CHAPTER 21

The Statutory Period

CHAPTER 62 of the Revised Statutes of 1846 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, except in the single case mentioned in the next section.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any contingency by which the estate of such persons may be determined before they attain their full age.

"Sec. 30. When a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take, in the same manner as if born before the death of the parents.

"Sec. 31. A future estate depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.

"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." 262

262 Rev. Stat. 1846, c. 62, §§15, 16, 30, 31, 41; Comp. Laws (1857) §§2599, 2600, 2614, 2615, 2625; Comp. Laws (1871) §§4082, 4083, 4097, 4098, 4108; Comp. Laws (1897) §§8797, 8798, 8812, 8813, 8823; How. Stat., §§5531, 5532, 5546, 5547, 5557; Comp. Laws (1915) §§11533, 11534, 11548, 11549, 11559; Comp. Laws (1929) §§12985,
The period of permissible suspension of the absolute power of alienation under Sections 15 and 16 differs from the period of permissible suspension of vesting under the common-law Rule Against Perpetuities in three respects: (1) Whereas under the common-law Rule there may be suspension for any number of lives in being, under the statutes the number of lives in being is limited to two. (2) Whereas under the common-law Rule suspension is always permissible during the minority of a person who is not in being at the commencement of the period but will certainly come into being, if at all, within lives in being, suspension is permissible under the statutes during such a minority only if the minor is certain to come into being, if at all, within two lives and only when the minor is entitled to a fee defeasible by a condition occurring during minority. (3) Whereas under the common-law Rule suspension is permissible during a gross period of twenty-one years or less, unconnected with an actual minority, whether or not such period follows lives in being, the statutes do not permit suspension for any period in gross whatever.

A. COMMENCEMENT OF THE PERIOD

Under both the common-law Rule Against Perpetuities and the statutes, the period is computed, as to an interest which is indestructible from its creation, from the time when the instrument creating the interest becomes effective. In the case of a deed, this is the time of


263 Part Two, note 95 supra.
264 Part Two, notes 31, 101, supra.
265 Part Two, notes 35, 112-115, supra.
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delivery; in the case of a will, the death of the testator. 266
Under both the common-law Rule and the statutes, an
interest created by the exercise of a power of appoint-
ment is normally deemed, for this purpose, to be created
by the instrument creating the power rather than by
the instrument exercising it. 267 However, under the
common-law Rule, an interest created by the exercise of
a power of appointment which is unlimited as to objects
and exercisable by deed, is deemed to be created by the
instrument exercising the power, 268 and this is true
under the statutes as to an interest created by exercise
of an absolute power of disposition of the entire fee. 269
Under both the common-law Rule and the statutes, the
commencement of the period may be postponed by the
existence of destructibility. What constitutes destruc-
tibility, however, is not the same under the statutes as
at common law. 270

B. THE REQUIREMENT OF CERTAINTY

Under both the common-law Rule Against Perpetui-
ties and the statutes, an interest which is indestructible
from its creation and not created by exercise of a power
is invalid unless, at the time when the creating instru-
ment becomes effective, it is absolutely certain that the
interest will not effect suspension for longer than the
permissible period; a high degree of probability is not
enough. If, viewed from that time, any combination of
future events which would extend suspension beyond

266 Part Two, note 63 supra; Rev. Stat. 1846, c. 62, §§15, 41, Part
Three, note 262 supra; Chaplin, SUSPENSION OF THE POWER OF ALIENA-
267 Part Two, notes 318, 322, Part Three, note 145, supra.
268 Part Two, note 301 supra.
269 Part Two, note 305, Part Three, note 148, supra.
270 Part Two, notes 70-81, Chapter 20, Section B (3), supra.
the permissible period is possible, the interest is void, although the actual occurrence of that combination of events is highly unlikely and even though, by the time the validity of the interest is litigated, it has become manifest that they did not or cannot occur.\textsuperscript{271} In determining this certainty it is always deemed possible, under the statutes as at common law, that a living person may marry a person as yet unborn,\textsuperscript{272} that a living person, regardless of age or physical condition, is capable of having children,\textsuperscript{273} and that such administrative steps as


\textsuperscript{272} Part Two, note 131 \textit{supra}; Schettler v. Smith, 41 N.Y. 328 (1869); Chaplin, \textit{Suspension of the Power of Alienation}, 3rd ed., \S 115 (1928); \textit{Property Restatement, App.}, Ch. A, \S 32 (1944). That is to say, if a limitation is construed to be to, or measured by the life of, anyone whom a named person may marry in the future, it is possible that the spouse may be a person as yet unborn. But in Dean v. Mumford, 102 Mich. 510 at 515, 61 N.W. 7 (1894), where a will, as construed by the court, created a trust to last for the lives of the testator's widow, his unmarried son, and the son's wife, it was said, "But it is suggested that, in this view, as Herbert L. was unmarried at the time the will took effect, the will should be construed to relate to any wife whom he might in the future marry, and, so construed, the estate would not vest in the children or heirs until after the expiration of two lives in being. We think the will not open to this construction, but that it was intended to mean any wife of Herbert L. living at the time of the decease of the testator." A limitation in favor of the wife of a married person is normally construed to refer to his existing wife. Conover v. Hewitt, 125 Mich. 34, 83 N.W. 1009 (1900); Cole v. Lee, 143 Mich. 267, 106 N.W. 855 (1906).

\textsuperscript{273} Part Two, notes 138-141, \textit{supra}; Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922); \textit{Property Restatement, App.}, Ch. A, §§31, Ch. B,
probating a will may not be taken within a predictable time. If the time when the absolute certainty must exist is the effective date of the instrument creating the interest, it follows that events which occur before that time may be considered in determining certainty but events which occur thereafter may not. As a will becomes effective upon the death of the testator, events which occur after the execution of the will and before such death may be considered; events which occur after the testator’s death may not.


Part Two, note 134 supra. Thus in Battelle v. Parks, 2 Mich. 531 (1853), it was suggested that a devise of a beneficial power to the testator’s administrator would be void because of the possible delay in appointing an administrator, and in Thatcher v. Wardens & Vestrymen of St. Andrew’s Church of Ann Arbor, 37 Mich. 264 (1877), Part Three, note 189 supra, it was assumed that a direction to a trustee to pay the expenses of last illness and funeral of a cestui que trust could suspend the absolute power of alienation for a period not limited by two lives. In both New York and Michigan there is a strong tendency to construe provisions postponing distribution until the completion of some administrative step as not suspending the absolute power of alienation in the meantime. PROPERTY RESTATEMENT, App., Ch. A, §66 (1944); Fitzgerald v. City of Big Rapids, 123 Mich. 281, 82 N.W. 56 (1900) (discretionary power in executor to withhold distribution of residue until payment of debts and other legacies; Court remarked that such delay would be necessary in the absence of the provision); Moss v. Axford, 246 Mich. 288, 224 N.W. 425 (1929) (devise to person to be selected by executor valid; suggestion that the ordinary delays in the settlement of an estate are not within the reason of the statute); McGraw v. McGraw, 176 Fed. 312 (6th Cir. 1910) (devise to trustee to convey to named persons after two lives and payment of testator’s debts). Cf. De Buck v. Bousson, 295 Mich. 164, 294 N.W. 135 (1940).

Mullreed v. Clark, 110 Mich. 229, 68 N.W. 188 (1896) (will suspended the absolute power of alienation for lives of testator’s wife and two children; death of wife before testator prevented invalidity); PROPERTY RESTATEMENT, App., Ch. A, §29, Ch. B, §56 (1944). Accord, under the common-law Rule: Part Two, note 125 supra.

