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### Perpetuity Statutes

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## PERPETUITY STATUTES

### SOME REFORM STATUTES IN NEED OF REFORMATION

By EDWIN C. GODDARD\*

THE common law of perpetuities is one of the most interesting examples of almost pure judicial legislation. De Donis, The Statutes of Uses and of Wills, but gave wider scope to the development by the courts of rules of law to thwart the attempt of the great landowners to tie up their landed estates in their families in perpetuity. One body of rules to this end limited restraints upon alienation, another the creation of future interests vesting at too remote a period. Restriction of restraints upon alienation, and the rule against perpetuities, these two were developed for the same end, have been often confused, but are separate and distinct remedies. The rule against perpetuities seeks its end by forbidding the postponement of the vesting of future interests beyond the period of a life or lives in being and twenty-one years and nine or ten months. The other rule forbids restraints upon the absolute power to convey realty, and of the absolute ownership of personalty, beyond a like period. Only in recent times have the two been clearly distinguished by the courts.<sup>1</sup>

But if the distinction has been clearly recognized by some courts, some American statutes have practically resolved the two into one by their provisions as to restraints upon alienation.

The history of and reason for the development of this wholly

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<sup>1</sup> London & S. W. R. Co. v. Gomm, 20 Ch. D. 562 (1882).

judge-made period of a life or lives in being and twenty-one years, and nine or ten months, and a possible second nine or ten months, has been set forth in many decisions, and very clearly and concisely stated by Professor Gray in his classical "The Rule Against Perpetuities," sec. 123 ff. It is interesting to notice that from *Child and Baylie's Case*,<sup>2</sup> 1618, 1623, in which Sergeant Davenport by his argument earned for himself the title "Father of Perpetuities," the *Duke of Norfolk's Case*,<sup>3</sup> 1682, in which perpetuities are first clearly perceived and boldly admitted, to *Cadell v. Palmer*,<sup>4</sup> which added twenty-one years, even as an absolute term, and *Thellusson v. Woodford*,<sup>5</sup> 1805, which admitted a period of gestation at the beginning and another at the end of any number of lives in being, provided they were easily ascertainable, is precisely the period between the settlement of the Colonies and the launching of the United States as an independent nation with its own laws. This life or lives in being and twenty-one years and nine or ten months was, therefore, accepted in all the states as the period fixed by law within which a future interest must vest, or beyond which the power of alienation cannot be suspended.

Ready as the judges were to make this law, they have refused absolutely to reform it, or even to narrow its application, in cases in which they admitted the results were unfortunate and even deplorable.<sup>6</sup> Legislation has had to step in where judges feared to tread. To some of this legislation and its consequences attention is now invited. In most states the common law period is the rule today; in some it has been written into the statute law.<sup>7</sup>

Changes in the period have followed the New York statute of 1830. Two groups may be noted. 1. Michigan,<sup>8</sup> Wisconsin<sup>9</sup> and

<sup>2</sup> Cro. Jac. 459.

<sup>3</sup> 3 Ch. Cas. 1.

<sup>4</sup> 1 Clark & F. 372.

<sup>5</sup> 11 Ves. 112.

<sup>6</sup> See, for example, *Thellusson's Case*, *supra*.

<sup>7</sup> See Ky. Stat. 1909, § 2360. "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter." For other statutes see 49 Am. St. Rep. 118, note.

<sup>8</sup> Mich., C. L. 1915, §§ 11532, 11533.

<sup>9</sup> Wisconsin Stat. 1898, §§ 2038, 2039. (Wisconsin in 1887 added to two lives "and twenty-one years.")

Minnesota<sup>10</sup> have practically copied the New York statute, providing that "the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate." By another section "the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." Future estates violating these provisions are void in their creation. 2. California,<sup>11</sup> followed by North<sup>12</sup> and South Dakota,<sup>13</sup> Montana,<sup>14</sup> Idaho,<sup>15</sup> and some other states, adopted the language of the New York statutes, but instead of limitation to two lives their limitation is to the "lives of persons in being at the creation of the condition or limitation."

It is important to notice that New York statutes contain a similar provision against suspension of the absolute ownership of personal property beyond two lives in being. In general the California group extends the same rule to chattels real as to realty,<sup>16</sup> and so does Minnesota,<sup>17</sup> but no other state has adopted the New York statute as to suspension of ownership of personal property. In cases involving mixed realty and personalty New York cases have often been misapplied because this difference was overlooked.<sup>18</sup> This will presently appear.

