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## FUTURE INTERESTS-SUSPENSION OF POWER OF ALIENATION-EFFECT OF TRUSTEE'S POWER TO SELL AND REINVEST

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FUTURE INTERESTS—SUSPENSION OF POWER OF ALIENATION—EFFECT OF TRUSTEE'S POWER TO SELL AND REINVEST—Testatrix' will provided that the residue of her estate was to be held in trust for the benefit of her great-nephews and great-nieces. The income from the trust estate was to be paid to them each year and, when the youngest attained the age of fifty, the corpus was to be divided equally among them. Testatrix left two nephews surviving her. *Held*, the disposition was valid. There was an implied power in the trustee to sell and reinvest the trust corpus,<sup>1</sup> and therefore, the trust did not violate the statutory prohibition against suspension of the absolute power of alienation.<sup>2</sup> *In re Walker's Will*, (Wis. 1950) 45 N.W. (2d) 94.

At common law, it is clear that a future interest that might not vest within the period allowed by the rule against perpetuities is void, notwithstanding a discretionary power in the trustee to sell and reinvest the trust estate.<sup>3</sup> However, in 1828, legislation was enacted in New York which defined the rule, in regard to real property, in terms of a prohibition against the "suspension of the absolute power of alienation"<sup>4</sup> rather than in terms of remoteness of vesting as the rule is stated at common law.<sup>5</sup> This legislation was copied, with a few minor variations, in twelve states and the district of Columbia.<sup>6</sup> Although these statutes were held to have varying effects on the common law,<sup>7</sup> and although great

<sup>1</sup> The court concluded that the power of sale arose by implication from the language of the will. Its discussion on this point is beyond the scope of this note.

<sup>2</sup> Wis. Stat. (1949) §230.14: "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property. . . ."

§230.15: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being at the creation of the estate and thirty years thereafter. . . ."

<sup>3</sup> SIMES, FUTURE INTERESTS §109 (1951); 4 PROPERTY RESTATEMENT §370, comment d; GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §§202.1, 269 (1942); 4 KENT'S COMM., 14th ed., 283 (1896). In the principal case, since children might be born to the nephews after testatrix' death, the gift of the corpus to the great-nephews and great-nieces obviously violates the common law rule against perpetuities. See note 5, *infra*.

<sup>4</sup> The present New York statute, which is substantially the same as when first enacted, is found in 49 N.Y. Consol. Laws Ann. (McKinney, 1945) §42. The suspension is allowed during the continuance of not more than two lives in being at the creation of the estate. The original statute also prohibited the suspension of the absolute ownership of personal property for longer than two lives in being at the death of testator. See now, 40 N.Y. Consol. Laws Ann. (McKinney, 1948) §11.

<sup>5</sup> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §201 (1942).

<sup>6</sup> Ariz., Cal., Idaho, Ind., Ky., Mich., Minn., Mont., N.D., Okla., S.D., Wis. A number of these states, including Wisconsin, did not adopt the provision relating to the absolute ownership of personal property. The Kentucky and District of Columbia courts have interpreted their statutes as being merely declaratory of the common law. *Fidelity & Columbia Trust Co. v. Tiffany*, 202 Ky. 618, 260 S.W. 357 (1924); *Shoemaker v. Newman*, (D.C. Cir. 1933) 65 F. (2d) 208.

<sup>7</sup> For a brief discussion of each of these statutes and their effect on the common law, see: 4 PROPERTY RESTATEMENT, APPX.; 2 SIMES, FUTURE INTERESTS, c. 32 (1936).

confusion resulted in most of the states that adopted them,<sup>8</sup> it was early settled in New York, and somewhat later in Michigan, that the mere power in a trustee to sell and reinvest the trust estate is not a power to alienate the land within the meaning of the statutes.<sup>9</sup> Moreover, five of the states which adopted the New York legislation embodied this interpretation in their statutes,<sup>10</sup> while, in 1945, the Indiana legislature repealed its former statutes and returned to the common law rule.<sup>11</sup> On the other hand, the courts of Minnesota and Wisconsin have repudiated the New York interpretation of the statutes, although the ultimate result reached in these two states will not necessarily be the same. In Minnesota, it is held that a discretionary power of sale renders the trust valid if, upon such conversion being made, the proceeds will not be fettered by an invalid trust.<sup>12</sup> Because the common law rule against perpetuities is still in force as to personal property in Minnesota, such a trust will still be void if it does not meet the common law test.<sup>13</sup> But the Wisconsin court has gone even further, consistently holding that "the absolute power of alienation is not suspended within the meaning of the statute so long as the absolute power is located somewhere to alienate, regardless of the condition in which the equivalent of the

<sup>8</sup> See, e.g., Fraser, "The Rules Against Restraints on Alienation, and Against Suspension of the Absolute Power of Alienation in Minnesota," 9 MINN. L. REV. 314 (1925); Goddard, "Perpetuity Statutes," 22 MICH. L. REV. 95 (1923); Rundell, "The Suspension of the Absolute Power of Alienation," 19 MICH. L. REV. 235 (1921); 46 HARV. L. REV. 701 (1933).