Dean v. Mumford, 102 Mich. 510, 61 N.W. 7 (1894) (will suspended the absolute power of alienation for lives of testator’s wife, son, and the son’s wife; widow’s election to take against the will did
THE STATUTORY PERIOD 575

Under the common-law Rule Against Perpetuities, there are two situations in which the absolute certainty that an interest will not suspend vesting for longer than the permissible period need not exist at the time when the creating instrument becomes effective. When an interest will be destructible for a time and then indestructible for a time, it is sufficient if the certainty that it will vest in due time exists when the indestructibility commences; that is, events which occur between the effective date of the creating instrument and the end of the period of destructibility may be considered in determining certainty.277 When the interest is created by exercise of a power of appointment, it is sufficient if certainty exists when the power is exercised, even though the period of the Rule is computed from the effective date of the instrument creating the power; that is, events which occur between the creation of the power and its exercise may be considered in determining certainty.278

Under the statutes, however, it may be that, in all cases, it must be absolutely certain at the time when the creating instrument becomes effective that any suspension of the absolute power of alienation effected thereby will terminate within the statutory period; that is, events which occur after the effective date of the creating instrument can never be considered in determining certainty.279 It may be that this is so even though, because


277 Part Two, notes 70, 125, supra; PROPERTY RESTATEMENT, §373, Comment C. (1944).

278 Part Two, note 324 supra.

279 Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§63, 89, 95, 360-362 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.13 (1952). On this theory, where a power is involved, the instrument exercising
the interest in question will be destructible for a time, the commencement of the period of suspension is postponed to the end of the period of destructibility. If John Stiles conveyed land to James Thorpe upon trust to apply the rents and profits to the use of John for life, then to the use of John's wife for life, then to the use of John's daughters Mary and Lucy for their lives and, on the death of the survivor, to convey to the descendants of John then in being, reserving to the grantor an absolute power of revocation, the trust would be destructible until the death of John and so could not suspend the absolute power of alienation until then. 280 Nevertheless, it may be that the fact that John's wife predeceased him could not be considered in determining the validity of the trust. At the time when the deed was delivered it was possible that the trust would suspend the absolute power of alienation for three lives, those of John's wife and his two daughters.

C. TWO LIVES IN BEING

(1) What is a Life in Being?

The statutes did not invalidate an interest which suspended the absolute power of alienation if it was certain when the instrument creating the interest took effect that the suspension could not last longer than the lives of two persons who were in being at that time and designated by or ascertainable from the instrument as the measuring lives. 281 On the other hand, except in the nar-

280 Part Three, notes 155, 200, supra.
row situation to which the restricted minority provision of Section 16 applied, the statutes did not permit suspension of the absolute power of alienation for any part of a life which was not certainly in being when the instrument creating the interest took effect.

In *Palms v. Palms*, land was devised to trustees to pay half the income to the testator's son for life and half to the testator's daughter for life. On the death of either, half the principal was to be paid to the children of the deceased child. A subsequent clause directed that the share of any grandchild who was a minor at its parent's death should be held in trust for it during minority. It was suggested that the latter provision was invalid as to


any grandchild who was not in being at the death of the testator. In *Burke v. Central Trust Co.*,285 land was devised to a trustee to pay the rents and profits to various persons. The will provided that the trust should terminate when the youngest of Frank's three living children "or of any child or children hereafter born to my said grandnephew Frank . . . shall attain the full age of twenty-five years," and devised the remainder to the then living children of Frank. As the youngest child of Frank might be a person not in being at the death of the testatrix, its life was not a proper measuring life and hence these provisions were void. In *Gardner v. City National Bank & Trust Co.*,286 land was devised to trustees (1) to pay the income to testator's daughter Alene for life; (2) to pay the income to Alene's named children and any further born children until each child reach twenty-five; (3) to transfer half of its share in the principal to each child of Alene on reaching twenty-five; (4) to pay the income from the remaining half to each such child until it reached thirty and then to transfer the principal to it; (5) if any child of Alene should die before receiving its full share of the principal, to pay the income from its share to its issue during minority, then to transfer such share in the principal to the issue; (6) if any child of Alene should die without issue before receiving its full share of the principal, to add that share to those of the other children; (7) if Alene and all her issue should die prior to the termination of these trusts, to add the principal to that of a like trust set up for testatrix's daughter Natalie and her children. As these provisions might suspend the absolute power of alienation for periods measured by parts of the lives of unborn children of the

daughters and the minority of unborn grandchildren, they were held void.

It would seem that the two measuring lives must be those of human beings; that the lives of corporations, animals, or plants would not serve. Although the Michigan statutes were not explicit on the point, it appears that a child *en ventre sa mere* at the time the instrument creating an interest became effective was a life in being which could serve as one of the two measuring lives. Part of a life in being could be used as a measuring life, but, when so used, it was treated as a whole life in computing the number of lives during which suspension might last. Thus a suspension of the absolute power of alienation for three minorities was invalid, although the minors were aged 18, 19 and 20 when the creating instrument took effect.

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290 Paton v. Langley, 50 Mich. 428, 15 N.W. 537 (1883) (widowhood); Hull v. Osborn, 151 Mich. 8, 113 N.W. 784 (1908) (until 45); Taylor v. Richards, 153 Mich. 667, 117 N.W. 208 (1908) (until 25 and worthy); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§106, 107 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.16 (1952). Measurement by part of a life in being must be distinguished from measurement by part of a life not in being (Part Three, notes 283-286, *supra*) and from measurement by a period not certain to terminate at or before the expiration of two lives. Thus a period defined as "until my son John reaches 21 or would have reached that age if alive" is a period in gross, not a measurement by part of a life.

291 Hawley v. James, 16 Wend. 61 (1836); Benedict v. Webb, 98 N.Y. 460 (1885); Matter of Butterfield, 135 N.Y. 473, *sub nom.* In re Christie, 31 N.E. 515 (1892), Part Three, note 137 *supra*; Chaplin,
criticized the use, under the common-law Rule Against Perpetuities, of the lives of persons who take no interest under the conveyance as measuring lives. The statutes did not prohibit doing this. Accordingly, it is not essential that the two measuring lives in being be those of persons who take an interest under the instrument in question. The suspension statutes did not limit the number of interests which could be created by an instrument. Hence a trust for receipt of the rents and profits of land could have any number of beneficiaries so long as it was certain to terminate at or before the expiration of two lives in being. Similarly, a future interest could be limited to any number of persons and could be preceded by any number of interests in any number of persons, so long as it was certain not to suspend the absolute power of alienation for more than two lives in being.

Suspension of the Power of Alienation, 3rd ed., §107 (1928); White-side, "Statutory Rules: Perpetuities and Accumulations," 6 American Law of Property, §25.16 (1952). In Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901), "until her death or marriage" was treated as a full life in counting the permissible two. Other Michigan cases on this point will be discussed below in connection with the problem of measurement by the life of the survivor of a group.


Crooke v. County of Kings, 97 N.Y. 421 (1884); Chaplin, Suspension of the Power of Alienation, 3rd ed., §105 (1928).

But see Chapter 19, supra, as to the statutory restrictions on successive legal life estates.


