CHAPTER 20

What Suspends the Absolute Power of Alienation?

SECTION 14 of Chapter 62, Revised Statutes of 1846, provided, “the absolute power of alienation . . . is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.” Such suspension can be caused by (1) an indestructible future interest, (2) an indestructible power, and (3) an indestructible trust. These three forms of suspension will be considered in the following sections of this chapter.

A. INDESTRUCTIBLE FUTURE INTERESTS

A limitation of an indestructible future interest to a person or corporation not in being suspends the absolute power of alienation. Such a person or corporation cannot convey his or its interest, so “there are no persons in being, by whom an absolute fee in possession can be conveyed.” If Andrew Baker devises land to


John Stiles, who has no children, for life, remainder to the first son of John, the absolute power of alienation is suspended until John has a son. Similarly, a limitation of an indestructible future interest to a class, the membership of which may possibly include a person or corporation not presently in being, suspends the absolute power of alienation.\textsuperscript{78} If Andrew Baker devises land to John Stiles for life, remainder to the children of John, the absolute power of alienation is suspended until the death of John because children who were not in being when the conveyance took effect may become members of the class. In \textit{Trufant v. Nunneley},\textsuperscript{79} a testator devised three tracts of land, each to a named child for the life of that child. A later clause of the will devised the three tracts to "the body heirs of my said son and daughters, share and share alike." It was held that the latter limitation suspended the absolute power of alienation for three lives. The "body heirs" of the three children might include persons who came into being after the deaths of the first two.

A limitation of an indestructible future interest to a


person or persons so described that neither the takers nor the group from among whom the takers are to be selected are presently ascertainable suspends the absolute power of alienation. No person or group of persons (except the whole populace) can convey the future interest, so "there are no persons in being, by whom an absolute fee in possession can be conveyed." If Andrew Baker devises land to John Stiles for life, remainder to the person who is Governor of Michigan when John dies, the absolute power of alienation is suspended until the death of John.

Vested future interests are, by their nature, owned by persons who are in being and ascertained. There has never been any doubt that a vested future interest, not subject to a trust, does not suspend the absolute power of alienation.

The notes of the New York revisers give the impression that they thought that a contingent future interest suspends the absolute power of alienation, although limited to a presently ascertainable living person. This would mean that the suspension statutes, like the com-

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81 Toms v. Williams, 41 Mich. 552, 2 N.W. 814 (1879); Chambers v. Shaw, 52 Mich. 18, 17 N.W. 223 (1883) (vested interest in child en ventre sa mere); Case v. Green, 78 Mich. 540, 44 N.W. 578 (1889); Hovey v. Nellis, 98 Mich. 374, 57 N.W. 255 (1894); Hull v. Osborn, 151 Mich. 8, 113 N.W. 784 (1908); McInerny v. Haase, 163 Mich. 364, 128 N.W. 215 (1910); Kemp v. Sutton, 233 Mich. 249, 206 N.W. 366 (1925); Rodey v. Stotz, 280 Mich. 90, 275 N.W. 404 (1937); In re Dingler's Estate, 319 Mich. 189, 29 N.W. (2d) 108 (1947). The statement in the text should be read with the qualification that a limitation to a class which may open to admit persons not presently in being or not presently ascertainable suspends the absolute power of alienation although the interests of those members of the class who are in being and ascertained are vested. Part Three, notes 78, 79, supra. It is not the vested interests which cause the suspension, however, so the statement in the text is literally accurate.

82 Part Three, note 6 supra.
mon-law Rule Against Perpetuities, prohibited remoteness of vesting as such. Because contingent future interests were inalienable at common law,83 their existence did suspend the absolute power of alienation. But contingent future interests are alienable under the New York and Michigan statutes,84 so the existence of such an interest does not prevent conveyance of an "absolute fee in possession" if all possible takers are ascertained living persons. If Andrew Baker conveys land to James Thorpe and his heirs so long as the Penobscot Building stands, remainder to John Stiles and his heirs, the interest of John is contingent, but James and John are "persons in being, by whom an absolute fee in possession can be conveyed." Similarly, if Andrew Baker devises land to John Stiles, who has four sons, for life, remainder to that son of John now living who makes the best grades in college, the remainder is contingent until all of John's living sons finish college, but John and his four sons are "persons in being, by whom an absolute fee in possession can be conveyed."

The New York Revised Statutes of 1829 contained two provisions which expressly prohibited remoteness of vesting. Sections 20 and 24 provided,

"§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.

"§24. - - - a fee may be limited on a fee, upon a

83 Part One, note §59 supra.
contingency, which, if it should occur, must happen within the period prescribed in this Article.” 85

Accordingly, it has been held in New York that a future interest in fee limited on a fee is void unless certain to vest within the statutory period, even though it is limited to an ascertained living person who could convey it. 86 This is not because such a future interest suspends the absolute power of alienation, but because Section 24 of the New York statute so provided. The quoted portion of Section 24 was not adopted in Michigan; the only provision against remoteness of vesting, as such, in the Michigan statutory scheme being that of Section 20.

In several of the earlier cases, the Michigan Supreme Court fell into the same error as the New York revisers by deeming suspension of the absolute power of alienation synonymous with suspension of vesting. Thus in Toms v. Williams, 87 Chief Justice Campbell said,


"The statutes restricting perpetuities are confined to avoiding future estates that are made more remote in their vesting than two lives in being, and such arrangements as serve to postpone them. In all cases where the application of the rules against perpetuities is invoked, the character of the interest as vested or otherwise is the turning consideration. Revisor’s note to Part 2, Ch. 1, New York Revised Statutes."

In one case, *State v. Holmes,* the erroneous notion that a limitation of a contingent future interest to an ascertained person suspends the absolute power of alienation controlled the decision. There the residue of an estate was devised to the testator’s wife for life, remainder, if the State of Michigan should accept and by due enactment within five years after the death of the wife erect a public educational or charitable institution on the devised land, to the State, otherwise to the testator’s grandson. The Court held both limitations in remainder void, saying that a condition precedent suspends the absolute power of alienation and that all of the parties together could not convey an absolute fee in possession until the performance of the condition or the expiration of five years after the widow’s death, a period in gross not permitted by Section 15. This decision was unsound. The limitations in remainder did suspend vesting for a period which might extend five years beyond a life in being, but the alternative contingent remainders of the State and the grandson were

88 115 Mich. 456, 73 N.W. 548 (1898). The decision might be defended under the ancient rule that when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for a public or charitable purpose, the corporation was incapable of alienating the property. Part One, note 219 *supra.* The difficulty with this theory is that it would have made all limitations of present vested interests to public and charitable corporations illegally suspend the absolute power of alienation, which they did not. Part Two, notes 396-400, *supra.*

89 Part Three, note 1 *supra.*
alienable, so they could unite to convey an absolute fee in possession from the moment of the widow's death. Indeed, the absolute power of alienation was not even suspended during the widow's lifetime, since she could join the State and the grandson in a conveyance of the fee.

The later Michigan decisions make it clear that a contingent future interest does not suspend the absolute power of alienation if there are persons in being who can unite to convey an absolute fee in possession; that suspension of the absolute power of alienation is not synonymous with suspension of vesting. This was first clearly recognized in Torpy v. Betts, where land was devised to the testator's widow for life, remainder to her son Frank in fee, on condition that he or his representatives pay $500 to her daughter Grace or her legal representatives. As the Court observed, even if the provision for payment of $500 was a condition precedent to the vesting of the remainder which might be performed at a time beyond two lives in being, Frank and Grace or their issue could convey an absolute fee in possession after the death of their mother. The opinion stated, "if an estate must go to persons in esse, the power of alienation would never be suspended, as, by joining, the owners of the various estates could always convey the fee." In Fitzgerald v. City of Big Rapids, a testatrix devised

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91 123 Mich. 239, 81 N.W. 1094 (1900). There were alternative contingent limitations of the remainder in the event of Frank's predeceasing his mother without surviving issue (1) to Grace, (2) if Grace predeceased her mother without surviving issue, as the mother should appoint.

92 123 Mich. 239 at 243.

93 123 Mich. 281, 82 N.W. 56 (1900).
her homestead to her executor to convey to the city, if it would agree to maintain a free public library thereon forever, such conveyance to be subject to a provision that if the premises were used for other purposes or not used for library purposes for three years, the land should "revert" to named legatees. If the city should not agree to those terms, the executor was directed to sell the land and pay the proceeds to the named legatees. These provisions were held valid, the Court saying, "If there are in existence persons who, by joining in a conveyance or by successive releases, are able to pass the whole estate, the requirements of the statute are met." 94 This decision would seem to overrule that in State v. Holmes, 95 where the limitations were virtually identical.

In Russell v. Musson, 96 land was devised to Guy and Clara, his wife, jointly, for their lives, remainder to the children of Guy surviving him. After the deaths of Guy and Clara, if Guy died without children, the land was devised to Josiah and Hannah in equal shares in fee, charged with support of their mother. If Josiah or Hannah should die without issue, his share was to pass to the survivor, and if both should die without issue, the

94 123 Mich. 281 at 283. In Windiate v. Lorman, 236 Mich. 531, at 534, 211 N.W. 62 (1926) it was held that a perpetual option to purchase did not suspend the absolute power of alienation, "because at all times there were persons in being by whom an absolute fee in possession could have been conveyed."

95 Part Three, note 88 supra.

96 240 Mich. 631, 216 N.W. 428 (1927). In Moss v. Axford, 246 Mich. 288, 224 N.W. 425 (1929), testatrix devised the residue of her estate to her executor "with the instructions to pay the same to the person who has given me the best care in my declining years and who in his opinion is the most worthy of my said property." This probably suspended vesting until the executor designated the residuary legatee and no measuring lives were specified, but it was held valid, the Court saying, "The will provided no restriction on alienation. The beneficiary, whoever it might be, was in being, and she and the trustee could have conveyed an absolute fee at any time." This was correct if it be assumed that the class of persons from which the executor could select was ascertainable.
land was to pass to their mother, Sarah, in fee. This disposition of the ultimate remainder suspended vesting for three lives, those of Guy, Josiah, and Hannah, but it was held valid because it did not suspend the absolute power of alienation beyond the life of Guy. On his death Clara and his children could convey a fee or, if there were no children, Clara, Josiah, Hannah, and Sarah could together convey an absolute fee in possession.

_Michigan Trust Co. v. Baker_97 involved the validity of a will which devised land to the testatrix's husband until his death or remarriage, remainder to a trustee to convert the land into money and hold the money on trust for various persons. In holding that the direction to convert prevented suspension of the absolute power of alienation for more than one life, the Court said,

"It must be kept in mind that, while the rule against perpetuities applies to future interests in both real and personal property, it has nothing to do with the statutory prohibition against suspension of power of alienation. The rule requires vesting of estates within a period, while the statute prohibits inalienability beyond a period; the rule is a restraint only upon future interests and has no concern with present interests; the statute reaches vested estates in real property but shorn of alienability."98

_In Rodey v. Stotz_,99 a will provided that the testator's nephew Adolph should have the use, income benefit, and control of property devised to Adolph's children until the youngest of the children attained the age of twenty-one, and that the testator's nephew Fred should have like enjoyment of property devised to Fred's chil-

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97 226 Mich. 72, 196 N.W. 976 (1924).
dren until the youngest of these attained the age of twenty-one. Subject to these provisions, all the property was devised to four named children of Adolph and four named children of Fred, share and share alike. The Court, in holding that the remainders vested in the eight children of the nephews on the death of the testator and that the dispositions were fully valid, said,

"There is no suspension of the power of alienation when there are ascertainable persons in being, who together can convey an absolute fee or interest in possession and this whether their interests are vested or contingent - - -.