As one may read in the elaborate opinions in *Coster v. Lorillard*,<sup>19</sup> and *Hawley v. James*,<sup>20</sup> the "three gentlemen, distinguished for their legal learning, their ability and their industry," to whom New York committed the revision of the common law in this field, intended to "extricate this branch of the law from the perplexity and obscurity in which it was involved; and render a system simple, uniform and intelligible, which was various, complicated and

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<sup>10</sup> Minn., R. L. 1905, §§ 3203, 3204, 3212.

<sup>11</sup> Kerr's C. C., §§ 715, 716.

<sup>12</sup> N. D., R. C. 1905, §§ 4744, 4745.

<sup>13</sup> S. D., R. C. 1919, secs. 294, 295.

<sup>14</sup> Mont., R. C. 1921, §§ 6705, 6706.

<sup>15</sup> Idaho, C. S. 1919, § 5335.

<sup>16</sup> Kerr's C. C., § 770.

<sup>17</sup> Minn., R. L. 1905, § 3212.

<sup>18</sup> *Toms v. Williams*, 41 Mich. 552, 562, 569.

<sup>19</sup> 14 Wend. 265.

<sup>20</sup> 16 Wend. 61.

abstruse." The language of the New York statutes was with slight changes the language recommended by the revisers, and at first reading it seems simple and intelligible enough. But if there was hope that these simplifications would make certain what before required expensive litigation to determine, it was ill founded. Instead, questions that before the statute would have been simple now required elaborate, protracted and expensive attention. *Coster v. Lorillard*<sup>21</sup> occupied 135 pages in Wendell. It was "fully argued before the Vice-Chancellor, and again on appeal from his decree more elaborately before the Chancellor"; and in the court of errors "for ten successive days by some of the most eminent counsel in this state, with a talent, learning and ingenuity which have been rarely equalled." The lawyers might be expected to disagree, but the Chancellor did not agree with the Vice-Chancellor, and the court of errors, by a nearly equally divided vote on some points, reversed the Chancellor. Almost as much divergence of view appears in *Hawley v. James*,<sup>22</sup> the next year, a case covering 225 pages in the report. Restraints on alienation were often sought to be imposed by leaving property to trustees, with directions to receive the rents and profits and "pay them over" to the beneficiaries. Whether under the statutes such a trust could be created divided the court equally in the two cases just referred to, and it was not till *Leggett v. Perkins*,<sup>23</sup> decided in 1849, that a "great question, which has been litigated more than fifteen years, is at the last settled by a single vote, and that vote governed by a supposed decision which I (Justice Bronson) verily believe was never made." That this uncertainty in the application of these simple statutes did not disappear with the early cases is seen in the very great number of cases still arising especially in New York,<sup>24</sup> and the contrary decisions of different courts on the same case as it goes to the court of last resort. See, for example, *Henderson v. Henderson*<sup>25</sup> (1889) decided forty years later, in which the general term of the supreme court reversed a judgment construing a will, and the court of appeals reversed the general term,

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<sup>21</sup> 14 Wend. 265-399 (1835).

<sup>22</sup> 16 Wend. 61-285 (1836).

<sup>23</sup> 2 N. Y. 297.

<sup>24</sup> See Gray, RULE AGAINST PERPETUITIES, § 750, pointing out the danger of radical legislation.

<sup>25</sup> 113 N. Y. 1.

and *Matter of Silsby*<sup>26</sup> (1920) in which the court of appeals reversed both the surrogates court and the appellate division of the supreme court on the question whether a provision suspended the power of alienation beyond two lives in being. Instances might be multiplied *ad nauseum*.

It will be noticed that the statutes were directed at suspension of power of alienation, not at postponement of vesting, except as that affected power to alienate. It is not then really a provision as to perpetuities under the so-called rule against perpetuities, though usually so spoken of.<sup>27</sup> Mr. Gray<sup>28</sup> has well pointed out the difficulties and confusion arising therefrom. It was early settled that under the statute any suspension of the power of alienation must be based on lives, and not on any arbitrary term, however short.<sup>29</sup> But whether there was a suspension of the power, whether it was for two lives, whether the rule was violated when the trustees were directed to sell the property, or when they were empowered to sell it, these and many other questions at once arose, causing a great increase in litigation that has not yet after 90 years subsided.

