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Addendum to Notes on the Rule Against Perpetuities in New York

Maurice Finkelstein

ADDENDUM TO NOTES ON THE RULE AGAINST PERPETUITIES IN NEW YORK

MAURICE FINKELSTEIN †

THE writer, in his paper on the Rule Against Perpetuities, given the hospitality of this *Review*,[1] suggested that in applying the doctrine of judicial surgery one is concerned with deciding whether or not the testator would have retained the valid portion of his will had he known that the invalid portion would be excised.[2]

But, as with physical surgery, so with judicial surgery, the process of cutting may some times go too deep and the result may be the total destruction of the testator's intent. An excellent example of this is in the case of *Matter of Triscett*,[3] in which the Appellate Division affirmed a Surrogate's determination upholding a trust for the life of a son and then for the lives of such children who would survive the son. Of course, since there might be children born to the son after the death of the testator, a trust for their lives would be invalid since it would be measured by lives not in being. Here the court held that the trust was valid for the life of the son and the lives of the children in being at the death of the testator, even though void as to after-born children. This decision was based on an earlier Court of Appeals case, *Matter of Mount*,[4] in which the same proposition was upheld. It would appear, therefore, that a series of trusts indistinguishable from each other, except by the fact that some are for the lives of living people and some for the lives of people yet unborn, will be upheld as to the valid trusts, even though

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† Professor of Law, St. John's University School of Law.

[1] Finkelstein, *Notes on the Rule Against Perpetuities in New York*, 26 ST. JOHN'S L. REV. 245 (1952).

[2] *Id.* at 248, 249.

[3] 270 App. Div. 767, 59 N. Y. S. 2d 474 (2d Dep't 1946), *affirming* 185 Misc. 599, 54 N. Y. S. 2d 798 (Surr. Ct. 1945).

[4] 185 N. Y. 162, 77 N. E. 999 (1906).

the trusts for the unborn people are invalid. No consideration is given in these cases to the problem of whether or not the testator would have made any such provision had he realized its partial ineffectiveness.

I am indebted to my colleague, Professor George Keenan, for calling my attention to an erroneous statement in the prior article, concerning *Matter of Wilcox*.[5] It was there stated:

> Thus, a gift to Frances for life, followed by invalid trusts to her children, but if she die childless to Charles and Maria, creates a contingent future interest in Charles and Maria which, viewed at the date of testator's death, may not vest within two lives. Hence, the gift over to Charles and Maria is bad, even though in fact Frances never had any children.[6]

I think this statement should be modified so as to make it clear that the invalidity will result only if the vesting of the gift to Charles and Maria is postponed until the death of Frances and her children, assuming of course that she had children on the date of the testator's death. If she had no children and the gift to Charles and Maria was in the alternative, then, of course, even under the rule of *Matter of Wilcox*, the gift would be valid.

Some interesting cases which have been decided since the original paper appeared need to be noted.

The problem concerning what constitutes a vested remainder was recently considered by the Court of Appeals in the case of *Healy v. Empire Trust Company*.[7] There it was held that a direction in a will to pay a trust fund at the termination of the trust to two named nieces or their survivor, creates a vested remainder, and that the nieces need not survive the life tenants in order to take under the will. It is interesting to note that this holding is hardly consistent with the statutory definition of "vested" and "contingent remainder," nor with the decision in *Moore v. Littel*.[8] It rather

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[5] 194 N. Y. 288, 87 N. E. 497 (1909).
[6] Finkelstein, *supra* note 1, at 251.
[7] 276 App. Div. 305, 94 N. Y. S. 2d 150 (1st Dep't), *aff'd*, 301 N. Y. 620, 93 N. E. 2d 914 (1950).
[8] 41 N. Y. 66 (1869).

harps back to the earlier common-law test as indicated in the writer's earlier paper.[9]

In considering a trust created by a deed inter vivos, the Court of Appeals has held that where the donor created a trust to endure during the lives of the donor and the donee and then to continue as donee might appoint, the possibility that the trust might be revoked during the life of the donor excluded his life from the computation of "lives in being." Thus *Morgan v. Keyes* [10] settled a thorny problem entirely in accord with the analysis set forth in the earlier paper. Since the trust could be cancelled during the life of the donor, there was, at least during that period, no suspension of the power of alienation at all. The suspension began only when the donor died.

Another matter considered in the earlier article dealt with adopted children. As there indicated, the rights of adopted children are the same as those of natural children except as limited by Section 115 of the Domestic Relations Law. That section provides that if a remainder is limited upon the death of a child, adopted children are not included in the designation of children. This section was applied in the recent case of *Matter of Watson.*[11]

To the growing body of case law dealing with the date upon which the membership in a class is determined, the Appellate Division has added the decision in *Safford v. Kowalik,*[12] where it was held that a class described by the testator as "his heirs" must be determined as of the date of the death of the testator. The same rule was applied in *Matter of Dillon* [13] to validate a gift which was to be held "until the youngest of my grandchildren attains 21." By holding that the class is determined upon the death of the testator and excluding after-born grandchildren from the class, the will was made valid. A difficult case was decided in *Geoffroy v. Schmidt.*[14] There it was held that an agree-

[9] Finkelstein, *supra* note 1, at 251.
[10] 302 N. Y. 439, 99 N. E. 2d 230 (1951).
[11] 199 Misc. 339, 99 N. Y. S. 2d 128 (Surr. Ct. 1950).
[12] 278 App. Div. 604, 101 N. Y. S. 2d 876 (3d Dep't 1951).
[13] 200 Misc. 147, 105 N. Y. S. 2d 541 (Surr. Ct. 1951).
[14] 279 App. Div. 912, 110 N. Y. S. 2d 576 (2d Dep't 1952).

ment not to seek partition violates the Rule Against Perpetuities inasmuch as the "power to alienate was suspended for an unreasonable time." This decision does not fall into any category discussed in the earlier article, nor is it possible to see how the power of alienation is suspended by an agreement which is always cancellable by the parties thereto or their privies.

It is interesting to note that it was still necessary in 1952 for the court to invalidate a provision suspending the power of alienation for a specified number of years.[15] On the other hand, in *Matter of Corlies*,[16] the continuation of a trust until infancy expires was upheld as a condition imposed by law rather than by the will, and is an example of the doctrine of administrative trusts, to which reference was made in the earlier paper.[17]

The writer expresses appreciation to the editors of the *Review* for permission to amend his earlier paper by the comments here made. John Chipman Gray, who remains the greatest among us in the world of the Rule Against Perpetuities, despaired that he would always do his sums correctly.[18] Naturally, the same apprehension falls to all of us.

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[15] Matter of Linke, 279 App. Div. 1096, 112 N. Y. S. 2d 673 (2d Dep't 1952).
[16] 201 Misc. 755, 106 N. Y. S. 2d 381 (Surr. Ct. 1951).
[17] Finkelstein, *supra* note 1, at 249.
[18] See GRAY, THE RULE AGAINST PERPETUITIES ix (2d ed. 1906).