"-- The question, however, is raised whether 3 Comp. Laws 1929, §§12934, 12935, lay down a rule as to remoteness of vesting in addition to a rule regarding the suspension of the power of alienation. This question is raised and answered in 2 Simes, Future Interests, p.481, in which it is stated:

"'Is the power of alienation illegally suspended if there is a contingent future interest which may not vest within lives in being, even though there is a group of ascertained persons who may alienate in fee simple absolute? In other words, do these statutes lay down, not merely a rule as to the legal power of alienation, but also a rule as to remoteness of vesting? While the matter is not free from doubt, it would seem that the statutes are not regarded as announcing any rule as to remoteness of vesting.' "

As has been seen, because courts of equity will compel specific performance of irrevocable options concerning land, an option to purchase land or to renew a lease is, in reality, an equitable future interest which is contingent upon notice and payment of the price or rent. As the optionor and optionee can unite to convey an ab-

101 280 Mich. 90 at 95, 99-100.
102 Part Two, notes 362, 364, supra.
solute fee in possession, an option does not suspend the absolute power of alienation within the meaning of Section 14. \(^{103}\) Section 20, however, prohibited a contingent remainder on a term of years unless the nature of the contingency was such that the remainder must vest in interest within two lives in being. \(^{104}\) Moreover, Section 24 of the New York statute prohibited a contingent limitation on a fee upon a contingency which might not occur within the statutory period. \(^{105}\) It is arguable that an option to renew a lease is a contingent remainder on a term of years within the meaning of Section 20 and that an option to purchase the fee is a contingent limitation of a fee on a fee. Nevertheless, in both New York and Michigan, options to purchase and to renew leases, not limited in duration to two lives in being, were held valid. \(^{106}\)

Reversions are vested future interests. \(^{107}\) Possibilities of reverter and rights of entry on breach of condition subsequent are, in some sense, contingent future interests. \(^{108}\) These interests do not suspend the absolute power of alienation because they are always held by living persons who can unite with the owner of the fee subject to

\(^{103}\) Part Three, notes 1, 76, supra. Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §179 (1928).

\(^{104}\) Part Three, note 85 supra.

\(^{105}\) Idem.


\(^{107}\) Part Two, note 332 supra.

\(^{108}\) Part Two, notes 336, 342, supra.
them to convey an absolute fee in possession. Mortgages and land contracts do not suspend the absolute power of alienation so long as the parties thereto can join to convey an absolute fee in possession.

It would seem that the absolute power of alienation is not suspended, within the meaning of Section 14, by a limitation of a present or future interest, otherwise alienable, to a person who, by reason of some personal incapacity, such as infancy or insanity, does not have normal power to convey land. At common law, when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for the corporate purposes or some of them, the corporation was incapable of alienating the property. A literal application of Sections 14 and 15 might make void all such conveyances in mortmain. Yet direct conveyances and devises of land to public and charitable corporations for corporate purposes have always been valid in both New York and Michigan, probably because the power to receive and hold land for their corporate purposes conferred upon such corporations by statute was looked

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112 Part One, note 219 supra.
113 Part Three, notes 1, 76, supra.
114 Bird v. Merklee, 144 N.Y. 544, 39 N.E. 645 (1895); Michigan cases cited in Part Two, notes 396-400, supra; Chaplin, Suspension of the Power of Alienation, 3rd ed., §510 (1928); Property Restatement, App., Ch. B, ¶55 (1944). A direct conveyance or devise to a charitable corporation must be distinguished from a charitable trust, which received very different treatment under the statutes. Part Two, note 406 supra; Property Restatement, App., Ch. B, ¶55 (1944).
upon as exempting interests limited to them from the operation of the suspension statutes. Michigan legislation of 1907 and later made it clear that such dispositions were not invalidated by the suspension statutes.\textsuperscript{115}

Section 14 provided, "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 chapter; - - -." \textsuperscript{116} This made it clear that a future interest which violated the suspension statutes, like a future interest which violated the common-law Rule Against Perpetuities, was wholly void, not merely invalid as to the excess.\textsuperscript{117} The effect of such invalidity on the title to the property in which the void interest was limited and upon other limitations in the same conveyance or will was the same as the effect of an interest being invalid under the common-law Rule Against Perpetuities.\textsuperscript{118} This being so, the consequences of violation of the suspension statutes and those of violation of the common-law Rule have been treated together in Chapter 17.

B. POWERS

(1) Powers Which Cause Suspension

The Michigan law of powers over land was codified by Chapter 64 of the Revised Statutes of 1846,\textsuperscript{119} which

\textsuperscript{115} Part Two, notes 400, 421, 423, 427, 428, supra.
\textsuperscript{116} Part Three, notes 1, 76, supra.
\textsuperscript{117} 2 Simes, LAW OF FUTURE INTERESTS, §566 (1936).
\textsuperscript{118} Property Restatement, App., Ch. A, ¶¶40, 70 (1944).
\textsuperscript{119} Rev. Stat. 1846, c. 64; Comp. Laws (1857) §§2658 to 2719; Comp. Laws (1871) §§4141 to 4202; Comp Laws (1897) §§8856 to 8917; How. Stat., §§5590 to 5651; Comp. Laws (1915) §§11592 to 11653; Comp. Laws (1929) §§12995 to 13056; Mich. Stat. Ann., §§26.91 to 26.152; Comp. Laws (1948) §§556.1 to 556.62. The following sections are pertinent to the present discussion.

"§2. A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the
owner granting or reserving such power, might himself lawfully perform.

§4. Powers, as authorized in this chapter, are general or special, and beneficial or in trust.

§5. A power is general, when it authorizes the alienation in fee, by means of a conveyance, will or charge of the land embraced in the power, to any alienee whatever.

§6. A power is special,
1. When the person or class of persons, to whom the disposition of the lands under the power is to be made, are designated:
2. When the power authorizes the alienation, by means of a conveyance, will or charge, of a particular estate or interest less than a fee.

§7. A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.

§22. A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds or other benefits to arise from the alienation of the lands, according to the power.

§23. A special power is in trust,
1. When the disposition which it authorizes, is limited to be made to any particular person or class of persons, other than the grantee of such power:
2. When any person or class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power.

§24. Every trust power, 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.

§25. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others of the persons designated as the objects of the trust.

§26. When a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion.

§27. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others.

§28. If the trustee of a power, with the right of selection, shall die leaving the power unexecuted, its execution shall be decreed in the court of chancery for the benefit equally of all the persons designated as objects of the trust.

§29. When a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve on the court of chancery.
was adopted from the New York Revised Statutes of 1829 and is still in force. This codification differs from the common-law rules as to terminology and, to a lesser extent, as to substance. Whereas at common law the term "power in trust" is equivalent to "imperative power," the statutes extend the term "power in trust" to include all powers which are not beneficial solely to the donee and all powers under which the donee cannot appoint to himself or his estate. The most im-

§33. The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power so reserved, shall be subject to the provisions of this chapter, in the same manner as if granted to another.

§36. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or granted in the instrument creating the power.

§47. When the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power.

§48. With the exceptions contained in the preceding sections, the intentions of the grantor of a power, as to the mode, time and conditions of its execution shall be observed, subject to the power of a court of chancery to supply a defective execution, in the cases hereinafter provided."

120 Part II, c. I, Tit. II, Art. Third.

121 That is, non-statutory law. Most of the law of powers is of equitable origin. 1 Simes, Law of Future Interests, §245 (1936).

122 1 Simes, Law of Future Interests, §292 (1936); Property Restatement, §320, Comment e., Special Note (1948 Supp.); S Walsh, Law of Real Property, §321 (1947), quoting the notes of the New York revisers, which make it clear that the changes in terminology were deliberate. Whereas at common law the term "general power" includes any power unlimited as to objects (possible appointees), the statutes (Sec. 5) restrict that term to powers to alienate the entire fee. Whereas at common law the term "special power" is restricted to powers limited as to objects, the statutes (§6) extend that term to all powers to alienate less than a fee. Whereas at common law the term "power in trust" is equivalent to "imperative power," the statutes (§§22, 23) include some powers which are not imperative in their definition of powers in trust. The statutes refer to the holder of a power as the "grantee" (§62), whereas at common law the holder of a power of appointment is usually referred to as the "donee." For the common-law terminology, see 1 Simes, Law of Future Interests, §§246, 247 (1936); Property Restatement, §§319, 320 (1940).
portant difference in substance is that every power which the statutes denominate a "power in trust" is imperative unless its execution is made expressly to depend on the will of the donee. An imperative power is one which the donee has a duty, enforcible in equity, to execute. At common law the rule is less rigid; although a power limited as to objects is presumptively imperative if there is no gift in default of appointment, express language is not required to rebut the presumption.

There is very little Michigan case authority as to the application of the suspension of the absolute power of alienation statutes to powers. The New York cases cannot be relied upon because of two important differences between the New York and Michigan statutes. First, the New York suspension statutes apply to both land and personalty, whereas the Michigan suspension statutes were restricted to land. Second, the New York suspension statutes were interpreted to restrict suspension of vesting as well as suspension of the absolute power of alienation, whereas the Michigan statutes were interpreted as restricting only the latter. Because the New York statutes, like the common-law Rule Against Perpetuities, restrict suspension of vesting, they prohibit powers which operate in such manner as to suspend vesting for longer than the statutory permissible period. Hence all powers which would violate the common-law

123 §§22, 23, note 119 supra.
124 §24, note 119 supra. In Waterman v. New York Life Insurance & Trust Co., 237 N.Y. 293, 142 N.E. 668 (1923), it was held that a power to appoint "to such one of my nephews of my own blood as she may by her will direct" was not imperative.
126 Part Three, notes 7, 8, supra.
Rule also violate the New York statutes. But all such powers did not violate the Michigan statutes. In Michigan the sole guide is Section 14 of Chapter 62 of the Revised Statutes of 1846, which provided 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." If a power operated to suspend the absolute power of alienation, as so defined, for longer than the statutory permissible period, it was void. It would seem that a power itself, as distinguished from interests appointed under the power and interests limited in default of its exercise, suspends the absolute power of alienation in the following situations:

Class (a) *Donee not in being or not ascertainable*. If the power is limited to a person or corporation not in being, to a class the membership of which may possibly include a person or corporation not presently in being, or to a donee or donees so described that neither the donees nor the group from among whom the donees are to be selected are presently ascertainable, and the power cannot be revoked, released, or overridden by ascertainable persons in being, the power suspends the absolute power of alienation.

If Andrew Baker devised land to


129 Part Three, note 1 supra.

130 Battelle v. Parks, 2 Mich. 531 (1853), involved a will which empowered the "executors or administrators" to sell land for the benefit of named legatees, but named no executors. It was held that the power was valid and exercisable by administrators *cum testamento annexo*, but the opinion suggests that such a power given to administrators for their own benefit would violate the suspension statutes because it would not be certain that the administrators would be ascen-
James Thorpe and his heirs, subject to a power in the first son of John Stiles (who had no son) to appoint the fee by deed or will to any person or persons, the power would suspend the absolute power of alienation until John had a son or died. Similarly, if Andrew Baker devised land to James Thorpe and his heirs, subject to a power in the children of John Stiles (who had five children) who survive him to appoint the fee by deed or will to any person or persons, the power would suspend the absolute power of alienation until the class of donees was closed by the death of John. Likewise, if Andrew Baker devised land to James Thorpe and his heirs, subject to a power in the person who should be Governor of Michigan in the year 1984 to appoint the fee by deed or will to any person or persons, the power would suspend the absolute power of alienation until 1984. The examples given involve powers beneficial solely to the donee. Class (a) also includes what the statutes term powers in trust, but the beneficiaries of a power in trust would be able to override it unless it also falls into Class (b) or (c) below.

Class (b) *Beneficiaries not in being or not ascertainable*. If the power is in trust, as that term is defined by the statutes, is not presently exercisable for the sole benefit of ascertainable persons in being, and the beneficiaries are a person or corporation not in being, a class the membership of which may possibly include a person or corporation not presently in being, or persons so described that neither they nor the group from among whom they are ascertainable within two lives. Both the decision and the dictum are consistent with the rule stated in the text. The actual power involved in the case could be overridden by the named legatees, who were ascertainable persons in being, so it did not fall into Class (a). If, however, the administrators had been the beneficiaries of the power as well as its donees, the power would have fallen into Classes (a) and (b).
are to be selected are presently ascertainable, and the power cannot be revoked, released or overridden by ascertainable persons in being, the power suspends the absolute power of alienation.\(^\text{131}\) If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to appoint the fee to his first son, the power would suspend the absolute power of alienation until John had a son. Similarly, if Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who has five children) to appoint the fee by will to those of his children who survive him, the power would suspend the absolute power of alienation until the class of objects was closed by the death of John. Likewise, if Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles to appoint the fee to some member of the Michigan Legislature of 1983, the power would suspend the absolute power of alienation until 1983.