(2) Ascertainment of the Measuring Lives

Under the common-law Rule Against Perpetuities, the measuring lives must be ascertainable from the instrument creating the interest or, in the case of an interest created by the exercise of a power, from the instruments creating and exercising the power. That is to say, under the common-law Rule, it must be possible, from the creating instrument and the extrinsic facts which may be considered in determining certainty, to ascertain at the time certainty is required the identity of the persons whose lives are the measuring lives in being. This is an aspect of the requirement of certainty with which the New York revisers must have been familiar and which they probably intended to adopt. Nevertheless, both the New York and Michigan courts relaxed this aspect of the requirement of certainty to some extent. Although it was necessary that the creating instrument or instruments provide some mode of ascertaining the two measuring lives in being which would ensure their identification at or before their own expiration, it was not essential that the identity of the two persons whose lives were to measure be determinable at the time the creating instrument became effective. It was sufficient if one life was immediately identifiable and the other certainly would be at the expiration of the first. Thus the duration of a

Mich. 249, 206 N.W. 366 (1925). But some of the preceding interests might be invalid under the statutes restricting the creation of life estates discussed in Chapter 19, supra.

297 Part Two, notes 89-91, supra.
298 Part Two, notes 125, 127, 128, Part Three, notes 275, 276, supra.
299 Part Two, notes 70, 125, 130, 324, Part Three, notes 271, 277, 278, supra.
300 Chapter 11, Section A, and Chapter 21, Section B, supra.
301 Everitt v. Everitt, 29 N.Y. 39 at 72 (1864); Chaplin, Suspension of the Power of Alienation, 3rd ed., §§95, 97-99 (1928).
302 Conover v. Hewitt, 125 Mich. 34, 83 N.W. 1009 (1900) (lives of named person and any wife who survived him); Van Cott v. Pren-
testamentary trust could be measured by the life of the testator's widow and that of his youngest child living at the widow's death. Moreover, it was sufficient if each measuring life was certain to be identifiable at or before its own expiration. Thus the duration of a testamentary trust could be measured by the lives of those two of the testator's six children who first died. 303

(3) Life of the Survivor of a Group

If it be accepted that it is sufficient if a measuring life is certain to be identifiable at or before its own expiration, it would seem to follow logically that a suspension of the absolute power of alienation could properly be measured by the life of the survivor of a group of three or more living persons. This would be a single life, certain to be identifiable before its own expiration. Relaxation of the requirement of ascertainability to this extent would, however, make the restriction to two lives virtually inoperative by equating it to the "any number of lives in being" of the common-law Rule. It would make possible the measurement of suspension by the life of the survivor of a group of twenty-eight persons, as was done in an English case 304 which had been severely criti-
cized by the New York revisers. Hence, illogically but understandably, the New York courts refused to take this step. They have held consistently that measurement by the life of the survivor of a group of more than two persons is not permissible; that it suspends the absolute power of alienation by as many lives as there are persons in the group. The Michigan Supreme Court experienced so much difficulty with this problem that a detailed review of the cases involving it is necessary to an understanding of the situation here.

_Toms v. Williams_ involved a devise of land to trustees to accumulate part of the rents and profits for the benefit of three named children of the testatrix's deceased brother. When the testatrix died these were aged, respectively, 15, 19, and 21. The will provided,

"I direct my trustees, at the expiration of the minority of the youngest of the said children of my deceased brother, to pay over to said children or the

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303 Extracts from the Original Reports of the Revisers, 3 N.Y. Rev. Stat. (2d ed.) 571 (1836), quoted in the text at Part Three, note 6 supra. The ideas of the revisers are criticized in 3 Walsh, _Law of Real Property_, §347 (1947), where it is pointed out that the lives of two healthy children are likely to last longer than any number of lives of mature persons, and that the life expectancy of two persons is little different from that of ten or more of the same age.

304 Coster v. Lorillard, 14 Wend. 265 (1835) (survivor of twelve persons); Hawley v. James, 16 Wend. 61 (1836) (until youngest of thirteen minors to reach 21 did so); Benedict v. Levi, 177 App. Div. 385, 163 N.Y. Supp. 846 (1917), aff'd., 223 N.Y. 707, 120 N.E. 858 (1918) (survivor of eight persons); _Property Restatement_, _App._, Ch. A, ¶39 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 _American Law of Property_, §25.16 (1952). The application of this rule is sometimes prevented by the tendency to construe "surviving" as meaning "surviving the testator." Part Two, notes 251, 253-258, _supra_.

307 _Property Restatement_, _App._, Ch. B, ¶54 (1944); 3 Walsh, _Law of Real Property_, §§58 (1947); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 _American Law of Property_, §§25.16, 25.43 (1952). Professor Whiteside discusses the Michigan cases in some detail. He and the _Restatement_ suggest that there is grave doubt as to their effect.

308 41 Mich. 552, 2 N.W. 814 (1879), Part Two, notes 485, 487, _supra_.

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survivors of them, share and share alike, all the net accumulations of my estate, - - - ."

A statute then in force provided that an accumulation of rents and profits of real estate "must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority." 309 As only two of the children were minors when the testatrix died, the quoted provision could not, on any possible construction of the statutes, have suspended the absolute power of alienation for longer than two lives in being, so the only question presented was the effect of the accumulation statutes. The trial court held that the accumulation for each child should terminate when it reached 21 and, as this ruling was not appealed, it was not disturbed, but the Supreme Court, after holding that "survivors" meant those who survived the testatrix, said,

"But we do not feel at all satisfied that the statute requires such a construction. Its language certainly is quite consistent with an accumulation for any number of infants until all come of age, and such an accumulation is really no more than for the minority of a single life in being." 310

This passage related only to the accumulation statute and had nothing to do with the two lives provisions of the suspension statutes, but the last clause reflects a mode of thought which is out of harmony with the New York decisions under the suspension statutes.

Dean v. Mumford 311 involved a will which gave the testator's widow the life use of his homestead and directed his executors to pay taxes and repairs and to pay her a

311 102 Mich. 510, 61 N.W. 7 (1894).
life annuity. A succeeding clause directed division of the residue among five children. A later clause directed that the shares of three sons be held in trust for the sons, their wives and children, "during the lives of my said sons, and their wives, and upon the decease of said sons and their wives, the portion so held in trust by my said executors shall become the property of and go to the child or children of said sons, severally." It was held that the first provision created a trust for the life of the widow which suspended the absolute power of alienation during her life, and that the last clause mentioned created three separate trusts, each of which was to be judged, as to validity, separately, and each of which suspended the absolute power of alienation for the lives of a son and his wife. The court held the three trusts void because, in combination with the trust for the widow, each suspended the absolute power of alienation for three lives, those of the widow, a son and his wife. This decision appears to accept the New York interpretation of the suspension statutes on the point under consideration.