The recent Michigan case of *Grand Rapids Trust Co. v. Herbst*,<sup>30</sup> has furnished some surprises, and has caused a re-examination of wills drawn for persons still living to see if they are within the rules there laid down. The will attempted to dispose of an estate valued at upwards of \$200,000, consisting of personalty, and of realty located in various states and in Canada. The chief point of attack was a provision for three life payments of \$75 per month each and a direction that the remainder of the net income from testator's estate be divided equally between his son (a minor), his brother and two sisters until the son reached 25 years of age, when the son was to have half the estate and the other half was to be charged as above. There was a contingent remainder if the son died before reaching 25 leaving legal issue, but this was not important to the decision

<sup>26</sup> 229 N. Y. 396.

<sup>27</sup> *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412.

<sup>28</sup> RULE AGAINST PERPETUITIES, § 748.

<sup>29</sup> *Hawley v. James*, 16 Wend. 61; *Rong v. Haller*, 109 Minn. 191; *In re Walkerly*, 108 Cal. 627; *Otis v. Arntz*, 198 Mich. 196; *State v. Holmes*, 115 Mich. 456; *Hagemeyer v. Saulpaugh*, 90 N. Y. S. 228. In Wisconsin, statute in 1887 had added "and twenty-one years thereafter." The effect is discussed in *In re Will of Kopmeier*, 113 Wis. 233; *Danforth v. Oshkosh*, 119 Wis. 262.

<sup>30</sup> 220 Mich. 321 (Nov. 1922).

because the previous provisions were held to invalidate nearly the whole will, at least so far as it affects property subject to the jurisdiction of the state. The court found that the various provisions of the will created an express trust for the lives of seven persons, suspending the power of alienation till the death of the last of the seven. The beneficiaries by sec. 11583, C. L. 1915, were forbidden to assign or dispose of their interest. Nor could the trustees alienate so as to satisfy the statute, unless thereby the estate was fully and finally settled and the trust ended, and this notwithstanding the will clothed the executors with "full power to sell, mortgage and convey any and all of my estate and said trust estate."

On this last point it appears that the court failed to take account of the difference between the Michigan and the New York statutes. In New York it would indeed be in the face of the policy of the law to allow the statute to be evaded by a permission, or a compulsory mandate, to the trustees to sell the real estate, if the proceeds as personalty must be held subject to the purposes of the will or deed for more than two lives in being.<sup>31</sup> The New York statutes apply alike to realty and to personalty. But in Michigan, contrary to the dictum in the dissenting opinion of Champlin, J., in *Palms v. Palms*,<sup>32</sup> followed by the whole court in *Niles v. Mason*,<sup>33</sup> there is no evidence in the statutes of any such policy of the law, except as to realty. The New York statutes were adopted in 1830, they were copied as to realty, but not as to personalty, in Michigan in 1848.<sup>34</sup> The Michigan statute has stood without changing the common law rule as to personalty for seventy years, showing that it is the Michigan policy to cut down the common law period as to realty, but not as to personalty. The court seems to admit that a compulsory mandate to the executors to sell the realty would satisfy the statute, it explicitly states that the Michigan statute applies to realty, as has been held in many previous cases, and clearly indicates that if these payments had been a charge upon personalty they would have been good. What policy of the law is violated then in giving the executors full discretion in the management of the property? The statute, as the courts have often held, does not require that there shall be

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<sup>31</sup> *Brewer v. Brewer*, 11 Hun 147; *Hobson v. Hale*, 95 N. Y. 588.

<sup>32</sup> 68 Mich. 355.

<sup>33</sup> 126 Mich. 482.

<sup>34</sup> *Tom v. Williams*, 41 Mich. 552; *Penny v. Croul*, 76 Mich. 471.

alienation, but only that the power of alienation shall not be suspended beyond the period.<sup>35</sup>