The three examples just given, as falling in Class (b), are of imperative powers of appointment limited as to object. Class (b) also includes imperative powers to sell, lease, charge, or encumber land when any person or class of persons other than the donee "is designated as entitled to the proceeds, or any portion of the proceeds or other

\(^{131}\) Trufant v. Nunneley, 106 Mich. 554, 64 N.W. 469 (1895) (imperative power to purchase land and convey a remainder therein to a class of persons which could not be ascertained for three lives and might include persons who came into being after two lives). In Moss v. Axford, 246 Mich. 288, 224, N.W. 425 (1929), the residue of an estate was devised to the executor, "with the instructions to pay the same to the person who has given me the best care in my declining years and who in his opinion is the most worthy of my said property." It was held that the power did not suspend the absolute power of alienation. It did suspend vesting but the group from among whom the beneficiary was to be selected consisted of ascertainable persons in being who could join with the executor to convey an absolute fee in possession. See also the preceding note.
benefits to arise from the alienation of the lands” or “from the disposition or charge authorized by the power.” If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to mortgage for $5,000 to pay for the education of his first son, the power would suspend the absolute power of alienation. Similarly, if Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to sell the fee when his first son reached the age of eighteen and use the proceeds of such sale to pay for the education of such son, the power would suspend the absolute power of alienation. Because the Michigan suspension statutes were limited to land, Class (b) has an exception: an imperative power to sell the entire fee for money or exchange it for personalty, presently exercisable, would not suspend the absolute power of alienation even though the beneficiaries of the proceeds were not in being or not ascertainable. Such a power would work an immediate equitable conversion of the land into personalty, so the suspension statutes would not apply. If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to sell the fee at once and hold the proceeds in trust for James and his heirs until John’s first son reached the age of eighteen, then to use the proceeds to pay for the education of such son, the power would not suspend the absolute power of alienation for a moment, even though John, with the consent of James, chose to delay effectuating the sale.

132 Rev. Stat. 1846, c. 64, §§22, 23, Part Three, note 119 supra. That is, if it is an imperative “power in trust” as this term is defined by the statutes.

133 Part Three, notes 9 supra, 197 infra.
Class (c) *Power to create a trust.* If the power is in trust, as that term is defined by the statutes, and calls for the creation or prolongation of a trust which would itself suspend the absolute power of alienation, and the power cannot be revoked, released, or overridden by ascertainable persons in being, the power suspends the absolute power of alienation.\(^\text{134}\) As will be made clear in Section C below, a trust for receipt of the rents and profits of land suspends the absolute power of alienation because, by statute, the interests of the trustee and the *cestui que trust* are inalienable. Hence an imperative power to create such a trust also suspends the absolute power of alienation. If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles to create a trust of the land for application of the rents and profits to the support of Lucy Stiles, present wife of John, for the life of Lucy, the power would suspend the absolute power of alienation for the life of Lucy.

It would seem that powers not included in one or more of these three classes did not suspend the absolute power of alienation under Michigan law. A power was not within any of these classes if it could be revoked, released, or overridden by ascertainable persons in being because, in those cases, there were “persons in being, by whom an absolute fee in possession” could be conveyed, despite the power, within the meaning of Section 14 of Chapter 62.\(^\text{135}\) The statutes expressly provided that “Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or


\(^{135}\) Part Three, note 1 *supra.*
POWER OF ALIENATION

The beneficiaries of a power may override it, that is, convey free of it, if they are all in being and ascertained and their interests are not inalienable because subject to a trust for receipt of the rents and profits of land. If Andrew Baker devised Blackacre to James Thorpe and his heirs, subject to an imperative power in John Stiles to appoint the fee to any one of his brothers, Thomas, Richard, and Henry, when and if James Thorpe or his heirs should inherit Whiteacre, James, John, Thomas, Richard, and Henry are persons in being who could presently convey an absolute fee in possession. Express provisions of the instrument creating the power could enable less than all the beneficiaries to override it. Thus, in the second example given in Class (b) above, if An-


137 Battelle v. Parks, 2 Mich. 531 (1853), Part Three, note 130 supra; Fitzgerald v. City of Big Rapids, 123 Mich. 281, 82 N.W. 56 (1900); Part Three, note 93 supra; Moss v. Axford, 246 Mich. 288, 224 N.W. 425 (1929), Part Three, note 181 supra; Hetzel v. Barber, 69 N.Y. 1 (1877); Trask v. Sturges, 170 N.Y. 482, 63 N.E. 534 (1902); Property Restatement, §338 (1940); Callahan and Leach, "Powers of Appointment," 5 American Law of Property, §23.32 (1952); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 American Law of Property, §25.13n (1952). See: Bennett v. Chapin, 77 Mich. 526 at 538, 43 N.W. 893 (1889). Cf. State v. Holmes, 115 Mich. 456, 73 N.W. 548 (1898), Part Three, note 88 supra. In Matter of Butterfield, 133 N.Y. 473, sub nom. In re Christie, 31 N.E. 515 (1892), where a testator devised land to his children in fee, subject to an imperative power in the executrix, not to be exercised until all of his children, five of whom were minors, should reach their majority, to sell the land for payment of debts and legacies. It was held that, because of the New York equivalent of Rev. stat. 1846, c. 64, §48, Part Three, note 119 supra, the power could not be overridden by the beneficiaries (i.e., the creditors and legatees, who were ascertained persons in being) because it was on the express condition that it should not be exercised until a future time. Consequently, the power suspended the absolute power of alienation for longer than the permissible period. It would seem that Sec. 48 does not really relate to the problem of overriding and that the decision is unsound.
drew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who has five children) to appoint the fee by will to those of his children who survive him, the power would not suspend the absolute power of alienation if the will further provided, "but such power may be overridden during the life of John by his children in being at the time of such over-riding."

Class (a) comprises powers limited to a donee who is not in being or not ascertainable. Such a power cannot be released by the donee. Classes (b) and (c) comprise powers in trust, which term under the statutes includes all powers which are not beneficial solely to the donee and all powers under which the donee cannot appoint to himself or his estate. As has been seen, under the statutes, a power in trust is imperative unless its execution is made expressly to depend on the will of the donee. At common law an imperative power cannot be released by the donee, and there is no doubt that this was also the rule under Chapter 64 of the Revised Statutes of 1846. There is a conflict of authority at common law as to whether and under what circumstances a power limited as to objects which is not imperative may be released by the donee, and there is grave doubt on

139 1 Simes, Law of Future Interests, §§283, 284 (1936); Property Restatement, §335 (1940), as changed by 1948 Supp.; 3 Walsh, Law of Real Property, §334 (1947); Callahan and Leach, "Powers of Appointment," 5 American Law of Property, §§23.27, 23.28 (1952); Annotation, 76 A.L.R. 1430 (1932); Simes, "Powers in Trust and the Release of Powers by the Donee," 37 Yale L.J. 211 (1927); Ball, "Release of Powers of Appointment for Federal Estate Tax Purposes," 4 Ark. L. Rev. 66 (1949-50). Prior to 1881 the English rule seems to have been that such powers were releasable if the donee had a possessory estate in the land in addition to the power but not otherwise.
the question of whether the donee of a power which is in trust, within the statutory meaning of that term, but not imperative, could release the power under the New York and Michigan statutes. Act 296 of the Public Acts of 1945 provides that the donee of a power, including a power in trust, may release the power. It follows that powers in trust created between May 25, 1945, the effective date of Act 296, and September 23, 1949, the effective date of the repeal of the suspension statutes, were releasable if the donee was in being and ascertainable. This means that no power created after May 24, 1945, fell into Classes (b) or (c). Act 296 pur-

140 Chase National Bank v. Chicago Title and Trust Co., 155 Misc. 61, 279 N.Y. Supp. 327 (1935), aff’d., 246 App. Div. 201, 284 N.Y. Supp. 472 (1935), aff’d., 271 N.Y. 602, 659, 3 N.E. (2d) 205, 475 (1936). The Appellate Division held that such a power could not be released. The Court of Appeals refused to pass on the question because the donee of the power subsequently died without attempting to exercise it. In Merrill v. Lynch, 19 N.Y. Supp. (2d) 514 at 532-533 (Sup. Ct. Spec. Term, 1939) it was suggested that the view of the Appellate Division was unsound. The fact that Rev. Stat. 1846, c. 64, §17, Part Three, note 119 supra, expressly authorizes a tenant for life with power to make leases for years to release the power to any person entitled to an expectant estate in the land, indicates by virtue of the maxim expressio unius exclusio alterius, that other powers in trust are not releasable. Sec. 15 classes such a power in a tenant for life as beneficial, but it is difficult to see why it does not fall under the definition of a power in trust made by Sec. 23, Part Three, note 119 supra.

ports to validate releases of powers executed before its effective date, but it would seem that retroactive application of the act would be unconstitutional insofar as it disturbed vested rights of property.

(2) Interests Created By Execution of Powers

An interest in land created by the donee of a power by execution of the power suspends the absolute power of alienation, within the meaning of Section 14 of Chapter 62 of the Revised Statutes of 1846, in the following situations:

(a) If the interest so created is an indestructible future interest of a type which, under the rules discussed in Section A, above, suspends the absolute power of alienation.

(b) If the interest so created is a power of a type which, under the rules discussed in Subsection B (1), above, suspends the absolute power of alienation.

(c) If the interest so created is a trust of a type which, under the rules discussed in Section C, below, suspends the absolute power of alienation.

In other words, the types of interests created by execution of a power which suspend the absolute power of alienation are exactly the same as the types of interests created by direct conveyance or devise which suspend the absolute power of alienation. The only difference is in the time from which the permissible period of suspension is computed. Whereas, in the case of an interest directly conveyed or devised, the suspension ordinarily commences when the deed or will creating it

143 Part Three, note 1 supra.
takes effect, in the case of an interest created by execution of a power the statutes provide,

"Sec. 55. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power, shall be computed from the time of the creation of the power, and not from the date of such instrument.

"Sec. 56. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted."  

These statutory provisions were taken from the New York Revised Statutes of 1829. The New York Court of Appeals has indicated that these two sections are modified by other sections of the statutes which, as in force in Michigan, provide:

"Sec. 9. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights  

Rev. Stat. 1846, c. 62, §§15, 41, Part Three, note 1 supra, provided, "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 two lives in being at the creation of the estate, . . . Sec. 41. The delivery of the grant, where an expectancy 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." [Emphasis supplied.] It should be borne in mind, however, that an interest does not suspend the absolute power of alienation while it is destructible by virtue of the fact that there are ascertainable persons in being "by whom an absolute fee in possession can be conveyed." Rev. Stat. 1846, c. 62, §14, Part Three, note 1 supra. See Subsection (3), infra. Cf. Chapter 10, Section A, supra.


Part II, c. 1, Art. Third, §§128, 129. See Part Two, note 303 supra.
of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

"Sec. 10. When a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

"Sec. 11. In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee.

"Sec. 12. When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the three last preceding sections.