In Trufant v. Nunneley,\textsuperscript{12} a testator devised the use of two described farms to his son John for life, the use of two smaller farms to his daughter Julia for life, and the use of farms of equal value to those of Julia to his daughter Alice for life. Subject to these life estates, all of the farms were devised "to the body heirs of my said son and daughters, share and share alike." The will further provided that if any child should die without issue before testator's widow, the land devised to that child for life should pass to the widow for life, with remainder to the body heirs of the children, if any, otherwise to the heirs of the wife. A decree holding these dispositions valid was reversed with an opinion which stated,

\textsuperscript{12} 106 Mich. 554, 64 N.W. 469 (1895).
"In any view of the case, we are satisfied that the will cannot be sustained as to these three parcels of land. The conditions of this will are such that there is no one who can convey so as to cut off future rights of as yet unascertained persons; for, until the death of testator's three children, it cannot be ascertained who are the body heirs of these three persons. Complainant's body heirs cannot be ascertained until his death, and so with the body heirs of the daughters. So the estate in these lands is tied up during the life of the son and two daughters, making three lives, and then the remainder over is to the body heirs of all the children of the testator. Until all these contingencies happen, there is no person or persons in whom the estate can vest in fee simple absolute, and hence no person in being who could convey. Chapl. Suspen. §127; Kilpatrick v. Barron, 54 Hun, 322; Graham v. Fountain, 2 N.Y. Supp. 598. It follows that the will must be held void as affecting the pieces of land described, and, as to the remainder in them, they must be distributed under the statute." 313

In Niles v. Mason, a testator devised his entire estate to trustees (1) to pay Sarah Niles $12.50 a month until her death or marriage; (2) subject thereto, to pay half the income to Charles Niles for life and the other half to Lottie Niles for life; (3) upon the death of Charles or Lottie to pay half the principal to the children of the deceased; (4) if Charles or Lottie die without surviving issue, to pay the entire income to the other for life and the

313 106 Mich. 554 at 560-561. Kilpatrick v. Barron, 54 Hun. 322 (1889), aff'd., 125 N.Y. 751, 26 N.E. 925 (1891) and Graham v. Fountain, 2 N.Y. Supp. 598 (1888), cited by the Court, did not involve suspension of the absolute power of alienation beyond two lives. These cases held merely that a future interest limited to a class which might include unborn persons could not be cut off by persons in being.

314 126 Mich. 482, 85 N.W. 1100 (1901). As pointed out above (Part Three, note 228 supra), this will would have been fully valid in New York because the annuity of Sarah was a charge on principal, alienable, and did not suspend the absolute power of alienation for her life. Hence, under the New York analysis, there was suspension only for the lives of Charles and Lottie.
entire principal to his children at death; (5) if both Charles and Lottie die without surviving issue, remainder to Charles Niles in fee. It was held that these dispositions suspended the absolute power of alienation for three lives, those of Sarah, Charles, and Lottie, and that, except as to the annuity of Sarah, they were void.

In Foster v. Stevens,\textsuperscript{315} land was devised to trustees to pay the rents, profits and income to the testator's widow and two sons “during their natural lives and the natural life of either of them.” A later clause directed that, upon the death of the sons, the land should descend to their heirs. The Court assumed that, if the trust was to last for the life of the survivor of the widow and sons, it would suspend the absolute power of alienation for three lives but construed the will as providing that the trust should cease upon the death of the survivor of the sons, even if the widow was still alive. As so construed the trust was, of course, valid.

In Root v. Snyder,\textsuperscript{316} Root conveyed land to Frantz as trustee to convey to Root, Susan Snyder, Jared Snyder, and Flora Snyder, “as joint tenants and to their heirs and assigns, and to the survivors or survivor of them, and the heirs and assigns of the survivors or survivor of them,” which Frantz did by a deed which contained the same language in the granting clause but the habendum of which was, “to them as joint tenants and not as tenants in common, and to their heirs and assigns forever.” Sub-

\textsuperscript{315} 146 Mich. 131, 109 N.W. 265 (1906). The Court cited People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N.Y. Supp. 436 (1905), which reached a contrary result on the construction problem, but sought to distinguish it on the ground that the Foster will made other provision for the widow. Mrs. Foster died before the litigation was commenced by one of the sons against the other and the trustee.


sequently Root sued to set aside these deeds on the ground, *inter alia*, that they limited interests to the heirs of the survivor of four persons and so suspended the absolute power of alienation for four lives. The Court rejected this contention, holding that the deeds created an ordinary joint tenancy in fee; that the heirs of the survivor took by descent and not by purchase. This being so, the entire title was held by four living persons and there was no suspension of the absolute power of alienation.317

*Truitt v. City of Battle Creek*318 involved a series of conveyances of land. On April 13, 1903, Robertson, who owned in fee, executed a life lease to Beauregard and wife. On the same day Robertson conveyed the fee, subject to the Beauregard lease, to Melbourne Truitt, and Truitt and the Beauregards joined in a mortgage of the fee to Welch. On July 24, 1903, Melbourne Truitt conveyed the fee, subject to the Beauregard lease, to Louise Truitt. On the following day Louise Truitt conveyed to Melbourne Truitt for life, remainder to his heirs. The Welch mortgage was foreclosed and the land purchased at foreclosure sale by Onen, who conveyed the fee to Melbourne Truitt in 1910. Louise Truitt then quit-

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317 After this decision, Susan and Jared Snyder died, Root conveyed an undivided half of the land to Jones, Root died, and Jones sued Flora Snyder for partition. The Court then held that the deeds created a joint tenancy for life, with a contingent remainder to the survivor in fee which could not be cut off by Root's conveyance. Hence Flora Snyder acquired the entire fee on the death of Root. *Jones v. Snyder*, 218 Mich. 446, 188 N.W. 505 (1922). Although this construction was inconsistent with that made in *Root v. Snyder*, it did not involve suspension of the absolute power of alienation because, under it, the entire fee was held by four living persons who could, acting together, convey an absolute fee in possession. On the construction problem see Part One, note 167 *supra*, and Danahey, “The Confusing Right of Survivorship,” 32 Mich. St. Bar Jl. 14-17 (Feb. 1953).

claimed in fee to Melbourne Truitt, and Melbourne brought a suit to quiet title against his own unknown heirs. The plaintiff conceding that, if he was a life tenant before the mortgage foreclosure, his purchase of the title acquired by the foreclosure would not cut off the remaindermen, contended that the deed of July 25, 1903, was void because it violated the suspension statutes and the statute prohibiting more than two successive life estates.\(^{319}\) On the original hearing the Supreme Court reversed a decree for the plaintiff, saying,

"The crucial question therefore in the instant case is, Did the life lease to Oliver Beauregard and Thersil, his wife, create an estate for two lives in being, two life estates, or but one? Was its duration measured by two lives or by only one, that of the survivor? That the estate created was an estate by entirety has been frequently held by this court - - -. Each is a tenant by the entirety, and the survivor takes the whole estate. The duration of the estate is measured by the life of the survivor. It is neither shortened nor lengthened by the death of one of the parties. It is terminated only by the death of the survivor. Obviously, therefore, the estate created is an estate for one life, viz., that of the survivor. See Woolfit v. Preston, 203 Mich. 502." \(^{320}\)

On rehearing, the original decision was vacated and the decree of the trial court quieting title in the plaintiff


\(^{320}\) 205 Mich. 180 at 183-184. In Woolfit v. Preston, 203 Mich. 502, 169 N.W. 838 (1918), Part Three, note 57 *supra*, land was devised to Claudia for life, remainder to Martha and Florence for life, remainder to Helen and Ruth in fee. It was held that this was a valid disposition of an undivided half to Claudia for life, remainder to Martha for life, remainder to Helen and Ruth in fee, and of the other undivided half to Claudia for life, remainder to Florence for life, remainder to Helen and Ruth in fee; that is, that the life estates of Martha and Florence were in separate shares. The Court was careful to hold explicitly that the survivor of Martha and Florence would take no interest in the share of the other.
in fee affirmed on the ground that the deed of July 25, 1903, had never been accepted, the court saying,

"The conclusion we have reached makes it unnecessary to determine the effect of the life estate given to Oliver Beauregard and wife Thersil. The determination of that question being unnecessary, what was said in the original opinion on that subject may be considered withdrawn, and the case will be disposed of on another theory." 821