In the days when Cooley, Campbell, Marston and Graves constituted the Michigan court it was said in *Thatcher v. St. Andrew's Church*,<sup>36</sup> "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." The court in the *Herbst* case thought the language was to be limited to cases where alienation of the land ended the trust. And so it should be in New York, but why in Michigan, Wisconsin and Minnesota, where the legislatures have seen fit to omit the New York restrictions on suspension of the ownership of personalty? In Wisconsin it was frequently held that if the trustees have a power to sell the realty, and it is fairly clear from the general scope and limit of the will that it is necessary to do so to carry out the trust, the doctrine of equitable conversion applies, and all will be treated as personalty,<sup>37</sup> and in *Becker v. Chester*<sup>38</sup> the court considered the Michigan cases of *Palms v. Palms*<sup>39</sup> and *Niles v. Mason*,<sup>40</sup> and rejected their reasoning as based on the English common law and the New York statutes, which treat suspension of alienation as one system applying to real and personal property, whereas the Wisconsin and Michigan statutes impose the restriction of the statute on real, but not on personal property. The conclusion is reached that even though the power of sale is not peremptory, and creates no conversion until it is actually exercised, yet such power makes the lands alienable and the will valid provided the converted fund by the terms of the will is to be held for a valid trust as personalty. This decision was approved in *Holmes v. Walter*,<sup>41</sup> and in *Danforth v. Oshkosh*,<sup>42</sup> in the broadest

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<sup>35</sup> *Robert v. Corning*, 89 N. Y. 226, a leading New York case; *Keyser v. Mead*, 103 N. Y. S. 1091; *Atwater v. Russell*, 49 Minn. 22, 56; same provisions in a deed, *Atwater v. Russell*, 49 Minn. 57, 77; *Re Sacrison*, 19 N. D. 160, 26 L. R. A. (N. S.) 724, note; *FitzGerald v. Big Rapids*, 123 Mich. 281.

<sup>36</sup> 37 Mich. 264.

<sup>37</sup> *Dodge v. Williams*, 46 Wis. 70; *Ford v. Ford*, 70 Wis. 19; *Harrington v. Pier*, 105 Wis. 485; cf. *Penny v. Croul*, 76 Mich. 471. See also *Underwood v. Curtis*, 127 N. Y. 523.

<sup>38</sup> 115 Wis. 90.

<sup>39</sup> 68 Mich. 355.

<sup>40</sup> 126 Mich. 482.

<sup>41</sup> 118 Wis. 409.

<sup>42</sup> 119 Wis. 262.

terms. "The absolute power of alienation of real estate is not suspended, within the provision of the statute, when a trustee or other donee of the legal title is given power and authority to sell and make conveyance of complete title," and this regardless of whether the power to sell was such as to work an equitable conversion. In *Mangan v. Shea*,<sup>43</sup> the *Becker* case was cited as authority, though in this case the sale of the realty by the trustee was mandatory. In Minnesota no case exactly in point seems to have come to the supreme court, but the language in *Atwater v. Russell*,<sup>44</sup> quoted with approval in *Y. M. C. A. v. Horn*,<sup>45</sup> puts no limitation on the doctrine "that where trustees were given the power to sell lands, there was no restriction upon alienation."

In Wisconsin, by a curious course of decisions, following dictum in *Dodge v. Williams*,<sup>46</sup> the astonishing conclusion has been reached that the force of the statute is to abrogate the common law as to restraints upon alienation not only of realty, but also as to personalty. "*Expressio unius exclusio alterius*." "In other words the declaration is that in Wisconsin ownership of personalty may become inalienable and tied up for all time."<sup>47</sup> The absurdity of such a conclusion from the partial adoption by Wisconsin of the New York statute is fully stated by Cassoday, C. J., in his dissenting opinion.<sup>48</sup> In both Michigan and Minnesota it has been consistently held that the failure to adopt the personal property provisions of the New York statute leaves the common law period of life or lives in being and twenty-one years and nine or ten months in force as to restraints as to alienation of ownership in personalty.<sup>49</sup> If there were in force any such public policy as Justice Champlin refers to in his dissenting opinion in *Palms v. Palms*,<sup>50</sup> which has been followed in the later Michigan cases as a correct statement of the law, then surely we should expect to find that public policy in the statutes in Michigan

<sup>43</sup> 158 Wis. 619.

<sup>44</sup> 49 Minn. 22, 56.

<sup>45</sup> 120 Minn. 404, 419. And see *In re Tower's Estate*, 49 Minn. 371, 378, and *In re Phelps' Estate*, 182 Cal. 752.

<sup>46</sup> 46 Wis. 70.

<sup>47</sup> *Becker v. Chester*, 115 Wis. 90.

<sup>48</sup> *Becker v. Chester*, 115 Wis. 136.

<sup>49</sup> *Palms v. Palms*, 68 Mich. 355; *In re Tower's Estate*, 49 Minn. 371; *In re Trust under Will of Bell*, 147 Minn. 62.