"Sec. 13. Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit." 147

147 Rev. Stat. 1846, c. 64, §§9 to 13; Comp. Laws (1857) §§2666 to 2670; Comp. Laws (1871) §§4149 to 4153; Comp. Laws (1897) §§8864 to 8868; How. Stat., §§5598 to 5602; Comp. Laws (1915) §§11600-11604; Comp. Laws (1929) §§13003 to 13007; Mich. Stat. Ann., §§26.99-26.103; Comp. Laws (1948) §§556.9-556.13. N.Y. Rev. Stat. 1829, Part II, Art. Third, §§81-85 were identical, except as to section numbers. N.Y. Real Property Law, §§149 to 153, as presently in force, are virtually identical. These sections operated to eliminate the strange fiction of powers appendant, under which one person might have both the whole fee and a power to appoint the fee which would enable him to defeat dower and creditors. See: Simes, "The Devolution of Title to Appointed Property," 22 Ill. L. Rev. 480 at 493-497 (1928).

The following section provides: "Sec. 14. When the grantor in any conveyance shall reserve to himself, for his own benefit an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned."

As will be pointed out in the following subsection, the commencement of the period of the suspension statutes may be deferred, as to interests created by the exercise of a power as well as other interests, by the existence of such an absolute power of revocation or by other
In the view of the New York Court, if the donee of a power has an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 have no application, and the validity of interests created by him in execution of the power is determined as if he were in fact an absolute owner disposing of his own property. If the donee does not have an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 do apply, and the validity of interests created by him in execution of the power is judged from the time of the creation of the power.\textsuperscript{148} Thus if the donee's power of disposition is limited to a future estate, it does not come within Sections 9-13, so Sections 55 and 56 apply. If Andrew Baker devises land to James Thorpe upon trust to pay the rents and profits to John Stiles for life, remainder as John Stiles may by deed or will appoint, John cannot dispose of the entire fee because, under New York and Michigan law, his equitable life interest as beneficiary of the trust is inalienable.\textsuperscript{149} Hence, even though his power to dispose of the remainder is unlimited and presently exercisable by deed, the validity of any apartment which he makes will be judged, under the New York view, from the death of Andrew.\textsuperscript{150}

provisions which make the interest destructible because there are ascertained persons in being "by whom an absolute fee in possession can be conveyed." Rev. Stat. 1846, c. 62, §14, Part Three, notes 1, 144, \textit{supra}.

\textsuperscript{148} Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266, 85 N.E. 59 (1908); Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 \textit{Va. L. Rev.} 149 at 167-171 (1940). Professor Walsh thought, however, that even an absolute power of disposition was governed by §§55 and 56; that the dictum to the contrary in the \textit{Kip} case was unsound. 3 \textit{Law of Real Property}, §349 (1947).


\textsuperscript{150} Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266, 85 N.E. 59 (1908).
As has been seen, when a power of appointment is restricted as to objects or exercisable only by will, the period of the common-law Rule Against Perpetuities is computed, as to interests created by exercise of the power, from the time of the creation of the power, rather than from that of its exercise; but facts which occur between the creation and exercise of the power may be considered in determining whether such interests are certain not to vest beyond the permissible period.\textsuperscript{151} Under the New York and Michigan statutes, when a power of appointment is not an absolute power of disposition, the period of permissible suspension of the absolute power of alienation is computed, as to interests created by exercise of the power, under Section 55, from the time of the creation of the power, rather than from that of its exercise, but it has not been settled in either state whether facts which occur between the creation and exercise of the power may be considered in determining whether such interests are certain not to suspend the absolute power of alienation beyond the permissible period.\textsuperscript{152}

(3) Powers Which Prevent Suspension: Destructibility

As has been seen, under the common-law Rule Against Perpetuities, if a future interest will be destructible at all times until it vests, it is not subject to the Rule, and if a future interest is so limited as to be destructible for a time and then indestructible for a time before it vests,

\textsuperscript{151} Part Two, notes 318, 322, 324, \textit{supra}.

\textsuperscript{152} \textit{PROPERTY RESTATEMENT, App., Ch. A, §30} (1944) (taking the position that such facts may be considered); Whiteside, "Perpetuities and Accumulations: Statutory Rules," \textit{6 AMERICAN LAW OF PROPERTY, §§25.13} (1952) (expressing the view that they may not be considered). Chaplin, \textit{SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§360-362} (1928), appears to favor the latter view.
the Rule applies, but the period of the Rule does not commence until the interest becomes indestructible. 153 A future interest is destructible for purposes of the common-law Rule Against Perpetuities only while some ascertained living person has unlimited and unconditional power to destroy it for his own exclusive benefit. 154 Where estates tail have been abolished, such destructibility under the common-law Rule ordinarily exists only because of a presently exercisable power of appointment or of revocation, by the exercise of which the donee could immediately vest the future interest in himself.

Under the statutes restricting suspension of the absolute power of alienation there is an analogous doctrine of destructibility. A future interest, power, or trust does not suspend the absolute power of alienation while there are ascertained persons in being who have unlimited and unconditional power to convey an absolute fee in possession. 155 As in the case of the common-law Rule, such destructibility ordinarily exists because of a power of appointment or of revocation, but the doctrine of destructibility under the statutes differs from the doctrine under the common-law Rule in seven important respects:

(a) Whereas, under the common-law Rule, the power of destruction must reside in the holder or holders of a

153 Part Two, notes 69, 70, supra.
154 Part Two, note 74 supra. As pointed out in the text at Part Two, notes 75-81, supra, a future interest is not destructible for purposes of the common-law Rule merely because its owner is ascertained, in being, and capable of uniting with the owners of other interests to convey an absolute fee; a power of appointment limited as to objects, exercisable only by will, or subject to a condition precedent, is not sufficient to make an interest subject to the power destructible; and a power of sale is not sufficient if the proceeds of the sale would be subject to the future interest.
single estate, interest, or power, under the statutes it is sufficient if the holders of various estates, interests, and powers can combine to convey an absolute fee in possession. If Andrew Baker conveys land to John Stiles (who has no son) and his heirs until some son of John reaches the age of thirty years and then to such son and his heirs, subject to a power in John and his heirs to appoint an absolute fee to any person or persons with the consent of the grantor, his heirs or assigns, the limitation to the son of John is not destructible under the common-law Rule Against Perpetuities and is void under that Rule. The interest of the son of John would, however, be destructible and valid under the Michigan suspension statutes, because there would at all times be persons capable of conveying an absolute fee in possession.

(b) Whereas, under the common-law Rule, the power of destruction must enable its holder to destroy the future interest for his own exclusive benefit, under the statutes it is sufficient that the power be exercisable for the benefit of others so long as its exercise does not subject the holder to any condition or penalty. If

156 Part Two, note 74 supra. Property Restatement, §373, Comment d. (1944), takes the position that destructibility does not exist if the power must be jointly exercised by two or more persons or is exercisable by the donee only with the concurrence of one or more other persons.


158 Part Two, note 74 supra. Property Restatement, §373, Comment d. (1944).


Andrew Baker conveys land to James Thorpe and his heirs upon trust to apply the rents and profits to the support of John Stiles, his sons, and grandsons, during their lives, and upon the death of the last grandson of John to convey the land to the great-grandsons of John, subject to an absolute and unconditional power in the trustee and his successors to terminate the trust at any time by reconveying the land to the settlor, his heirs or assigns, the remote future interests are not destructible under the common-law Rule Against Perpetuities and are void under that Rule. They would, however, be destructible and valid under the Michigan suspension statutes, because there would at all times be persons capable of conveying an absolute fee in possession.\textsuperscript{161}

(c) Whereas, under the common-law Rule, a power to destroy a future interest exercisable only by will is not sufficient,\textsuperscript{162} under Section 12 of Chapter 64 of the Revised Statutes of 1846 a tenant for life or years with a general and beneficial power to devise the inheritance has an absolute power of disposition, which is sufficient.\textsuperscript{164}

(d) Whereas, under the common-law Rule, the mere fact that the holder of the future interest in question is in being, ascertained, and able to convey his interest, does not make it destructible, even though he can unite will created a trust which suspended the absolute power of alienation for longer than the permissible term, subject to an unrestricted power in the \textit{cestuis que trustent} to sell the land and distribute the proceeds to others. It was held that the penalty of loss of the property imposed upon the donees in the event of exercise of the power prevented the power from making the trust destructible.


\textsuperscript{162} Part Two, note 75 supra.

\textsuperscript{163} Part Three, note 147 supra.

\textsuperscript{164} See Part Two, note 321 supra.
with others to convey an absolute fee in possession,\textsuperscript{165} under the Michigan statutes no interest suspended the absolute power of alienation if its owner was in being, ascertained, and able to unite with the holders of other estates, interests, and powers to convey an absolute fee in possession.\textsuperscript{166} If Andrew Baker devises land to James Thorpe and his heirs so long as the Penobscot Building stands and then to John Stiles and his heirs, the interest of John Stiles, although alienable, is not destructible under the common-law Rule Against Perpetuities and is void. As James and John have unconditional power to convey an absolute fee in possession at any time, the interest of John would not offend the Michigan suspension statutes.

(e) Whereas, under the common-law Rule, it is sufficient if the offending future interest itself is destructible,\textsuperscript{167} under the statutes destructibility does not exist unless ascertained persons in being have power to convey the entire fee.\textsuperscript{168} If Andrew Baker devises land to James Thorpe and his heirs for the life of John Stiles, (who has no son), upon trust to apply the rents and profits to the use of John, remainder to the first son of John who reaches the age of thirty, subject to a power in John to appoint the remainder by deed or will to any person or persons, the limitation to the son of John is destructible during the life of John under the common-law Rule Against Perpetuities and so is valid because it must vest within lives in being at the death of John. Under the statutes, however, because the life interest of John is inalienable, there are no persons in being

\textsuperscript{165} Part Two, note 78 supra.
\textsuperscript{166} Part Three, notes 90-94, 96-99, supra. Property Restatement, App., Ch. B, §§53 (1944); But see Part Three note 160 supra.
\textsuperscript{167} Part Two, note 67 supra.
\textsuperscript{168} See: Cutting v. Cutting, 86 N.Y. 522 (1881).
during the life of John who can convey an absolute fee in possession.\textsuperscript{169}

(f) Whereas, under the common-law Rule, if a future interest is so limited as to be destructible for a time and then indestructible for a time before it vests, the period of the Rule does not commence until the interest becomes indestructible and lives in being at that time may be used as measuring lives although they were not in being when the instrument creating the interest became effective,\textsuperscript{170} this is not the case under the statutes. An interest does not suspend the absolute power of alienation while ascertained persons in being have unlimited power to convey an absolute fee in possession, but if an interest is so limited as to be destructible in this sense for a time and then indestructible for a time, during which it will suspend the absolute power of alienation, the two lives which measure the permissible period of suspension must be those of persons who were in being when the instrument creating the interest became effective.\textsuperscript{171} If John Stiles (who has no son) conveys land to James Thorpe and his heirs upon trust to apply the rents and profits to the use of John for life, then to apply them to the use of the first son of John for life and, at his death, to convey the land to the eldest son of such first son, subject to an unconditional power in John to revoke by deed or will, the interests of the son and grandson are destructible under both the common-law Rule Against Perpetuities and the statutes during the life of John. The first son of John must necessarily be in being at John’s death, and the grandson must neces-

\textsuperscript{169} See Part Three, note 149 \textit{supra.}
\textsuperscript{170} Part Two, note 70 \textit{supra.}
sarily come into being during the son's life, so their interests do not violate the common-law Rule. But both interests would violate the suspension statutes because they would suspend the absolute power of alienation during the life of John's first son, a life not in being at the time of the conveyance. On the other hand, if John Stiles, having a son Henry and a grandson Peter, conveys land to James Thorpe and his heirs upon trust to apply the rents and profits to the use of John for life, then to the use of Henry for life, then to the use of Peter for life and, on the death of Peter, to convey the land to the first son of Peter, subject to an unconditional power in John to revoke by deed or will, the fact that the interests were destructible during the life of John would mean that the absolute power of alienation was suspended for only two, instead of three, lives, those of Henry and Peter, which were in being at the time of the conveyance. Hence none of the limitations would violate the statutes. 172

(g) Whereas, under the common-law Rule, a power to sell land or exchange it for other property is not sufficient if the proceeds of the sale or property received in exchange are subject to the future interest, 173 under the Michigan statutes, a power to convert land into other property could, in some situations, prevent a future interest, power, or trust from suspending the absolute power of alienation. 174 This is because the common-law Rule Against Perpetuities applies to all forms of property, whereas the Michigan statutes applied only to land.