Despite the express withdrawal of the quoted language of the original opinion, its presence in the Reports introduces disturbing elements of confusion into the law. As the Court evidently failed to see, the interests involved could not possibly have suspended the absolute power of alienation for longer than the life of Melbourne Truitt. As none of them was subject to a trust, at Melbourne's death his heirs would certainly be ascertainable and able to combine with the Beauregards and the mortgagee to convey an absolute fee in possession. Hence the only problem presented was whether a conveyance to two persons for the life of the survivor creates a single life estate or two successive life estates within the meaning of the statute prohibiting more than two. It was already settled in Michigan that such a conveyance creates a single life estate.822 The statement that such an estate is one for a single life has nothing to do with the question whether there was a single estate or two and so was wholly unnecessary to the decision, even on the theory of the original opinion. Even more disturbing than this confusion of two separate questions is the suggestion implicit in the original opinion that when the absolute power of

821 208 Mich. 618 at 619. Both opinions were by Fellows, J.
alienation of a tract of land is suspended by each of several distinct and separate conveyances, the periods of suspension effected by each are to be added together and invalidity found if the aggregate of these periods exceeds the permissible statutory period. The New York decisions clearly negative this suggestion. They hold that the statutory period limits only suspension created by a single transaction. For example, if an owner in fee creates a trust which suspends the absolute power of alienation for two lives, retaining the reversion, he may at a later time, as a separate transaction, create another trust of the reversion for two other lives then in being.\footnote{323}

\textit{Grand Rapids Trust Co. v. Herbst} \footnote{324} involved a will which (1) directed payment of $75 a 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 brothers 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 entire estate to four named charitable institutions, subject to the payments specified in (3). Provision (4) was probably invalid, insofar as it purported to create a trust for receipt of the rents and profits of lands to last during the minority of unborn persons. It had, however, been held in *Palms v. Palms* that the invalidity of such a provision did not invalidate other dispositions made by the same will. The Court decided that provisions (1), (2), and (3) created a trust for receipt of the rents and profits of lands to last until the death of the survivor of the son, brother, sisters, nephews, and niece, and held that such a trust was void because it was to last for seven lives. Although this case was complicated by the interests of the unborn issue of the son, the decision, like those in *Dean v. Mumford*, *Trufant v. Nunneley*, *Niles v. Mason*, *Foster v. Stevens*, and *Root v. Snyder*, appears to be based on the New York theory that a suspension of the absolute power of alienation for the life of the survivor of a group of persons is a suspension for as many lives as there are persons in the group.

In *Allen v. Merrill*, a testator devised the residue of his estate to trustees (1) to pay out of income $1,000 per year to his wife for life and the balance to his wife and five children in equal shares; (2) if any child die, his children to receive the income otherwise payable to him,

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325 Part Three, note 283 *supra*. But see Part Three, notes 369, 370, *infra*.

326 68 Mich. 355, 36 N.W. 419 (1888), Part Two, note 561 *supra*.

327 Part Three, note 311 *supra*.

328 Part Three, note 312 *supra*.

329 Part Three, note 314 *supra*.

330 Part Three, note 315 *supra*.

331 Part Three, note 316 *supra*.

332 Part Three, note 306 *supra*.

or, if none, the other children of the testator; (3) on the death of the wife, principal to be distributed to the five children, share of any child pre-deceasing the wife to go to its issue, if any, otherwise to the surviving children of the testator; (4) if the wife predecease the testator or elect to take against the will, trustees to distribute within five years after the testator’s death as provided in (3). The wife elected to take against the will. Ten years after the testator’s death, a creditor of one of his children attached the trust land, and the trustees sued to remove the attachment as a cloud on title. A decree for the plaintiffs was affirmed in an opinion which rejected the contention of the creditor that the trust was void because it suspended the absolute power of alienation beyond two lives in being. In this connection the Court said,

"Under the will the trustees hold the legal estate, for they have power to convey and thereby cut off the equitable estates or interests of the designated beneficiaries. Such holding by the trustees, coupled with the duty, in case of sale, to bring the avails to the administration of the trust, suspends in law the power of alienation. And this brings us to the pivotal question of whether this suspension goes beyond two lives in being.

"If the widow elected to take under the statute, then the will directed the estate to be settled in five years after testator’s death, by distribution, first, to his children then living (one life in being); second, in case of death of any of his children, with issue, then to such issue by right of representation (two lives in being), and if no issue, then to his surviving children. The distributees, so designated, were all in being at the death of testator. The trust was a valid one." 334

The meaning of this passage is obscure. As the trustee was empowered to terminate the trust by distribution at

334 223 Mich. 467 at 471-472. Per Wiest, C.J.
any time after the death of the widow or her earlier election to take against the will, neither the trust nor interests under it could suspend the absolute power of alienation for longer than the life of the widow.\textsuperscript{335} If this were not so, the trust would be void because it might last for a gross term of five years, unconnected with measuring lives, and the class of distributees might include persons who came into being at any time within five years after the death of the testator.\textsuperscript{336} The quoted passage has sometimes been thought to state that suspension of the absolute power of alienation may be measured by the life of the survivor of a group of more than two persons on the theory that that would be one life.\textsuperscript{337} If this be its meaning, the language is not pertinent to the facts, because the trust involved in the case was not measured by lives at all but by a term in gross.

\textit{Kemp v. Sutton} \textsuperscript{338} involved a devise of land to the testator’s widow and three sons and the survivors and survivor of them, remainder on the death of the survivor to the City of Sault Ste. Marie. The Court correctly held that the will created no trust and that, because all in-

\textsuperscript{335} Part Three, notes 185, 200, \textit{supra}.

\textsuperscript{336} The quoted passage appears to construe “surviving” as meaning “surviving the testator.” See Part Two, notes 251, 253-258, \textit{supra}. Actually, it probably meant “surviving to a time when the trustees are authorized to distribute,” which would be (1) the death of the testator if his wife predeceased him, (2) the death of his widow, or (3) the widow’s election to take against the will. On either of these constructions, the distributees of both income and principal would all be in being and ascertained within a life in being at the testator’s death. If, however, “surviving” meant “surviving until actual distribution,” the class of distributees might include persons who came into being at any time within five years after the testator died. A limitation to such a class would, in the absence of destructibility, be void even if the trust itself did not suspend the absolute power of alienation beyond the widow’s life. Part Three, note 78 \textit{supra}.


\textsuperscript{338} 233 Mich. 249, 206 N.W. 366 (1925), Part Three, note 61 \textit{supra}.
interests in the land were limited to ascertained persons in being, there was no suspension of the absolute power of alienation whatever. The only problem involved was whether there was a violation of the statute prohibiting more than two successive legal life estates. Consistently with previous decisions, the Court held that a joint estate for the life of the survivor of several persons is a single estate, not several successive life estates. In reaching this conclusion, however, the Court used language which has sometimes been misunderstood to state that the life of the survivor of a group of persons is a single life for purposes of the suspension statutes. It said,

"The life tenants are joint holders. They count as a class and in the eye of the law as one life in being. As was said in Smith's Appeal, 88 Pa. St. 492:

'It matters not how many lives there may be so that the candles are all burning at the same time, for the life of the longest liver is but a single life.'

"See 2 Alexander on Wills, §1158. Such rule was announced upward of two and a half centuries ago. See 1 Siderfin, 451."

In Felt v. Methodist Educational Advance, a testator devised a farm to his widow for life, remainder to his three children,

339 Rev. State. 1846, c. 62, §17, Part Three, notes 1, 53, supra. This was true also in Truitt v. City of Battle Creek, Part Three, note 318 supra.


