in fee during the minority of its owner.

In the case of all other contingent remainders, it is necessary , under the provisions regulating the creation of remainders, that they must vest in interest during the continuance of not more than two lives in being. The term vested in interest is a wider term than absolute alienability, and indicates a present fixed right of future enjoyment.

Where land is given in undivided shares to two or more persons as tenants in common for life, with cross remainders, they constitute successive estates for life

and consequently there can be under the statute but two life estates in all, as to each parcel or share. Thus where there is a gift to A and B as tenants in common for life, with cross remainders, and after the death of both to C for life , and then with a remainder in fee to such children as C might leave: one of the shares is void, both as to the remainder for life to C and the remainder over; but it cannot be ascertained which one it is until the death of A or B. If A and B had been joint tenants with a like remainder, it would have been valid; as there is no such thing as a remainder among joint tenants, for each is in legal contemplation at all times seized of the entire estate.

The statutory period allowed for suspension of absolute ownership of personal property is in all cases two lives in being. In all other respects limitations of future contingent interests in personal property are governed by the rules prescribed in relation to future estates in land. But while real property must become absolutely alienable, the provisions in regard to personalty require vesting in beneficial owners. So long as the right to personal property remains contingent, the ownership cannot be

said to be absolute; as soon, however, as it vests absolutely, suspension of the absolute ownership ceases.

Where personal property is given by will, or otherwise, with restrictions which delay merely the right to possession, the absolu te ownership is not suspended: as where a fund is given to A for life, with remainder to B, C and D in equal shares to be paid them by the executors ten years after A's death, the interest to be paid to them in the mean time. The property vests in them as a present gift. The right of the executor or trustee to retain it is regarded as a power which does not interfere with vesting the absolute ownership, or with the owners free right to assign or release. But where a present gift is not intended, the vesting is postponed: as where a will provides for a future division among the persons who shall then answer the a given description. The question in each case is, did the testator intend a present gift? and if he did not, the vesting must take place within two lives in being.

The law against the suspension of alienationof real or personal property is applicable to ever species of conveyance and limitation: whether it be by deed or will; whether limited by an executory devise, or a springing

use , or for a charitable purpose;and whether in the form of a power in trust, or of a legal express trust.

In determining whether the power of alienation is suspended, where a trust is created , the same rules which have been heretofore considered. In New York express trust can only be created for such purposes as are allowable by statute. Under the first two sections of the provisions of the Revised Statutes specifying such purpose,they may be created: to sell lands for the benefit of creditors, and to sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon . In such trusts where the direction is to sell the land, there is obviously no suspension of the power of alienation; as the only purpose for which they could be created would necessitate an immediate sale. But where the direction is to mortgage or lease lands, it is not so clear; and it is sometimes difficult to tell whether the trust comes under the second or third section. If it comes under the second, the interest of the beneficiary is assignable and the power of alienation is not suspended.

Under the third section, trusts may be created:"To receive the rents and profits of land 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." It is further provided in the statute of uses and trusts, that where the trust is or shall be expressed in the instrument creating the estate, every sale or conveyance by the trustee in contravention of the trust shall be void; and that a beneficiary for the receipt of rents and profits cannot assign or dispose of such interest. Therefore, the statute makes the estate inalienable, and also expressly subject to the rules against suspension. So it becomes very necessary to determine whether a trust comes under the second or third section, and the courts have decided that where a trustee is directed to receive the rents and profits and apply or pay them over, such trust belongs to the third class, but where he is directed to pay a specific sum of money assuch, and not as rents and profits, the trust belongs to the second class.

And now as to the fourth and last purpose for which trusts can be created: that is, " To receive the rents and profits of land and to accumulate the same for the purpose, and within the limits prescribed in the first article of

this act." Article first provides in substance, that accumulations may be made for the benefit of one or more minors then in being, and terminate with their minority If the accumulation is to commence at any time after the creation of the estate out of which the rents and profits are to arise; it shall commence within two lives in being, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

There is an important distinction between accumulations of real and personal property, here to be noted. In the case of real property, accumulations for the benefit of an unborn child may be directed to commence at the end of two lives in being, at the birth of such child and extend through his minority; but in the case of personal property , it must commence before the expiration of the second life, otherwise the provisions are the same. (Manicev. Manice, 43 N. Y. 383.)