<sup>9</sup> Hawley & King v. James, 5 Paige (N.Y.) 318 (1835); Brewer v. Brewer, 11 Hun. (N.Y.) 147 (1877); Hobson v. Hale, 95 N.Y. 588 (1884); Allen v. Allen, 149 N.Y. 280, 43 N.E. 626 (1896); Matter of Rosenstein, 152 Misc. 777 (1934); Palms v. Palms, 68 Mich. 355, 36 N.W. 419 (1888); Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901); Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 N.W. 250 (1922); Gardner v. City Nat. Bank & Trust Co., 267 Mich. 270, 255 N.W. 587 (1934).

<sup>10</sup> Cal. Civil Code (Deering, 1949) §771; 4 Mont. Rev. Code (1947) §67-512; 4 N.D. Rev. Code (1943) §47-0412; Okla. Stat. Ann. (1949) tit. 60, §31; 3 S.D. Code (1939) §51.0412. These statutes are identical and were copied verbatim from FIELD'S CIVIL CODE OF NEW YORK §228 (1865), which provides that "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of [the statute]." This section of the code has never been adopted in New York. The above statutes were held to be controlling in: Estate of Hinckley, 58 Cal. 457 (1881); Penfield v. Tower, 1 N.D. 216, 46 N.W. 413 (1890); Estate of Maltman, 195 Cal. 643, 234 P. 898 (1925).

<sup>11</sup> 10 Ind. Stat. Ann. (Burns, 1949 Supp.) §51-105. Michigan has also repealed its earlier statutes and returned to the common law. 18 Mich. Stat. Ann. (1949 Cum. Supp.) §§26.49(1)-(3).

<sup>12</sup> In re Tower's Estate, 49 Minn. 371, 52 N.W. 27 (1892).

<sup>13</sup> In re Tower's Estate, supra note 12; Congdon v. Congdon, 160 Minn. 343, 200 N.W. 76 (1924); Jacobson v. Mankato Loan & Trust Co., 191 Minn. 143, 253 N.W. 365 (1934). Thus, such a power will have the effect of lengthening the period from "two lives," allowed by the Minnesota statute relating to real property, to "lives in being and twenty-one years," permitted at common law. The question of the effect of a power of alienation in a trustee has not yet arisen in Arizona or Idaho. Since the common law rule against perpetuities is probably in effect as to personal property in those states, it would seem that the Minnesota result will prevail if those courts do not adopt the New York interpretation. See Lowell v. Lowell, 29 Ariz. 138, 240 P. 280 (1925); Anderson, "The Rule Against Perpetuities," 1 IDAHO L.J. 73 (1931).

property alienated may be left. . . ."<sup>14</sup> It thus becomes evident that Wisconsin, with "technical alienability" as its sole test,<sup>15</sup> has greatly narrowed the broad policy foundations on which the common law rule has come to be based, completely overlooking the facts that the quantum of wealth remains "tied up" even though a specific piece of property is alienable, and that such a commitment renders assets unavailable to meet the current exigencies of persons beneficially entitled to them.<sup>16</sup> However, in view of the abundant Wisconsin authority in support of the "technical alienability" rule,<sup>17</sup> the court had little choice but to decide the principal case as it did; clearly, any change in the Wisconsin rule must emanate from the legislature.<sup>18</sup>

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<sup>14</sup> *Becker v. Chester*, 115 Wis. 90 at 115, 91 N.W. 87, 650 (1902); *Holmes v. Walter*, 118 Wis. 409, 95 N.W. 380 (1903); *Will of Butter*, 239 Wis. 249, 1 N.W. (2d) 87 (1941). It is interesting to note that at the time this rule evolved, Wisconsin had no rule against perpetuities whatsoever as to personal property. In 1925, the Wisconsin legislature added to §230.14, supra note 1, a provision that "Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property," but this addition came too late to have any effect on the result in the principal case, if that was the legislature's intention.

<sup>15</sup> "The statute clearly means persons having an absolute and unqualified, unconditional fee by inheritance or purchase, which can be conveyed absolutely, not only with reference to the subject of the conveyance, but to the product of its sale." *Brewer v. Brewer*, 11 Hun. (N.Y.) 147 at 152 (1877).

<sup>16</sup> 4 PROPERTY RESTATEMENT (1944) Div. IV, Part I, Intro. note, p. 2131. "Moreover, the trustee's power of alienation is far from absolute. He cannot give the property away. He cannot spend it for his own enjoyment. Indeed, it cannot be said to be in commerce." SIMES, FUTURE INTERESTS §109 (1951). But see, Dwight, "Powers of Sale as Affecting Restraints on Alienation," 7 COL. L. REV. 589 (1907).

<sup>17</sup> See cases cited in note 14 supra.

<sup>18</sup> *Will of Butter*, supra note 14.