341 233 Mich. 249 at 257, 260. Per Wiest, J. As the question at issue was not whether there were one or more lives but whether there were successive life estates, it is unfortunate that the court chose to discuss the problem of whether a period measured by the life of the survivor of a group is one or several lives and to cite authorities relating to the permissible period of suspension of vesting under the common-law Rule Against Perpetuities.

"to have and to hold the same to the said Joseph Elwell, George W. Elwell and Rhody Conant for and during the term of their natural lives, - - - the same to be equally divided among them if requested by all or either of them; and from and immediately after the decease of the said Joseph Elwell, George W. Elwell and Rhody Conant, or either of them, the share set off to such deceased heir, I give, devise and bequeath to the heirs of said deceased heir, for him, her or them and their heirs and assigns forever."

The ultimate remainders were held valid in an opinion stating, "Our later cases hold that the devise of a life estate to a class collectively creates an estate for one life only, that of the 'longest liver' of the class, and is to be so taken in determining the period of suspension of power of alienation." Although the decision was perfectly sound, this statement was inaccurate and unnecessary. There were two questions presented, (1) whether the devise created more than two successive legal life estates, and (2) whether the remainder interests of the heirs of the life tenants suspended the absolute power of alienation for more than two lives. There was no "devise of a life estate to a class collectively;" what was involved was a devise of separate life estates in distinct shares, without cross-remainders. As to each third of the farm, there was a life estate in the widow, a second successive life estate in a child, and a remainder in fee to the heirs of that child. Thus as to any share there were only two successive life estates and suspension of the absolute power of

alienation for one life, that of the child who was life tenant in remainder.

*Bateson v. Bateson* 344 was a suit by the settlor to set aside a deed on the ground that the trust created thereby suspended the absolute power of alienation for more than two lives. The deed conveyed land to a trustee (1) to pay the net income to the settlor for life; (2) on the death of the settlor to transfer an undivided 4/10 of the principal to the settlor's son George or, if George was then dead, to George's wife Jennie and son George, Jr. or the survivor of them; (3) after the death of the grantor to hold an undivided 4/10 of the principal in trust, pay the net income therefrom to the settlor's son Samuel for life and, on the death of Samuel, to transfer this 4/10 of the principal to Samuel's wife Hattie and daughters Harriet and Dorothy, or the survivors or survivor of them; (4) after the death of the settlor to hold an undivided 2/10 of the principal in trust, pay the net income to the settlor's grandson James for fifteen years, computed from the death of the settlor, and, at the expiration of that period, to transfer this 2/10 of the principal to James, but if James should die within the fifteen years, to transfer this 2/10 of the principal to the wife and children of James or the survivors of them. The deed provided that if James should die within the fifteen years without surviving wife or children, the trustees should transfer half of this 2/10 of the principal to George and retain the other half in the trust for Samuel. The majority opinion, written by Mr. Justice Wiest, the author of the opinions in *Allen v. Merrill* 345 and *Kemp v. Sutton*, 346 stated,

"The trust deed grant of the 2/10 interest suspended

344 294 Mich. 426, 293 N.W. 705 (1940), Part Three, note 260 *supra.*
345 Part Three, notes 333, 334, *supra.*
the power of alienation during the lifetime of the grantor and for 15 years thereafter. The grantor is still living. Upon execution of the deed there were no persons in being by whom an absolute fee in possession could be conveyed. Contingent, subsequent vesting of the title upon expiration of the stated period of suspension, dependent upon future and unpredictable events, leaves the title beyond disposition by persons in being by whom an absolute fee in possession could be conveyed and renders the grant of the $2/10$ interest void under the statute. 3 Comp. Laws 1929, §§12934, 12935 (Stat. Ann. §§26.14, 26.15).---

"This brings to consideration the question of whether the void grant invalidates all the grants. Courts in construing trust deed grants make no fine distinction between such and testamentary trust devises for the ultimate determinative factors in either instance run along like lines and are accorded like consideration.

"To carry out the directions of the grantor the attorney who prepared the deed of trust had to treat each grant separately for they were unlike in purpose and scope. Each was separate and consequently severable and the valid grants are in no way dependent upon operation of the one found invalid. The intention of the grantor at the time of the execution of the deed of trust governs, and it is clear that he then considered each grant by itself and imposed conditions relative to contingent devolution not to a class but to persons specifically designated. True, the three grants were in one instrument, but that is of no particular importance upon the question of severability. Under the evidence bearing upon the grantor's intention at the time of the execution of the deed and expressed in the terms of that instrument we must hold the grants separate and independent and the void one falls alone.

"The general principle is stated in Chaplin on Suspension of the Power of Alienation (3rd ed.), §528, as follows:

"'Where an instrument contains dispositions some of
which are void for undue suspension, or postponement of vesting, it does not necessarily follow that all parts of the scheme are thereby destroyed. For a distinction is to be observed between schemes which were obviously intended to constitute a single entity and must stand or fall on their merits as one whole, and those which may be separated into wholly independent dispositions. If a provision of the former character involves an unlawful suspension or postponement, the whole scheme falls to the ground, while if the taint of illegality attaches only to a wholly independent part of an entire scheme, this illegal part may be cut off, and the rest allowed to stand.'

"And also sections 529 and 530 reading:

"'The fact that valid and void limitations are both embraced within the terms of a single trust, does not constitute any insuperable obstacle in the way of sustaining the former while cutting off the latter.

"'And where an estate is vested in a trustee upon several independent and separable trusts, some of which are legal, while others are in contravention of the statute concerning suspension, the estate of the trustee may, in accordance with the principles above stated, be upheld to the extent necessary to enable him to execute the valid trusts.'"

"We hold the trust deed valid, except as to the $\frac{2}{10}$ interest mentioned. The devise of the mentioned $\frac{2}{10}$ interest was 'void in its creation' and title thereto remained vested in plaintiff.'" 347

Three justices dissented in part in an opinion stating.

"First, it should be noted that the mere inclusion of the 15-year limitation incident to this trust provision does not render it invalid, because wholly independent of that limitation the period of suspension is measured by two lives in being—i.e., the life of plaintiff and that of his grandson. - - -

347 294 Mich. 426 at 431, 432-433. These parts of the opinion, other than the first paragraph quoted, are set out here because they are a sound and valuable discussion of the problem of separability.
"Nor am I in accord with that portion of my Brother's opinion wherein he holds that 2/10ths interest in the corpus of the trust provision for the grandson is void in toto. Instead, the provision as to the one-half of this 2/10ths which upon the death of the grandson will forthwith vest in fee in defendant George Bateson (or in the surviving wife and children, if any, of the grandson), is valid because it does not suspend the power of alienation beyond two lives in being."

The minority was correct in stating that the trust for the grandson James did not suspend the absolute power of alienation for fifteen years in gross. It was bound to terminate at or before the death of James. But the minority view that the limitation of the 1/10 which might, on the death of James, be continued in trust for the life of Samuel, was void follows the New York theory that a trust to last for the life of the survivor of three persons suspends the absolute power of alienation for three lives and so is void.