Every accumulatiom must be for the sole benefit an i fant and where it is for the purpose of paying a lump sum legacy the power of alienation is not suspended, nevertheless, where the accumulation is to commence after

the creation of the estate, alienation may be suspended and the rules already considered are to be applied in determining its validity.

I will now consider the rules against perpetuitics, as applied to powers. It seems an anomaly to say , that the power of alienation may be suspended by the creation of a power, for if there is in fact a power in any body to sell the property, it cannot be said that the power of alienation is wanting, nevertheless, such may be the case where the power cannot be excercised until the expiration of a certain time. If the power can be exercised only at a time beyond that within which all limitations must take effect in possession , namely, two lives in beimg, the power is void; so also if the power is special, and the appointment is limited to a person or to persons none of whom can take from being to remote under the rule, thus the power to appoint among great- grandchildren of the testator. (Dana v. Murray, 122 N. Y. 613.)

Not only may the power of alienation be suspended where there is a power to sell land at a future day and pay over the proceeds to persons,who,cannot till then be ascertaind ; but also where the direction is to pay the

proceeds to a trustee.

If a trust is created which involves suspension, and a power is given to the trustee to sell the land and thereby entirely free the proceeds from the operation of the execution of the trust, the existence of the power must obviate any suspension of the power of alienation,; but if the proceeds of such sale are to remain subject to the execution of the trust, then alienation is suspended. (Brewer v. Brewer, 11 Hun, 147.)

The period during which the absolute power of alienation may be suspended by any instrument in execution of a power is computed, not from the date of such instrument, but from the time of the creation of the power.

Where the execution of a power in trust to sell real estate is unlimited as to time, it is not for that reason invalid; the mere possibility of an illegal appointment will not invalidate the power if it is in the end properly exercised. The rules governing the creation of powers in real property are to be applied so far as applicable to powers concerning personal property, keeping in mind, however, the distinction already considered between suspension of power of alienation, and of absolute owner-

ship. (Hutton v. Benkard, 92 N. Y. 295.)

The earlier deci sions of this State tended towards holding perpetual trusts for charitable purposes valid. The leading case was that of Williams v. Williams, (4 Sel 484.)where it was held that the rule against perpetuitées in New York did not apply to gifts for a charitable purpose. Here the issue was as to the validity of a bequest to three persons, by name, directing the application of the fund to the education of the children of the poor in Huntington at the academy in that village. It also contained provisions for perserving a succession of trustees to apply the fund, and was upheld as valid. The decision did not meet with favor from the courts, and was continually distinguished, critized, and finally overruled in the case of Bascomb v. Albertson, (34 N. Y. 584.) The court , after a most careful and exaustive research, decided that a gift to a charitable use was subject to the rules against perpetuities, and that in determining whether the viceof perpetuity attaches, it is of no significance whatever that the limitations are to what are understood as charitable objects.

It has been the policy of this State, nevertheless,

to encourage gifts and legacies to legally incorporated societies organized for charitable purposes; but the law has thrown around such institutions necessary and healthful restrictions upon their taking and holding property a devise to a corporation is prohibited except in cases where by the law of its creation or some other law of the State the particular corporation is authorized to take by devise, and corporations can only take and hold property to the amounts an d for the purposes prescribed by their charters; to this extent each act of incorporation is a dispensation (in favor of the particular corporation in respect to the prohibition of the statutes against perpetuities.

I have refrained from going into this subject more in detail as I regard a clear precise presentation as more beneficial and important than a more minute and voluminous disquisition, and indeedthis is rendered unnecessary as the so called doctrine of perpetuities is no longer an uncertain metaphysical policy, the fundamental principles being governed by postive legislation. Most of the difficulties of the present day are in determining intention, and when this is once fixed upon, the application of the rules becomes comparatively easy.