173 Part Two, notes 79, 81, supra.
174 Part One, note 639, Part Three, note 9 supra; Property Restatement, App., Ch. B, ¶51 (1944); This point is covered in detail in the paragraphs which follow.
Because the common-law Rule Against Perpetuities applies only to unvested future interests and has no application to present and other vested interests, whether or not they are subject to a trust, the examples of destructibility given in the preceding paragraphs (a) through (g) have been designed to illustrate, by contrasting the common law and statutory rules, the existence and effect of destructibility in the case of future interests which, in the absence of destructibility, would violate both the common-law Rule Against Perpetuities and the suspension statutes. Because, under the New York and Michigan statutes, the interests of the trustee and *cestuis que trustent* of a trust for receipt of the rents and profits of land are inalienable, such a trust suspends the absolute power of alienation even though all interests involved are present or vested. Most of the decisions as to the existence and effect of destructibility under the statutes relate to suspension of the absolute power of alienation by trusts, and hence the details of the doctrine of destructibility under the statutes must be developed by consideration of those decisions. It should be borne in mind, however, that the principles developed by the cases apply equally to suspension of the absolute power of alienation occasioned by future interests limited to unborn or unascertained persons and by powers.

Under the New York decisions and what Michigan cases there are, for destructibility to exist, not only must ascertained persons in being have power to convey an absolute fee in possession, but the power itself must be absolute in the sense that its exercise is not subject to any condition precedent and does not entail any penalty

175 Part One, notes 580, 583, 602, 621, supra.
176 Part One, note 593 supra; Section C, infra.
or loss to the persons who exercise it. Thus a trustee's power to terminate the trust by selling the land and distributing the proceeds to ascertained persons in being is not sufficient if sale is not permitted until a certain price can be obtained or until the *cestuis que trustent* demonstrate capacity to handle the proceeds wisely. Neither is it sufficient if its exercise is conditional upon the consent of the *cestuis que trustent* and the proceeds


179 Matter of Perkins, 245 N.Y. 478, 157 N.E. 750 (1927); Chaplin, *Suspension of the Power of Alienation*, 3rd ed., §70 (1928); Property Restatement, *App.*, Ch. A, ¶20 (1944); Whiteside, “Statutory Rules: Perpetuities and Accumulations,” 6 *American Law of Property*, §25.15 (1952). In Taylor v. Richards, 153 Mich. 667, 117 N.W. 208 (1908), land was devised to executors upon trust to apply the income to the support of testator’s grandson, William, with discretionary power of sale for reinvestment, “title thereto to remain in my executors until he arrives at twenty-five years of age, when, if he shall show himself worthy and of steady habits, my said executors shall, if they deem it safe and for his best interest, transfer and convey said farm [to William], or in case they shall have previously sold said farm then they shall transfer to said William the proceeds . . . if they shall so deem it safe and for his best interest.” No doubt these powers were not sufficient to prevent suspension of the absolute power of alienation, but, as such suspension could not last beyond a life in being, there was no violation of the statutes. In Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924), testatrix devised land to her husband until death or remarriage, with power to invade principal for his support and comfort and to convey to that end, remainder to a trustee with mandatory direction to convert to money, and hold on trust for, inter alia, unborn persons. The opinion suggests that the power of the husband, which was subject to a condition precedent which might not occur, and that of the trustee, which was not exercisable until the husband's death, did not prevent suspension of the absolute power of alienation during the life of the husband.
are payable to others, so that the giving of such consent would entail loss to the *cestuis*. A requirement of consent of the *cestuis que trustent* or some other person before exercise of the power does not prevent destructibility, however, if the persons whose consent is required are ascertained and in being and the exercise of the power will not entail any penalty or loss to them. Moreover, if the power is immediately exercisable, a mere permission to the trustee to delay its exercise for a time or until conditions are favorable does not prevent destructibility. Thus in *Floyd v. Smith*, an imperative power to be exercised "at the earliest time practicable after my death, without undue sacrifice of the true value thereof," was held sufficient to make destructible a trust which, in its absence, would have suspended the absolute power of alienation for four lives.

As has been seen, under the common-law Rule Against Perpetuities, the existence of a power to sell land or chattels free of future interests or to exchange for other property is not sufficient to make future interests therein destructible if the proceeds of the sale or property received in exchange are subject to the future interests. That is to say, the common-law Rule inhibits not only the tying up of specific land or chattels for unduly long

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184 Part Two, notes 79, 81, *supra*. 
PERPETUITIES AND OTHER RESTRAINTS

periods, but also the tying up of aggregations of economic power even when the specific property involved can itself be alienated free of contingencies. It would have been possible to construe the New York statutes as restricting only suspension of the absolute power of alienation of specific land or chattels. The New York courts, however, accepted the common-law view by holding that, although a trustee's unconditional power to terminate the trust by sale of the corpus and distribution of the proceeds to ascertained persons in being is sufficient to make the trust destructible, an unconditional power to sell or exchange for reinvestment, that is, one after the exercise of which the trust would continue to bind the proceeds, is not sufficient to make the trust destructible. Because the Michigan suspension statutes, unlike those of New York, applied only to land, the situation here was different. If a trustee had unconditional power, whether imperative or discretionary, to sell the land or exchange it for other property, it was arguable that the absolute power of alienation was not suspended, even though the proceeds would be subject to the trust. The trustee was a person in being who could convey an absolute fee in possession, and the fact that the absolute power of alienation of the proceeds would


187 Part Two, note 52, Part Three, note 8 supra.
be suspended was immaterial, so long as they did not consist of land.\(^\text{188}\)

*Thatcher v. Wardens and Vestrymen of St. Andrew’s Church of Ann Arbor*\(^\text{189}\) has sometimes been assumed to stand for the proposition that a trustee’s discretionary power of sale for reinvestment prevented a trust of land from suspending the absolute power of alienation.\(^\text{190}\) By deed of June 20, 1862, Minerva Mundy conveyed land to trustees, “to have, hold, use and enjoy the same, and lease, or dispose of the same, or cause the same to be used, and to receive the rents, profits and income thereof, and to use or dispose of the same on trust,” first, for the use of the grantrix during her life; second, to pay the grantrix’s debts and funeral expenses; and third, to support the grantrix’s husband for life and pay the expenses of his last illness and funeral, whereupon the trust should cease. The next paragraph of the deed conveyed the legal remainder in the land to the Wardens and Vestrymen of St. Andrew’s Church of Ann Arbor. Minerva Mundy died in 1871 and her heirs employed Erastus Thatcher, a lawyer, to conduct a suit to quiet title on their behalf. In 1873 the heirs conveyed to Fanny Thatcher, wife of Erastus, and in 1875 they quit claimed to the Wardens and Vestrymen, who brought an action

\(^{188}\)As the statutes making the interest of the trustee and *cestui que trust* inalienable apply in Michigan only to trusts of land (Part One, notes 638, 640, *supra*), a trust of personality would not suspend the absolute power of alienation, even if such suspension were prohibited, unless it was a spendthrift trust.

\(^{189}\)37 Mich. 264 (1877). The facts are not fully stated in the report, which accounts for the fact that the decision has been misunderstood. They are to be found in Records & Briefs, June Term, 1877, No. 36. It is not clear, however, when the grantrix’s husband died.

of ejectment against Erastus and Fanny Thatcher. The Circuit Court entered judgment for the plaintiffs on the ground the deed to Fanny Thatcher was void as chancerous. The defendants appealed, contending, *inter alia*, that the trust deed of June 20, 1862, was void because the provisions for payment of expenses of last illness and funeral caused a suspension of the absolute power of alienation for longer than two lives. The Supreme Court, in an opinion by Justice Marston, in which Chief Justice Cooley and Justices Campbell and Graves concurred, affirmed the judgment for the plaintiffs on the ground the trust deed of June 20, 1862 was valid, saying,

"We think it is a self-evident proposition that the 'absolute power of alienation' is not suspended, where the instrument gives the trustees power to dispose of the property at their option. Where power is given to convey the trust estate, the absolute power of alienation can in no possible way be said to be suspended. If such a power is exercised as it may at any time, the trust is at once and forever, upon the execution and delivery of the conveyance, at an end, and cannot be revived, and that such a power is good when contained in an instrument which without it would be invalid, there can be no doubt. A conveyance under such a power would be good and would pass a good title to the grantee. In order to render the instrument invalid under our statutes the power of alienation must be suspended, and the time it is so suspended must be for over two lives in being at the creation of the estate, or at least so that it may be so suspended, - - - but there is no absolute suspension whatever where the trustees have power to sell. It is true they may not dispose of the estate, but it is not a question of what they may or may not in fact do, but one of power. Have they power to sell, or is the power of sale suspended absolutely for the prohibited period? If the former, the instrument is valid; if the latter, in-
valid. *Belmont v. O'Brien*, 12 N.Y. 394; *Mason v. Mason*, 2 Sandf. Ch., 432; *Hawley v. James*, 16 Wend., 153, per Bronson, J.; *Hunter v. Hunter*, 17 Barb., 90; *Nelson v. Callow*, 15 Sim. Ch., 353; *Cresson et al v. Ferree*, 70 Pa. St., 446. The power being one which may be exercised at any time before the determination of the limitations which precede the ultimate one, renders the trust valid. Beyond this we do not express any opinion as to the correctness of the rule laid down in New York as to the proper construction of the statute.” 191

For several reasons, the *Thatcher* case is not authority for the proposition that a trustee’s discretionary power of sale for reinvestment prevented a trust for receipt of the rents and profits of land from suspending the absolute power of alienation. First, the Court treated the power not as one of sale for reinvestment but as one of sale and termination of the trust. Second, even if the power did not extend to termination of the trust, the trust was not to continue beyond the lives of Minerva Mundy and her husband except as a trust “to sell lands for the benefit of creditors.” 192 As will be made clear in the next section, such a trust does not suspend the absolute power of alienation because the interests of the *cestuis que trustent* are alienable. The provision for payment of expenses of last illness and funeral, therefore, could suspend the absolute power of alienation beyond the lives of Mrs. Mundy and her husband only if it be assumed that it constituted a limitation of an indestructible future interest to creditors who might not be ascertainable or members of an ascertainable group for several days after the deaths of Mr. and Mrs. Mundy. 193

Third, even if the provision for payment of expenses of

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193 Chapter 20, Sec. A, Subsec. B. (2), supra.
last illness and funeral did suspend the absolute power of alienation because it was a limitation of a future interest to persons who might not be ascertainable within two lives, the validity of that interest was not involved in the litigation before the Court. All that was involved was the validity of the legal remainder limited by the deed of June 20, 1862, to the Wardens and Vestrymen. This was vested in a corporation in being, subject only to partial divestment by exercise of the power in favor of the creditors. If the interest of the creditors was void, the remainder would be valid and indefeasible.¹⁹⁴

The proposition that a trustee's discretionary power of sale for reinvestment prevents a trust from suspending the absolute power of alienation was questioned in Palms v. Palms ¹⁹⁵ and definitely rejected in Niles v. Mason.¹⁹⁶ This rejection is probably justifiable on the ground that a trustee's discretionary power of sale for reinvestment is never really absolute and unconditional; under the law of trusts the trustee would be guilty of a breach of trust if he exercised it before such time as the proposed change of investments would be of benefit to the cestuis que trustent. Such a power is, therefore, really subject to a condition precedent. This is not true of an imperative power of sale for reinvestment which the trustee is bound

¹⁹⁵ 68 Mich. 355 at 386, 36 N.W. 419 (1888) (Concurring opinion of Champlin and Sherwood, JJ).
to exercise, regardless of the resulting advantage or disadvantage to the *cestuis que trustent*. Consequently, the Michigan Supreme Court repeatedly and consistently held that an imperative power of sale for reinvestment in property other than Michigan land worked an equitable conversion, so that the trust was to be considered a trust of chattels personal, not subject to the suspension statutes, from the time when the trustee had an unconditional duty to sell.\(^{197}\) It has been rather liberal in construing powers to be unconditional and imperative for this purpose. Thus in *Floyd v. Smith*,\(^ {198}\) land was de-