In re Wagar's Estate involved a will which devised land to a trustee to pay the income to the testator's widow for life and after her death to pay fixed annuities from the rents and earnings to three named children and four named grandchildren, or the heirs of any who died, until the death of the survivor of the three children. The only question raised in the litigation was whether the widow of one of the children was an heir for this purpose. The parties did not attack the validity of the provision, and the Court decided the question presented in favor of the widow without considering the validity of the trust. It is possible that this is, in effect, a decision

348 294 Mich. 426 at 433-435. A justice having died, the Court had only seven members.
that the duration of a trust for receipt of the rents and profits of land may be measured by the life of the survivor of a group of four persons. It may, however, constitute a ruling that the annuities involved were alienable and so did not suspend the absolute power of alienation.\textsuperscript{350} What is more likely than either of these hypotheses is that the validity of the trust was already \textit{res judicata} because of failure to appeal from the original probate order of distribution.\textsuperscript{351} If this is the case, the decision has no value whatever as a precedent on the question under consideration.

In \textit{Dodge v. Detroit Trust Company},\textsuperscript{352} the residue of an estate was devised to trustees to form a corporation, transfer the property to it in exchange for its stock, and hold the stock in trust until the death of the survivor of four named persons. The interested parties entered into a settlement agreement under a statute authorizing such settlements. Later one of them sued to set aside this agreement. Counsel for the defendants argued that, under the language in \textit{Kemp v. Sutton}\textsuperscript{353} and \textit{Felt v. Methodist Educational Advance},\textsuperscript{354} the life of the survivor of four persons is one life which might be used to measure the duration of a trust under the suspension statutes. The Court found it unnecessary to pass upon this contention, suggesting that the validity of the trust was sufficiently doubtful to warrant a settlement agreement.

It thus appears that, although there are dicta in five opinions which seem to suggest that measurement of

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\textsuperscript{350} Part Three, note 255 \textit{supra}.
\textsuperscript{352} 300 Mich. 575, 2 N.W. (2d) 509 (1942). For the statute authorizing such settlement agreements, see Part One, note 648 \textit{supra}.
\textsuperscript{353} Part Three, notes 338, 341, \textit{supra}.
\textsuperscript{354} Part Three, notes 342, 343, \textit{supra}.
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suspension of the absolute power of alienation by the life of the survivor of a group of persons is measurement by one life, none of the cases in which these opinions were rendered actually involved the problem.\textsuperscript{355} In every case where the problem was really involved the Michigan Supreme Court acted on the theory of the New York courts that suspension for the life of the survivor of a group of persons is for as many lives as there are persons in the group.\textsuperscript{356} What the Court will do in cases which arise in the future remains to be seen, but it would be hazardous to rely on its departing from the New York theory in cases involving the suspension statutes, as distinguished from the statutes restricting accumulations and successive life estates.

(4) Separability

As was seen in Chapter 17, under both the common-law Rule Against Perpetuities and the statutes restricting suspension of the absolute power of alienation, when one interest created by an instrument is void because it may effect a suspension for too long a period, other interests created by the same instrument may be valid if they are separable from the void provision.\textsuperscript{357} Where, as in New


\textsuperscript{357} Part Two at notes 529-572, \textit{supra}, and see the discussion of this point in the opinion in Bateson v. Bateson, Part Three, note 344 \textit{supra}, quoted in the text at Part Three, note 347 \textit{supra}.
York, the period of suspension is restricted to two lives in being and suspension for the life of the survivor of a group of more than two persons is not permitted. The doctrine of separability attains a new importance because in some situations, although all the interests violate the statutes if they are not separable, all may be valid if they are. If John Stiles devises land to a trustee to apply the rents and profits to the use of John’s widow for life and then to the use of his five children for the life of the survivor, the trust suspends the absolute power of alienation for six lives and is wholly void under the New York and, at least the earlier, Michigan decisions. If, however, John Stiles devises land to a trustee to apply the rents and profits to the use of his widow for life and on her death to divide the principal into five shares and hold each on trust for the life of one of John’s children, the trusts for the children are separable and all are valid. As to each share, the absolute power of alienation is suspended for only two lives, those of the widow and one child. The New York courts have developed the doctrine of separability elaborately and, by means of it, have saved many dispositions which otherwise would have failed. Although there are fewer cases here, Michigan recognizes the doctrine. If, as sug-

358 Part Three, note 306 supra.
361 Dean v. Mumford, 102 Mich. 510, 61 N.W. 7 (1894), Part Three, note 311 supra; Mullreap v. Clark, 110 Mich. 229, 68 N.W. 138 (1896) (devise to wife for life, remainder to James in fee but if James die without issue, to Mary and Jane in fee and if either Mary or Jane die without heirs, her share to Elizabeth in fee. The wife pre-deceased the testator, and the shares of Mary and Jane were treated as
gested in the preceding paragraph, Michigan still follows the New York rule that the absolute power of alienation may not be suspended for the life of the survivor of a group of more than two persons, the doctrine of separability may yet be used here to validate all of the provisions of an instrument which would, in its absence, be wholly void.

D. THE RESTRICTED MINORITY PROVISION

Under the common-law Rule Against Perpetuities, vesting may be suspended during the minority of a person who is not in being at the commencement of the period but is certain to come into being, if ever, within designated lives in being. The suspension statutes permitted suspension of the absolute power of alienation beyond two designated lives in being at the time the creating instrument took effect in only one narrow situation. Section 16 of Chapter 62 of the Revised Statutes of 1846 provided,

"A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any contingency by which the estate of such persons may be determined before they attain their full age."
The extended suspension permitted by this section appears to be that effected by the second remainder in fee and to be permitted only when the person whose minority is to serve as its measure is himself certain to come into being within the statutory period and when a fee in remainder is first limited to him. It should be noted that the provision is not limited to situations where the person whose minority is to measure the extended term is not in being when the creating instrument takes effect. That is, it permits suspension for two and a fraction lives in being or for two lives in being plus the minority of a person not in being.

In Van Gallow v. Brandt, land was devised to the testator's sister Mary in fee. The will provided,

"In case my said sister - - - should die before her husband, I hereby give, bequeath and devise forever the premises described in this paragraph five to the children of my said sister - - - in equal shares, share and share alike, intending thereby that my brother in law - - -, husband of my said sister - - -, shall not in any manner whatever participate in my estate; neither as heir of his wife or any of his children, and to that end I do hereby ordain, and it is my will and intent, that in case any one or more of the children of my sister die under age and without issue, that his or her surviving brothers and sisters shall inherit such respective share of any deceased child to the absolute and complete exclusion of its or their father - - - ."

As no trust was created, the only possible suspension of the absolute power of alienation was by the limitation of future interests to persons not in being. Although at the death of the testator Mary was 68 and had eight

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365 Id., §121.
children, all of whom were of age, it was possible, in the eye of the law, that she might have further children who might die under age and without issue after her death. The Court held that "in that remote event the limitation would not violate the statute." This decision was sound because the ultimate limitation fell squarely into the provision of Section 16. All of the children of Mary were certain to come into being within a single life in being, that of their mother, each took a "prior remainder in fee," and each ultimate remainder in fee was limited on a contingency by which the estate of the prior remainderman in fee would be determined before he attained his full age.

The language of Section 16 appears to relate only to suspension of the absolute power of alienation by future interests. Whether Section 16 permits the duration of a trust for receipt of the rents and profits of land to be prolonged beyond two designated lives in being is a much more difficult problem. In Manice v. Manice,367 land was devised to trustees (1) to apply the rents and profits to the use of the testator's widow for life; (2) at her death to divide into shares and apply the rents and profits of one share to the use of testator's daughter Mary for life; (3) on the death of Mary, to divide her share into as many shares as she had children and hold each on trust to accumulate the rents and profits during the minority of the child and transfer the principal and accumulated rents and profits to it at 21; (4) if any child of Mary die during minority, to transfer its share to its issue, if any, otherwise to the other children of Mary.