<sup>50</sup> 68 Mich. 355, 386.

as we do in New York. Justice Champlin himself in this opinion points out that Michigan has not followed New York as to personalty, so that in Michigan a will of realty is good if it directs that the real estate be converted into personalty. Why not equally if the will permits that realty be turned into personalty? That would carry out the testator's intent in the *Herbst* case, and there would be no conflict with either statute or public policy. As has been shown, it is of no importance whether there actually is alienation if only there is someone who has the power to alienate. Would the court hold that a third person to whom the trustees in reliance on the power in the will in the *Herbst* case had sold the real estate would not get good title? "The test of alienability of real or personal property is that there are persons in being who can give a perfect title."<sup>51</sup>

The question arises, does public policy forbid such provisions for persons all *in esse* because there chance to be seven of them instead of two? The fact that the statute has stood unchanged for almost a century in New York, and for three-fourths of a century in Michigan, is strong proof that public policy approves cutting down the common law period, but Mr. Gray is justified in saying that the limit of lives in being is a natural limit, but the limit of two lives is arbitrary, cutting through the most ordinary provisions, and is an invitation to litigation, as the event has proved.<sup>52</sup> Why two rather than one or three? As already noted, most of the states influenced by the New York revisers have placed the limit at lives in being, not at two lives, as in New York, and Michigan, Wisconsin and Minnesota. Mr. Gray has pointed out<sup>53</sup> how unjustifiable upon principle was the addition of 21 years to cover a minority of a beneficiary, and even more so to cover a term in gross. There seems to be no better reason for limitations upon lives of those having no interest in the will. A statute fixing the period of restriction or postponement at lives in being of persons beneficially interested would be justifiable and understandable. But why should A be allowed to give his wife a life estate and his only child a successive life estate, tying up his property for two lives in being, while B is not permitted

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<sup>51</sup> *Williams v. Montgomery*, 148 N. Y. 519, quoted and approved in *Becker v. Chester*, 115 Wis. 90.

<sup>52</sup> RULE AGAINST PERPETUITIES, § 749.

<sup>53</sup> RULE AGAINST PERPETUITIES, §§ 186-188.

after the life estate to the wife to make the same provision for life for each of his two or more children? To take a case more like the *Herbst* case, *supra*, why should A be allowed to limit two annuities in the manner attempted in the Carman will in that case, while B with seven living relatives for whom he attempts like provisions has his will declared invalid, and all his intentions defeated? Public policy surely does not approve when there happen to be only two living persons to be provided for, but disapprove if there are three or more.

That this is so is the more evident from the fact that the present statute does not accomplish the object, if such be its intent. It is merely a trap for the unwary, and it leads to endless litigation. If only the testator be wary the law permits him to do just this thing, and there has never been any statute to try to prevent it. It is all a question of how the will is drafted. This is especially true in Michigan, Wisconsin and Minnesota, where a direction in the will to convert the realty into personalty permits the property to be tied up not only for any number of lives in being, but also for twenty-one years and nine or ten months, and this even when the executors are given certain discretion as to the time within which to sell.<sup>54</sup>

But even in New York there are still other ways of providing for more than two. It is a mere question of using the right words in the will. It has been held in a great number of cases that a life estate to any number of persons in equal shares is but a limitation for one life, each share being treated for this purpose as distinct, and separately limited for a single life.<sup>55</sup> The change of a few words in the will in the *Herbst* case would have made all its provisions valid, though the property were as effectually tied up as the actual will contemplated.

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<sup>54</sup> See *Lent v. Howard*, 89 N. Y. 169.

<sup>55</sup> See *Lang v. Ropke*, 5 Sandf. (N. Y. Supr.) 363, so treating parts of the estate set aside for annuities; *Roosevelt v. Porter*, 73 N. Y. S. 800, and *Smith v. Havens Relief Fund Society*, 90 N. Y. S. 168, affirmed in 190 N. Y. 557, are to the same effect. But cf. *Herzog v. Title Guarantee & T. Co.*, 177 N. Y. 86. And see further *Mason v. Mason's Exrs.*, 2 Sandf. Ch. 432; *Buckley v. Depeyster*, 26 Wend. 21; *Wells v. Wells*, 88 N. Y. 323; *Robert v. Corning*, 89 N. Y. 225, a leading case; *Van Brunt v. Van Brunt*, 111 N. Y. 178; *Allen v. Allen*, 149 N. Y. 280; *Kalish v. Kalish*, 166 N. Y. 368; *Matter of Colegrove*, 221 N. Y. 455 (part valid and part void); *Hayden v. Sugden*, 96 N. Y. S. 681. In re *Kohler's will*, 183 N. Y. S. 550; In re *McGeehan's Will*, 193 N. Y. S. 856; In