\(^{197}\) Penny v. Croul, 76 Mich. 471, 43 N.W. 649, 5 L.R.A. 858 (1889) (devise of legal life estate, remainder to trustee with direction to convert at once into personalty and hold the latter on perpetual charitable trust); Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890) (mandatory direction in will to convert Michigan land into Missouri land on death of testator and to hold the Missouri land in trust for more than two lives); Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924) (devise of legal life estate, remainder to trustee to sell, convert into money, and hold the latter on trust for more than two lives); Gettins v. Grand Rapids Trust Co., 249 Mich. 238, 228 N.W. 703 (1930) (devise to trustee with mandatory direction to sell at once and hold proceeds on trust for more than two lives); In re De Bancourt's Estate, 279 Mich. 518, 272 N.W. 891 (1937) (devise to trustee to pay income to testator's heirs for fifteen years, to convert into money at or before the expiration of fifteen years, and to divide the proceeds among the heirs at the end of fifteen years, determined according to the statute then in force); Van Tyne v. Pratt, 291 Mich. 626, 289 N.W. 275 (1939) (devise to trustee upon trust for three lives with mandatory direction to sell land at the end of a named life); Floyd v. Smith, 303 Mich. 137, 5 N.W. (2d) 695 (1942), Part Three, note 198 *infra*. See: Joseph v. Shaw, 48 Mich. 355, 12 N.W. 486 (1882) (direction to administrator to convert land into money before distribution to life tenant); Dodge v. Detroit Trust Co., 300 Mich. 575, 2 N.W. (2d) 509 (1942) (devise to trustees with mandatory direction to form a corporation, convey the land to it in exchange for its stock, and hold the stock in trust). *Property Restatement, App.*, Ch. B, ¶51 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *American Law of Property*, §25.37 (1952). Although an imperative power to convert to personalty prevented a trust from suspending the absolute power of alienation, contingent limitations of interests under or following the trust might violate the common-law Rule Against Perpetuities. Michigan Trust Co. v. Baker, Gettins v. Grand Rapids Trust Co., *supra*.

vised to trustees upon a trust which was to last for four lives. The following language of the will was treated as creating an imperative power which prevented suspension of the absolute power of alienation:

"Any real estate constituting a part of my estate at the time of my death shall be sold and converted into personalty at the earliest time practicable after my death without undue sacrifice of the true value thereof, to the end that the trust by this will created shall be solely a trust of personalty and subject to the rules applicable thereto only."

Although a trustee's power to sell for reinvestment has never been sufficient to make the trust destructible in New York\textsuperscript{199} and was not sufficient in Michigan unless imperative, a power in the trustee to terminate the trust by distributing the corpus, or by selling the corpus and distributing the proceeds, has always been sufficient in both states to prevent the trust from suspending the absolute power of alienation, whether the power is imperative or discretionary.\textsuperscript{200} It should be borne in mind,\textsuperscript{199} Part Three, note 186 \textit{supra}.\textsuperscript{200} Part Three, note 185 \textit{supra}; Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910) (inter vivos trust to last for three lives or twenty years, whichever was shorter, with power in the trustee to distribute the corpus whenever he deemed it advisable); Allen v. Merrill, 223 Mich. 467, 194 N.W. 131 (1923) (devise to trustee with discretionary power of sale and direction to distribute the corpus within five years after testator's death); Union Guardian Trust Co. v. Nichols, 311 Mich. 107, 18 N.W. (2d) 383 (1945) (trust mortgage with imperative power in the trustee, in the event of foreclosure, to sell the land and distribute the proceeds to holders of participation certificates). \textit{PROPERTY RESTATEMENT, App., Ch. A, ¶20} (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," \textit{6 AMERICAN LAW OF PROPERTY, §25.42} (1952). See Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901); Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 N.W. 250 (1922); In re Richard's Estate, 283 Mich. 485, 278 N.W. 657 (1938), where it was held that a discretionary power of sale for reinvestment was not sufficient to make the trust destructible but suggested that a discretionary power to terminate the trust would be sufficient. See also Ward v. Ward, 163 Mich. 570, 128 N.W. 761 (1910).
however, that while a power of termination in the trustee prevents the trust, as such, from suspending the absolute power of alienation, the provisions for distribution of the corpus or its proceeds may constitute limitations of future interests in land or personalty which raise independent problems of validity. In New York, these would always be governed by the suspension statutes. In Michigan it would seem that, if the distribution was to be of land, the suspension statutes governed, but if chattels or money were to be distributed, the common-law Rule Against Perpetuities applied. 201

C. INDESTRUCTIBLE TRUSTS

Chapter 63 of the Revised Statutes of 1846 provides:

“Sec. 11. Express trusts may be created for any or either of the following purposes:

1. To sell lands 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 prescribed in the last preceding chapter:

4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed in the preceding chapter:

5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title.

201 Cf. note 197 supra.
"Sec. 19. 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 interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

"Sec. 21. 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." 202

This legislation was adopted from the New York Revised Statutes of 1829, 203 but Subsection 5 of Section 11 and the provision as to married women in Subsection 4 are peculiar to Michigan. 204

(1) Trusts for Receipt of the Rents and Profits of Land

The New York courts gave an extensive effect to the first clause of the New York equivalent of Section 19, holding not only that a cestui que trust of a trust for receipt of the rents and profits of land could not alienate his interest, 205 but that, even though all the cestuis were


204 Rev. Stat. 1846, p. V.

205 Douglas v. Cruger, 80 N.Y. 15 (1880). An express provision of the trust instrument, authorizing alienation by the cestui, has been deemed inoperative because of the statute. Crooke v. County of Kings, 97 N.Y. 421 (1884); Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266 at 280, 85 N.E. 59 (1908); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §254 (1928); PROPERTY RESTATEMENT, App., Ch. A, ¶17 (1944); 3 Walsh, LAW OF REAL PROPERTY, §344 (1947); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.11 (1952).
in being and ascertained, they could not compel the termination of the trust 206 or cooperate with the trustee to terminate it. 207 Moreover, they held that the statutory inalienability of the cestuis' interests applied to trusts to receive and pay over the rents and profits as well as to trusts to receive and apply them. 208 This being so, the existence of such a trust meant that there were no persons in being by whom an "absolute fee in possession" 209 could be conveyed. In consequence, unless such a trust was destructible under the rules discussed in the preceding subsection, it suspended the absolute power of alienation even though all interests in the land were indefeasibly vested in ascertained persons in being. 210

Although the language of Subsection 5 of Section 11 indicates that, when the Michigan Legislature adopted the New York statutes governing trusts and suspension of the absolute power of alienation, it was aware of and intended to adopt the New York judicial interpretation of them, it has been seen that the Michigan Supreme Court appears to have held in *Bennett v. Chapin* 211 that,


208 Leggett v. Perkins, 2 N.Y. 297 (1849); Cochrane v. Schell, 140 N.Y. 516 (1894); Part One, note 597 supra; PROPERTY RESTATEMENT, App., Ch. A, ¶18 (1944).


211 77 Mich. 526, 43 N.W. 893 (1889), Part One, note 611, Part Two, note 466 supra. But see Blossom v. Anketell, (D.C. Mich. 1921) 275 F. 947. In Conover v. Hewitt, 125 Mich. 34, 83 N.W. 1009 (1900), land was conveyed to a trustee to apply the rents and profits to the
if the cestuis que trustent of a trust for receipt of the rents and profits of land were all in being and ascertained, they could compel termination of the trust and convey an absolute fee in possession. If so, it would seem to follow logically that, in Michigan, such a trust was destructible under the rules discussed in the preceding subsection 212 and so did not suspend the absolute power of alienation. Nevertheless, the Michigan Court held repeatedly that a trust for receipt of the rents and profits of land did suspend the absolute power of alienation even if all interests in the land were owned by ascertained living persons who, were it not for the statutory inalienability of the interests of trustee and cestuis que trustent, could join to convey an absolute fee in possession. In Casgrain v. Hammond,213 land was conveyed to a trustee (1) to pay the income to the settlor for life; (2) if the settlor died within fourteen years, to pay the income to five children of the settlor or the survivors of them until the expiration of that period; (3)

use of William Fitzhugh during his life and after his death to apply them to the use of his wife and children during the life of the wife, remainder at her death to the children. After the death of William his widow released her interest to the other beneficiaries. They sued to compel termination of the trust and distribution of the corpus to them and were granted the relief sought. This decision is, of course, in flat conflict with Section 19 inssofar as it holds that the interest of a beneficiary of a trust for receipt and application of the rents and profits of land is alienable.

212 Part Three, notes 181, 185, supra.

213 154 Mich. 419, 96 N.W. 510 (1903). Accord: Scheibner v. Scheibner, 199 Mich. 630, 165 N.W. 660 (1917) (devise to trustees to pay income to widow for life, then to pay $75 a month to each of two sons until twenty years after testator's death, then to convert into cash and divide between the sons); Loomis v. Laramie, 286 Mich. 707, 282 N.W. 876 (1938) (devise to trustees to accumulate for twenty years and then distribute to six named persons, their heirs or assigns); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 American Law of Property, §25.41 (1952). In James E. Scripps Corporation v. Parkinson, 186 Mich. 663, 153 N.W. 29 (1915) it was held that a trust suspended the absolute power of alienation although the sole trustee was also the sole income beneficiary.
after the death of the settlor and the expiration of fourteen years from the date of the trust instrument, to convey the principal to the five children or the survivors of them. Although the entire fee was owned by the settlor, the trustee, who was one of the five children, and the other four children, all of whom were ascertained living persons, it was held that the trust was wholly void because it might suspend the absolute power of alienation for a period not measured by two lives in being.

Most trusts for receipt of the rents and profits of land involve suspension of the absolute power of alienation caused not only by the statutory inalienability of the interests of the trustees and *cestuis que trustent*, but by the fact that unborn or unascertained persons are entitled to the rents and profits or to shares in the principal at some future time. In such cases, the interests of the unborn or unascertained persons are, of course, future interests which, if indestructible, would suspend the absolute power of alienation under the rules discussed in Section A of this chapter even if there were no trust. The opinions commonly fail to make a clear


216 Part Three, notes 77-80, supra.
distinction between the two types of suspension, by trusts themselves and by future interests under or following trusts, but it is important to make that distinction because the possible duration of suspension of the one type may not, in a given case, be the same as the possible duration of suspension of the other type. If Andrew Baker devises land to James Thorpe for the life of John Stiles upon trust to apply the rents and profits to the use of John, legal remainder to the children of John who reach thirty, the remainder is a future interest which may suspend the absolute power of alienation beyond the permissible period, but suspension caused by the trust itself cannot last longer than a single life in being, that of John.

A future interest which violates the common-law Rule Against Perpetuities is wholly void, not merely void as to those parts which may suspend vesting for too long.217 Section 14 of Chapter 62 of the Revised Statutes of 1846 applied the same rule to future interests which violate the suspension statutes by providing that “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 chapter.” 218 The invalidity of present trusts which suspend the absolute power of alienation rested, however, on Section 15, which provided merely 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 two lives in being . . .” 219 It would, therefore, have been possible

217 Thus a class gift is wholly void under the common-law Rule if the interest of any member of the class may vest too remotely, even though the interests of some members are presently vested. Part Two, note 280 supra.
to hold that a trust set up to last for too long was void only as to the excess; for example, that a trust to last for three lives was valid for the first two lives named.\textsuperscript{220} The New York courts held, however, that a trust which, under its terms, might last longer than the statutory period was wholly void, not merely invalid as to the excess,\textsuperscript{221} and Michigan followed this view.\textsuperscript{222}

(2) Trusts for Payment of a Sum in Gross; Annuities

As the statutory inalienability created by Section 19 of Chapter 63 affects only the interests of beneficiaries under trusts, it is clear that a provision for payments to an ascertained living person which does not create a trust does not suspend the absolute power of alienation. Thus a provision for payment of a legacy, whether in a lump sum or in instalments,\textsuperscript{223} or a provision for payments which imposes a mere equitable charge or lien on land,\textsuperscript{224}

\textsuperscript{220} Cf. Rev. Stat. 1846, c. 62, §17, Part Three, notes 1, 53, supra, which provided, “when 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, . . .” Under this section, if more than two successive legal life estates were limited, the first two were valid. Rev. Stat. 1846, c. 62, §38, Part Two, note 482 supra, provided, similarly, that a provision for an accumulation for longer than the permitted period was void only as to the excess.