The trusts for accumulation could extend beyond two lives in being and during the minority of children of Mary who were not in being at the death of the testator. Both the trusts and the ultimate limitations were held valid. The Court held that Section 37 expressly permits trusts for accumulation during the minority of unborn persons and that the interest of such a person is a "prior remainder in fee" within the meaning of Section 16. This is not a decision that any other type of trust may be measured by the minority of an unborn person.

In Matter of Trevor, part of the residue of an estate was devised to trustees (1) to apply the rents and profits to the use of testator's widow for life; (2) on the death of the widow to divide the principal into three shares and hold each on trust to apply the rents and profits to the use of a designated child until it reached a stipulated age; (3) if any child died before reaching the stipulated age, to divide its share into as many sub-shares as it had issue, which sub-shares should then vest indefeasibly in such issue; (4) to hold the sub-share of any such issue in trust during minority and apply the rents and profits to its use. All persons taking interests under these dispositions would necessarily be in being and ascertained within two designated lives in being, but provision (4) contemplated trusts for receipt of the rents and profits of land which were not for accumulation and which might suspend the absolute power of alienation beyond

two lives in being. Moreover, the "prior remainder in fee" of each of the issue was not defeasible. Nevertheless, they were held valid. The language of Section 16 does not extend to this situation and it is doubtful that the Michigan courts would follow the decision.\footnote{370}

E. PERIODS IN GROSS

Under the common-law Rule Against Perpetuities, vesting may be suspended during a period in gross of twenty-one years or less, either following lives in being or unrelated to lives.\footnote{371} Of the suspension statutes the New York revisers said, "the period of twenty-one years, after a life or lives in being, is no longer allowed as an absolute term," \footnote{372} and Section 15 and 16 \footnote{373} certainly did not permit measurement of a period of suspension of the absolute power of alienation by anything except two


\footnote{372} Extracts from the Original Reports of the Revisers, 3 N.Y. Rev. Stat. (2d ed.) 571-573 (1836), Part Three, note 6 \textit{supra}.

lives in being and an actual minority. Hence a future estate could not be limited to a class which might increase to include members not theretofore in being during a fixed term of years,\textsuperscript{374} and a trust for receipt of the rents and profits of land could not be created to last for a term of years,\textsuperscript{375} or even for a single year.\textsuperscript{376}

When, under the terms of the instrument creating an interest, suspension was to last for the longer of two alternative periods, one measured by one or two lives in being and the other by a gross term of years, the interest was void. Thus a trust for receipt of the rents and profits of land stipulated to continue until the death of a named beneficiary and, if that beneficiary died within

\textsuperscript{374} Farrand v. Petit, 84 Mich. 671, 48 N.W. 156 (1891) (devise of land to trustees to hold for 20 years and then convey a quarter to the children of each of testator's four children as each grandchild came of age; share of any grandchild who died without issue before such conveyance to be conveyed to the others); Otis v. Arntz, 198 Mich. 196, 164 N.W. 498 (1917) (devise of residue on trust for 25 years, then to grandchildren and issue of deceased grandchildren to be ascertained at that time); In re Richards' Estate, 283 Mich. 485, 278 N.W. 657 (1938) (devise to trustees for 20 years, then to grandchildren and issue of deceased grandchildren to be ascertained at that time). See: State v. Holmes, 115 Mich. 456, 73 N.W. 548 (1898), Part Three, note 88 \textit{supra}. Cf. Allen v. Merrill, 223 Mich. 467, 194 N.W. 131 (1923), Part Three, notes 200, 333, \textit{supra}; In re De Bancourt's Estate, 279 Mich. 518, 272 N.W. 891 (1937), Part Three, note 182 \textit{supra}. Cf. the complementary provision of Rev. Stat. 1846, c. 62, §20, Part Three, note 1 \textit{supra}.


fourteen years from the date of the creating instrument, until the expiration of such fourteen years, was invalid.\footnote{Casgrain v. Hammond, 134 Mich. 419, 96 N.W. 510 (1903), Part Three, note 213 supra. Accord: Schneiber v. Schneiber, 199 Mich. 630, 165 N.W. 660 (1917), Part Three, note 213 supra (life of widow or 20 years, whichever was longer).}

On the other hand, when, under the terms of the creating instrument, suspension could not last beyond the shorter of two alternative periods, one measured by one or two lives in being and the other by a gross term of years, the interest thereby created did not offend the suspension statutes.\footnote{Chaplin, Suspension of the Power of Alienation, 3rd ed., §134 (1928); Property Restatement, App., Ch. A, ¶67, Ch. B, ¶56 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 American Law of Property, §§25.18, 25.43 (1952).}

In \textit{Ward v. Ward},\footnote{163 Mich. 570, 128 N.W. 761 (1910), Part Three, note 303 supra. Six children survived the testator.} a devise to trustees to receive the rents and profits for twelve years "or until the death after my decease and prior to the expiration of said period of 12 years, of two of my children who shall survive me" was treated as valid. In \textit{Young v. Young},\footnote{255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).} a devise to a trustee to receive the rents and profits and pay them over to the testator's two children for ten years if they should so long live was treated as valid. In \textit{Miller v. Curtiss},\footnote{255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).} the residue of an estate was devised to a trustee to pay the income and five per cent of the principal annually to Phyllis Jane Russell, and, if she should die before distribution of the principal was completed, the remainder was devised to her children or, if there were none, to seven named persons. The Court rejected a contention that this trust


\footnote{163 Mich. 570, 128 N.W. 761 (1910), Part Three, note 303 supra. Six children survived the testator.}

\footnote{255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).}

\footnote{255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).}
suspended the absolute power of alienation for twenty years in gross, saying,

"In any event, the trust cannot continue beyond the lifetime of Phyllis Jane Russell. The suspension of the power of alienation is not for a period beyond the lifetime of Phyllis Jane Russell; it will be shorter than her lifetime if she lives more than 20 years after the death of the testator.

"The trust period is not in gross, but is for the lifetime or less than the lifetime of one person, the first and direct beneficiary. It is not necessary to examine into plaintiff's theories as to the class or classes of remaindermen. It is of no moment to consider how many of the contingent remaindermen may die before the death of Phyllis Jane Russell." 382

It will be recalled that, in Bateson v. Bateson,383 a trust to receive the rents and profits of land and pay them to the testator's grandson James for fifteen years or until his earlier death was treated by the majority of the Court as suspending the absolute power of alienation for a gross period of fifteen years and so void. This view was, of course, unsound and contrary to the preceding three cases mentioned. A trust which cannot last longer than one life in being does not suspend the absolute power of alienation for a term in gross merely because it may terminate before the expiration of that life. Three of the seven justices sitting in Bateson v. Bateson dissented on this point.384 The decision in the later case of Miller v. Curtiss was unanimous.385 Insofar as Bateson v. Bateson held, contrary to the New York and all other Michigan decisions, that the absolute power of alienation

382 328 Mich. 239 at 242-243. Per Reid, J. The decision was unanimous.
383 294 Mich. 426, 293 N.W. 705 (1940), Part Three, note 344 supra.
384 Part Three, note 348 supra.
385 Part Three, note 381 supra.
could not be suspended for the shorter of two alternative periods, one measured by one or two lives and the other by a gross term of years, it must be deemed to have been overruled *sub silentio*.