The New York revisers observed that "the interests of society require that the power of the owner to fetter the alienation and suspend the ownership of an estate by future limitations should be confined within certain limits." Very true and well put. But can any one offer a good reason to fix those limits at two lives rather than at one or three or more? Michigan in more than 75 years has not thought it necessary to confine the power even to lives in being as to personalty. Why fix upon two lives as to realty? If restrictions for lives are to be permitted at all, why not for the lives of all living persons for whom the testator desires to provide? A limitation for lives is but for a single life after all, that of the longest liver. If all the candles are lighted at once they will all go out in the life of a single candle,<sup>56</sup> the one burning longest, and that might easily, though not certainly, be one of the two permitted under the Michigan statute. The statute permits any number of future interests provided they all terminate within two lives.<sup>57</sup> Why require the testator to speculate on which two lives will outlast the rest, and if his guess proves to be wrong leave the remaining objects of his bounty unprovided for after the death of the two?<sup>58</sup> The common law rule permitted restrictions for 21 years and a period of gestation beyond any lives in being, so that the owner might tie up his estates so that they could not be enjoyed by any person living at his death or born within 21 years and two possible periods of gestation thereafter.<sup>59</sup> This was an absurdity, and yet in most of the states it is still the law. To end this the statute may well cut off the 21 years and the periods of gestation, except in the case of a posthumous child who might take under the will, and also the lives of all except beneficiaries under the limitations in question. There is no occasion for limiting these lives to two. This would recognize within proper limits the reason for the law, and would at the same time cut off its artificialities and prevent taking property out of commerce for a longer period than seems

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re *Horner's Estate*, 198 N. Y. S. 665. Michigan follows this rule. *Woolfitt v. Preston*, 203 Mich. 502; *Allen v. Merrill, Lynch & Co.*, 223 Mich. 467. See also *Cole v. Lee*, 143 Mich. 267 (two lives and an annuity).

<sup>56</sup> *Love v. Windham*, 1 Sid. 450, nota per Twisden, J.

<sup>57</sup> *Griffen v. Ford*, 1 Bosw. (N. Y. Supr.) 123; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Bird v. Pickford*, 141 N. Y. 18.

<sup>58</sup> *Crooke v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, 97 N. Y. 460; *Buchanan v. Little*, 154 N. Y. 147.

<sup>59</sup> *Thellusson's Case*, 11 Ves. 112.

permissible under any public policy ever suggested by court or statute. To use the language of the New York revisers this would "abolish all technical rules and distinctions having no relation to the means of its beneficial enjoyment," and would "define with precision the limits within which the power of alienation may be suspended."<sup>60</sup> It is because the Michigan court overlooked the reason for the statute, and the evils it was intended to avert, that it gave a narrow construction to "power of alienation," and defeated the worthy efforts of the testator in the *Herbst* case<sup>61</sup> to provide by life interests for more than two of those who were properly objects of his bounty. It is the duty of the court, if possible, to give effect to the intent of the testator.<sup>62</sup> This could easily have been done in that case by a fair interpretation of the statute in accord with its reason and spirit. The court could not, of course, override the statutory limitation to two lives, but it could have held there was no suspension of the absolute power of alienation. The two lives limitation can be changed only by the legislature.

The statute in its present form continually thwarts the intent of testators, and this without promoting any public policy or serving any good purpose. Our legislatures doubtless make altogether too many laws, but here is a need for one good law in the form of a slight amendment, in language already so many times construed by the courts that it should not, as many statutes do, merely start a new train of expensive law suits to determine what the new law means. It might read:

The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the lives in being at the creation of the estate of persons taking under the provisions subject to such limitation or condition.

The absolute ownership of personal property shall not be suspended for a longer period than the absolute power of alienation of real estate.

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<sup>60</sup> *Hawley v. James*, 16 Wend. 61, 204.

<sup>61</sup> *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321.

<sup>62</sup> *In re Tower's Estate*, 49 Minn. 371; *Palms v. Palms*, 68 Mich. 355.