\textsuperscript{221} Coster v. Lorillard, 14 Wend. 265 (N.Y. 1835); Whiteside, “Statutory Rules: Perpetuities and Accumulations,” 6 American Law of Property, §25.12 (1952). However, if trust provisions could be construed to be separable, that is, to call for several separate trusts, some might be valid although some were void. Property Restatement, App., Ch. A, §§33, 47-52 (1944). The problem of separability will be discussed in Chapter 21, infra.

\textsuperscript{222} Part Three, notes 213-215, Part Two, note 541 supra.

\textsuperscript{223} See: Radley v. Kuhn, 97 N.Y. 26 (1884).

\textsuperscript{224} Torpy v. Betts, 123 Mich. 239, 81 N.W. 1094 (1900); McInerny v. Haase, 163 Mich. 364, 128 N.W. 215 (1910); Peoples’ Trust Co. v. Flynn, 188 N.Y. 385, 80 N.E. 1098 (1907); Property Restatement, App., Ch. A, §53 (1944); Whiteside, “Statutory Rules: Perpetuities and Accumulations,” 6 American Law of Property, §25.15 (1952). When the amount payable to the beneficiary is fixed as to total or as to periodical payment and thus does not depend upon the amount of rents and profits actually earned, the provision is a charge.
does not effect suspension. If a provision does create a trust, it becomes necessary to determine whether it is for “the receipt of the rents and profits” or the “payment of a sum in gross.” If Andrew Baker devises land to James Thorpe on trust to receive the rents and profits and apply them to the use of John Stiles, his wife, and children, during their lives, it is clear that Section 19 makes the interests of the beneficiaries inalienable. If Andrew Baker devises land to James Thorpe on trust to sell, mortgage, or lease in order to raise the sum of $10,000, to pay this sum to John Stiles, and then to transfer the balance of the proceeds of sale or the land subject to the mortgage or lease to Lucy Baker, it is equally clear that the interests of the beneficiaries are alienable. 225

The provisions which have caused difficulty are those which call for periodic payments in fixed amounts, usually referred to as “annuities.” If such a provision creates only an equitable charge, with priority over the

225 In Fredericks v. Near, 260 Mich. 627, 245 N.W. 537 (1932), a husband and wife conveyed land to a trustee to sell it and pay a debt of the husband to a corporation. Being unable to make a sale, the trustee, with the consent of the corporation, reconveyed to the settlors. Because this was a trust “to sell lands for the benefit of creditors” created under Subsection 1 of Sec. 11 (Part Three, note 202 supra), not a trust “for the receipt of the rents and profits of lands,” and because it was “for the payment of a sum in gross,” the interest of the beneficiary was alienable under §19. Hence it was correctly held that the reconveyance effectively terminated the trust. In re De Bancourt’s Estate, 279 Mich. 518, 272 N.W. 891 (1937), involved a devise to a trustee to pay $10,000 to the Salvation Army in Jackson upon the performance of a condition precedent. Because this was a trust “to sell . . . lands, for the benefit of legatees” created under Subsection 2 of Sec. 11 (Part Three, note 202 supra), not a trust “for the receipt of the rents and profits of lands,” and because it was “for the payment of a sum in gross,” the interest of the beneficiary was alienable under §19. In Fox v. Greene, 289 Mich. 179, 286 N.W. 203 (1939), land was conveyed to trustees to subdivide, sell, and distribute the proceeds to the settlors. Because this was a trust to sell and distribute the proceeds, not one to hold and receive the rents and profits, the interests of the beneficiaries were properly treated as alienable.
trust, the New York decisions are to the effect that it does not suspend the absolute power of alienation.\textsuperscript{226} If, on the other hand, a trust is created and the payments are to be made exclusively from the rents and profits, such an annuity does suspend the absolute power of alienation.\textsuperscript{227} If the provisions in question create a trust and make an annuity payable from principal or from both principal and income, it is held in New York that the annuity does not effect suspension and does not prolong the duration of the trust.\textsuperscript{228} After the trust terminates, such an annuity becomes a mere equitable charge.\textsuperscript{229} If Andrew Baker devises land to James Thorpe upon trust to pay $5000 per year to Lucy Baker for life, using either income or principal therefor, and, subject thereto, to pay the net income to John Stiles for life, then to William Stiles for life, residue to the heirs of the testator, the trust is treated as terminating with the deaths of John and William. If Lucy Baker is alive at that time, her annuity continues only as an equitable

\textsuperscript{226} Part Three, note 224 supra.

\textsuperscript{227} Cochrane v. Schell, 140 N.Y. 516, 35 N.E. 871 (1894); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §250 (1928).

\textsuperscript{228} Clark v. Clark, 147 N.Y. 639, 42 N.E. 275 (1895); Chaplin, id., §249; Whiteside, id., §25.15. Subsection 2 of Section 55 of the New York statute (Part One, note 580, Part Three, note 203, supra) was amended by Laws 1909, ch. 52, to read, "To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon." Section 63 was amended to read, "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property, ... may be transferred." Real Property, Law, §§96, 103. These amendments served to confirm the existing judicial construction of the original sections.

\textsuperscript{229} Buchanan v. Little, 154 N.Y. 147, 47 N.E. 970 (1897); Powell and Whiteside, THE STATUTES OF THE STATE OF NEW YORK CONCERNING PERPETUITIES AND RELATED MATTERS, 102 [N.Y. Legislative Document (1936) No. 65 (H)]. Cf. Burke v. Central Trust Co., Part Three, note 247 infra, where it was suggested that an express provision to this effect would be valid.
charge, which does not suspend the absolute power of alienation. The Michigan decisions involving these problems are neither clear nor harmonious and so require detailed discussion.

In *Toms v. Williams*, the testatrix owned land subject to a forty-year lease which provided that the lessor would pay for the lessee's improvements at the expiration of the term or renew the lease for an additional forty years. At the time of the testatrix's death, the original term had eighteen years to run. She devised this and other property to trustees (1) to set aside $5,000 per annum to form a sinking fund to pay for the lessee's improvements; (2) to accumulate the balance of the income and pay it over to two nephews and a niece when the youngest attained majority; (3) to transfer the principal to the nephews and niece as soon as the lessee's improvements were paid for. It was held that this was a trust to "lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon" within the meaning of Subsection 2 of Section 11 and that it was not subject to the suspension statutes. The opinion suggests that trusts falling under Subsection 1, to sell lands for the benefit of creditors, were also exempt from the suspension statutes.

*Russell v. Musson* involved a devise to a son and his wife for their lives, remainder to the children of the son who survived him but, if there were no such children, remainder to Josiah and Hannah Musson, charged with the support of their mother, and if either die with-

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230 41 Mich. 552, 2 N.W. 814 (1879). The lessee's interest under the trust was alienable. The provision for accumulation of the balance of the income was held not to exceed the permissible duration. Part Two, notes 485-487, *supra*. See Part Three, note 225 *supra*.

out issue, to the survivor; if both die without issue, to
their mother. Under this devise, after the death of the
son, all interests in the land would necessarily be held
by ascertained living persons, the son’s wife, Josiah, Han­
nah, and their mother. Hence the entire fee would be
freely alienable after a single life in being unless the pro­
vision for support of the mother made her the bene­
ficiary of a trust for receipt of the rents and profits of
lands so that her interest thereunder was inalienable. It
was held that her interest was alienable and that the dis­
position could not suspend the absolute power of alien­
ation beyond the son’s life. This decision was sound
because the provision for support created an equitable
charge, not a trust.232 The interest of the beneficiary of
an equitable charge is not made inalienable by statute;
therefore such a charge in favor of an ascertained living per­
son does not suspend the absolute power of alienation.

In Wilson v. Odell,233 a testator devised his entire
estate to trustees with power to sell land, “except as
otherwise provided, at such times and in such parcels
as they shall deem advisable, and out of said property pay” (1) funeral expenses and the cost of a monument;
(2) an annuity of $1500 to his widow; (3) annuities to
each of his three children of $600 while under fourteen
and $1000 beyond that age; (4) two pecuniary legacies.
Subsequent clauses directed retention of certain parcels
of land for the purpose of aiding in carrying out the
third purpose, devised the residue to his grandchildren
after the death of all his children and on the majority

232 TRUSTS RESTATEMENT, §10 (1935). An equitable charge differs
from a trust in that it is a mere lien on land, the legal owner of which
holds for his own benefit without fiduciary duties to the beneficiary
of the charge, whereas a trustee holds for the benefit of the cestuis que
trustent and owes fiduciary duties to them. The holder of an equitable
charge is, in effect, a mortgagee.

of the youngest grandchild, and directed that the annuity of any deceased child be continued to its children until the division. It was held that these dispositions were valid as to the land subject to the trustees' power of sale.\textsuperscript{234} Insofar as they related to land not subject to sale, it was held that the implied direction to accumulate surplus rents and profits was valid only during the minority of the children,\textsuperscript{235} that the limitations to the grandchildren were void, and that the trust would terminate when the children came of age, at which time the land would pass to the heirs, subject to the children's annuities. The opinion does not discuss the problem of whether the annuities of the children suspended the absolute power of alienation, but the fact that they were treated as valid indicates that the Court thought they did not.

\textit{Dean v. Mumford}\textsuperscript{236} involved a will which devised the use of testator's homestead to his widow for life, directed the executors to pay the taxes and repairs thereon from the estate, bequeathed a life annuity of $1500 to the widow, and devised the residue to his five children. The will provided that the executors should hold the shares of three sons on trust for these sons, their wives and children, during the lives of the sons and their wives, remainder to their children. It was held that the latter provision was for three separate trusts, each for the life of a son and his wife, but that the provisions for payment of taxes and repairs and the annuity to the widow created a trust which suspended the absolute power of alienation for her life. As to each of the three shares, therefore, the absolute power of alienation was sus-

\textsuperscript{234} Part Three, note 190 \textit{supra}.

\textsuperscript{235} Part Two, note 489 \textit{supra}.

\textsuperscript{236} 102 Mich. 510, 61 N.W. 7 (1894). The widow elected to take against the will, so the validity of the provisions for her was not in question.
pended for three lives, those of the widow, a son, and his wife. The trusts for the sons, their wives and children, and the remainders thereafter to the sons' children were held void. 237

In Niles v. Mason, 238 an estate was devised to a trustee (1) to pay debts, funeral expenses, and a small legacy; (2) to pay $12.50 per month to sister Sarah for life, but, "upon the event of her marriage the said legacy to cease, and to become part of the income hereinafter provided for;" (3) subject to the foregoing, to pay half the income to son Charles for life and half to daughter Lottie for life; if either die without issue, the whole income to the survivor for life, remainder to the issue of Charles and Lottie or, if there should be none, to a brother. It was held that the provision for an annuity to the sister suspended the absolute power of alienation during her life and that the other provisions suspended it during the lives of Charles and Lottie, making three lives; that the trust for Charles and Lottie and the remainders were void, but that the annuity, being separable, was valid. Before the case was decided the trustee had executed a mortgage to the sister to secure payment of the annuity, and the Court approved his act in doing so, thus indicating that it considered the annuity a charge on principal, not merely on the rents and profits. As has been seen, such an annuity does not suspend the absolute power of alienation under the New York decisions. 239

Van Driele v. Kotvis 240 involved a will which pro-

237 Part Two, note 562 supra.
238 126 Mich. 482, 85 N.W. 1100 (1901).
239 Part Three, note 228 supra.
240 135 Mich. 181, 97 N.W. 700 (1903). Contra: Otis v. Arntz, 198 Mich. 196, 164 N.W. 498 (1917) (bequest to church of $25 a year for ten years, "the said sum to be taken from the income of my estate.") But the will in this case became effective in 1916, after the enactment of Act 122 of 1907, Part Two, note 421 supra.
vided, "I - - - bequeath to the Fourth Dutch Reformed Church - - - the sum of five hundred dollars, to be paid by my executor out of the rents, issues, and profits of my estate in the manner following, to wit: Twenty-five dollars per year, for a period of twenty years." The provision was held invalid on the ground that it suspended the absolute power of alienation for twenty years.

In *Skinner v. Taft*, a testator devised his estate to trustees to pay "out of the interest, income and profits" $5,000 per year to his widow and $1,666.66 to each of his three children. The will provided, "the trust herein and hereby created . . . shall terminate five years from the date of the probating of my will," at which time the trustees were directed to distribute the principal to the wife and children in equal shares. The income was insufficient to pay the annuities, and the widow sought a decision that they were a charge on principal. It was held that they were not in an opinion which assumed that, as so construed, the trust was valid. If, as appears to have been the case, the estate included land, the implied holding that the trust did not suspend the absolute power of alienation seems irreconcilable with the previous Michigan decisions discussed above.

*Cole v. Lee* involved a will which directed the executors (1) to pay Phebe Simons $200 a year for life; (2) to provide Carrie Humphrey with a home costing not more than $2,000, pay her $50 a month for life, and "to make such further expenditures as may be necessary to secure her maintenance in ease and comfort;" (3) to pay the living expenses of Frank Cole, his wife and children, during the lives of Frank and wife. Subject to these provisions and some outright legacies, the residue

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242 143 Mich. 267, 106 N.W. 855 (1906).
was devised to the children of Frank, whenever born. It was held that the will created a valid trust for the lives of Frank and his wife. The opinion does not mention the Simons annuity but states, "The charge of an annuity in favor of Mrs. Humphrey does not prevent the vesting of the estate, as the amount is fixed."

The will involved in *Hull v. Osborn*\(^{243}\) directed the "executors and trustees" to pay (1) testator's widow $250 per month during her lifetime, an additional $150 per month on demand, and a sum sufficient to pay taxes, insurance, and repairs on her home; (2) Fred Rowley $150 per year during the life of Carrie Rowley for the use of Carrie. The residue was devised to Blanche and Frances Hull in equal shares, each to be paid $10,000 at 21, $10,000 at 25, $10,000 at 30, $10,000 at 35, $10,000 at 40, and the balance of her half at 45. The will further provided that, if Blanche or Frances died under 45, without issue, payments due her should be made to the survivor at the same times, and that if both died without issue, the payments due them should be made to a number of relatives to be ascertained at that time. The executors and trustees were directed to keep the assets safely invested until distribution. When both were under 30, Blanche and Frances sued to compel termination of the trust and distribution of the entire principal to them. An order sustaining a demurrer to the bill was affirmed in an opinion which states that the provisions for Blanche and Frances did not create a trust and, because their interests were vested, did not violate the suspension statutes, and that the provision for distribution of the residue in the event both Blanche and Frances died without issue did not suspend the absolute power of alienation beyond two lives. Although the

\(^{243}\) 151 Mich. 8, 113 N.W. 784 (1908).
opinion does not mention the annuities to the widow and Fred Rowley, the decision necessarily assumes that they did not suspend the absolute power of alienation. This assumption also seems inconsistent with earlier decisions.

In *Scheibner v. Scheibner*, the residue of an estate was devised to trustees (1) to pay the income to the testator's widow for life; (2) to pay to the testator's two sons $75 "a month each, from and after the death of my said wife, until the expiration of a period of twenty years from the date of my death, during which time I direct that none of my property shall be sold or mortgaged;" (3) to convert the estate into cash at the end of the twenty years and pay it to the sons. It was held that a bill of complaint praying that this trust be declared void as suspending the absolute power of alienation beyond two lives stated a cause of action.

*Grand Rapids Trust Co. v. Herbst* involved a will which (1) directed payment of $75 per month each to two nephews and a niece during their lives; (2) directed division of the remainder of the net income among a son, a brother, and two sisters in equal shares; (3) devised to the son, when and if he reached 25, half the estate outright and the other half charged with payment of the $75 a month to each nephew and niece and the remainder of the net income therefrom to the brother and sisters and the survivor of them during life; (4) if the son died under 25 leaving issue, devised half the estate to trustees to apply principal and income to the support of the issue until 21 or earlier death; principal to the issue at 21; (5) if the son died under 25 without issue or with issue which failed to reach 21, devised the

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244 199 Mich. 630, 165 N.W. 660 (1917).
entire estate to four named charitable institutions, subject to the payments specified in (3). It was held that all of these provisions were void, the opinion saying,

"Counsel for sustaining the will contended no trust is created by the will except for the unborn issue of testator's son, and designating as 'annuities' the monthly payments provided for the nephews and niece in paragraphs 3-5, urge that they are thereby made outright bequests of definite sums of money to be paid the beneficiaries by the executors. But the next paragraph (6) directs 'the remainder of the net income,' not the income of the remainder, to 'be equally divided between' testator's son, brother and two sisters, and although by paragraph 7 an ownership accrues to the son if he lives until 25 years old which relieves one-half of the estate of the monthly payments to nephews and niece, the brothers and sisters yet receive 'the balance of the net income' of the remaining half after payment of the $75 per month each provided for the nephews and niece, thus plainly providing that their monthly payments are to be taken from net income and are not annuities. An annuity is 'A yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only' (Burrill's Law Dict.), distinguished from an 'income' by the latter being interest or profits to be earned. - - -.

"- - - the life beneficiaries being interested in the rents and profits of the real estate to which it relates, we are unable to see how against the prohibition of this statute those beneficiaries can relieve it of that burden by disposing of their interests. The interests of the life beneficiaries are not sums in gross but portions of an income, or rents and profits of ultimate indeterminate amount, even as to those given a stated monthly stipend owing to uncertainty of their respective lives." 247

In *Burke v. Central Trust Co.*, 248 a testatrix devised her estate to a trustee (1) to pay Mary Burke $300 per month for life out of income or, if necessary, out of principal; (2) to pay stipulated monthly sums out of income to each of five named persons for life; (3) when the youngest child of grandnephew Frank Burke, whenever born, reached 25, to transfer the principal and any accumulated income to the children of Frank then living, subject to a lien to ensure payment of the monthly payments specified in (1) and (2). A codicil provided for payment of $300 per month to the guardian of Frank’s children from the death of their parents until the termination of the trust. It was held that the entire trust was void but suggested that, if the will had provided that the trust should terminate when the youngest child of Frank then in being reached 25, the provisions would have been valid. This, in effect, is dictum that, after the termination of the trust, the annuities would be mere equitable charges which would not suspend the absolute power of alienation.

In *re Wagar’s Estate* 249 involved a will which devised the estate to a trustee (1) to pay the entire income to the widow for life; (2) after the death of the widow, to pay stipulated monthly sums from the “rents and earnings” to each of three named children and three named grandchildren until the death of the survivor of the children, the heirs of any of the six persons who died before the termination of the trust to receive the amounts otherwise payable to the person so dying. The only question raised in the litigation was whether the

249 295 Mich. 463, 295 N.W. 227 (1940). Cf. *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W. (2d) 509 (1942), where a number of annuities under a trust were involved but their validity was not determined.
widow of one of the children was an "heir" for this purpose. In an opinion which does not discuss the validity of the trust it was held that she was.

It would seem from the cases just reviewed that, in Michigan as in New York, a provision for an annuity which created a mere equitable charge and not a trust did not suspend the absolute power of alienation. Several of the decisions, however, found that a trust was created in situations where an equitable charge construction would have been possible. When the language used was construed to create a trust, the Michigan decisions are not consistent. It will be recalled that, under the New York decisions, an annuity payable under a trust suspends the absolute power of alienation if it is to be paid exclusively from the rents and profits but does not if it is to be paid from principal or from both principal and income. Three of the Michigan cases involving an annuity payable under a trust exclusively from rents and profits held that it did effect suspension, and two appear to have held that it did not. Two Michigan decisions held that an annuity pay-

250 Russell v. Musson, Part Three, note 231 supra; Wilson v. Odell, Part Three, note 233 supra; Cole v. Lee, Part Three, note 242 supra; and Hull v. Osborn, Part Three, note 248 supra, are probably decisions to this effect. The dictum in Burke v. Central Trust Co., Part Three, note 248 supra, also appears to support this proposition.


252 Part Three, note 227 supra.

253 Part Three, note 228 supra.


255 Skinner v. Taft, Part Three, note 241 supra; In re Wagar's Estate, Part Three, note 249 supra. The Wagar decision may have assumed or held that the provisions were valid either because the probate order of distribution to the trustee was res judicata on this point [Snyder v. Potter, 328 Mich. 236, 43 N.W. (2d) 922 (1950)] or
able under a trust from both principal and income sus-
pended the absolute power of alienation, and two
others which involved this problem did not clearly de-
cide it. In this state of the authorities, it would be
hazardous to venture an opinion as to when an annuity
under a trust suspended the absolute power of alienation
in Michigan. As Section 19 of Chapter 63 of the Re-
vised Statutes of 1846 has not been repealed, the prob-
lem of the alienability of such annuities may still arise,
even though the instrument creating them became effec-
tive after the repeal of the suspension statutes.

If the settlor of an inter vivos trust is also a ben-
eficiary, it is held in New York that his beneficial interest
is alienable and so does not suspend the absolute power
of alienation. Hence a trust to last for the lives of
the settlor and two other persons is valid. The plaintiff
in Bateson v. Bateson conveyed land to a trustee (1)
to pay the entire income to the settlor during his life-
time; (2) after the settlor’s death to hold 2/10 of the

because the suspension effected could not extend beyond the permis-
sible statutory period. In Sprague v. Moore, 130 Mich. 92, 89 N.W.
712 (1902), a mother conveyed land to a daughter on trust to use the
income to support the settlor and pay not to exceed $1000 per year
to each of the settlor’s seven children and one grandchild, these eight
to receive the principal on the death of the settlor. The opinion
appears to treat the interests of the children and grandchild as to
income as alienable. If so, they did not suspend the absolute power
of alienation.

Dean v. Mumford, Part Three, note 236 supra; Niles v. Mason,
Three, note 248 supra.

Wilson v. Odell, Part Three, note 233 supra; Burke v. Central
Trust Co., Part Three, note 248 supra.

Schenck v. Barnes, 156 N.Y. 316, 50 N.E. 967 (1898); Whiteside,
“Statutory Rules: Perpetuities and Accumulations,” 6 AMERICAN LAW

630 (1857); Casgrain v. Hammond, 134 Mich. 419, 96 N.W. 510
(1903), Part Three, note 213 supra. See Part One, supra, at notes
626-632.
corpus in trust and pay the income therefrom to James for 15 years; (3) at the expiration of the 15 years to convey this 2/10 of the corpus to James in fee; (4) if James should die within the 15 years, to convey the fee to his wife and children; but if there were none, to convey 1/10 to George and hold the other 1/10 on trust and pay the income therefrom to Samuel for life and, on his death, to convey the corpus to Samuel's wife and children. The Court disagreed as to the validity of the provision relative to George, but all the justices agreed that the provisions as to the 1/10 to be held in trust for the lives of the settlor, James, and Samuel suspended the absolute power of alienation for three lives and so were void. This decision is, therefore, contrary to the New York view.

The application of the suspension statutes to charitable and honorary trusts has been discussed in Chapter 16.\textsuperscript{261} The situations in which a trust does not suspend the absolute power of alienation because it is destructible by the exercise of a power have been discussed in the preceding section of this chapter.

\textsuperscript{261} Part Two, \textit{supra}, at notes 406-428, 432, 437-447.