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NOTES ON THE NEW YORK RULE AGAINST SUSPENSION OF THE POWER OF ALIENATION

RECENT proposals to repeal the New York rules against the suspension of the power of alienation and to reinstate the common law rule against perpetuities recall the strictures upon the New York legislation which were indulged in by Gray. That great commentator was of the opinion that "in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York." [1] This, according to him, was a result of the confusion inherent in the New York statutory scheme. While "the common law rule of perpetuities grew out of the ordinary usages of the community," [2] he pointed out that "the limit of two lives fixed by the New York statute, is an arbitrary limit," [3] and that "to allow future estates, and yet to confine them within bounds so purely arbitrary, would seem to be an invitation to litigation." [4]

No one who attempts the task of commenting on the rule against perpetuities can take lightly any dictum of Gray. His illumination of this dark subject has been so great and his exposition so thorough and erudite that it is with the greatest hesitation that we subject his conclusions to critical analysis.

On the other hand, no quantity of deference to the opinions of Gray nor any sentimental attachment to the rule of

[1] Gray, The Rule Against Perpetuities (2nd ed., 1915), p. 568.
[2] *Ibid.* at 567.
[3] *Ibid.*
[4] *Ibid.*

The Duke of Norfolk's case[5] will substitute for a realistic investigation into the operation of the statutory rule in New York as expounded by the courts. More than a century[6] has passed since these rules were first placed upon our statute book, and if they are now to be repealed, which may, of course, be a logical next step, the action should be taken only in the light of the clearest and most painstaking investigation of all the facts.

Professor Gray pointed out that before the passage of the Revised Statutes in question there was only one case before the courts in New York in which the remoteness of a limitation was called in issue and that that case presented "only a simple question of construction." He then listed all the cases that have come before the courts since the Revised Statutes and gave the following statistics:

> "From the passage of the Revised Statutes down to the publication of the first edition of this treatise in 1886 there had been over 170 reported cases on questions of remoteness. During the twenty-eight years since 1886, there have been some 300 cases more, making a total little short of, if not over, 470 cases. This enormous amount of litigation is perhaps as striking an illustration as could be found of the dangers attending radical legislation." [7]

It is submitted that this simple method of demonstrating the evil effects of the legislation is not significant. The period between 1828 and 1914, which is covered by the statistics, was, of course, a period of enormous growth in litigation generally and was exactly the epoch in which New York State grew from an agricultural community to the largest industrial civilization in the world. It is not remarkable, therefore, that the quantity of litigation with regard to any one subject should have thus vastly increased. The contrary would have been more to be wondered at. On the other hand, a calculation of the number of cases involving suspension

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[5] 3 Ch., Cas. 1 (1681).
[6] Laws of 1828. Rev. St., pt. 2, ch. 1, tit. 2, and Rev. St., pt. 2, ch. 4, tit. 4.
[7] *Supra* Note 1 at 568, sec. 750.

since 1914 has led to the astounding result that only thirty cases of this character have been passed upon by the court of last resort.[8] Several hypotheses are suggested by these new statistics. It might be said, for example, that the statutory rule having become fixed in judicial exposition, few difficulties present themselves to the draftsmen of wills. It might also be opined that the residents of the State had adapted themselves to the arbitrary requirements of the New York statutes. It would also seem that, on the whole, the purposes of the community are being satisfactorily served, for when a rule of law is applied without protest for more than a century, it affords the conclusion that interests sufficiently alive to translate their purposes into law are not belligerently inimical to the rules as applied by the courts.

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[8] Matter of United States Trust Co., 216 N. Y. 639, 110 N. E. 1051 (Mem., 1915), *aff'g* 168 App. Div. 903, 152 N. Y. Supp. 1147 (1st Dept., 1915), *aff'g* 86 Misc. 603, 148 N. Y. Supp. 762 (1914); Matter of Colgrove, 221 N. Y. 455, 117 N. E. 813 (1917); Appell v. Appell, 221 N. Y. 602, 117 N. E. 1060 (Mem., 1917), *aff'g* 177 App. Div. 570, 164 N. Y. Supp. 246 (1st Dept., 1917); Matter of Hitchcock, 222 N. Y. 57, 118 N. E. 220 (1917); Central Trust Co. of N. Y. v. Falck, 223 N. Y. 705, 120 N. E. 859 (Mem., 1918), *aff'g* 177 App. Div. 501, 164 N. Y. Supp. 473 (1st Dept., 1917); Benedict v. Salmon, 223 N. Y. 707, 120 N. E. 858 (Mem., 1918), *aff'g* 177 App. Div. 385, 163 N. Y. Supp. 846 (3rd Dept., 1917); Greene v. Fitzgerald, 223 N. Y. 718, 120 N. E. 864 (Mem., 1918), *aff'g* 178 App. Div. 941, 165 N. Y. Supp. 36 (3rd Dept., 1917); Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135 (1919); Walker v. Marcellus & O. L. Ry. Co., 226 N. Y. 347, 123 N. E. 736 (1919); Matter of Farmers' Loan & Trust Co., 226 N. Y. 691, 124 N. E. 1 (1919), *mod'f'g* 186 App. Div. 722, 175 N. Y. Supp. 37 (1st Dept., 1919); Matter of Silsby, 229 N. Y. 396, 128 N. E. 212 (1920); Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613 (1921); Matter of Kohler, 231 N. Y. 353, 132 N. E. 114 (1921); Epstein v. Werbelovsky, 233 N. Y. 525, 135 N. E. 902 (Mem., 1922), *aff'g* 193 App. Div. 428, 184 N. Y. Supp. 330 (2nd Dept., 1920); Crehan v. Megargel, 234 N. Y. 67, 136 N. E. 296 (1922); Mount v. Mount, 234 N. Y. 568, 138 N. E. 449 (Mem., 1922), *aff'g* 196 App. Div. 508, 188 N. Y. Supp. 170 (1st Dept., 1921); *In re* Allen's Will, 236 N. Y. 503, 142 N. E. 260 (Mem., 1923), *mod'f'g* 202 App. Div. 810, 194 N. Y. Supp. 913 (2nd Dept., 1922), which *aff'd* 111 Misc. 93, 181 N. Y. Supp. 398 (1920); Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924); Matter of McGeehan, 237 N. Y. 575, 143 N. E. 748 (Mem., 1924), *aff'g* 200 App. Div. 739, 193 N. Y. Supp. 856 (1st Dept., 1922); Matter of Trevor, 239 N. Y. 6, 145 N. E. 66 (1924); Matter of Buttner, 243 N. Y. 1, 152 N. E. 447 (1926); Matter of Chittick, 243 N. Y. 304, 153 N. E. 83 (1926); Matter of Bahrenburg, 244 N. Y. 561, 155 N. E. 897 (Mem., 1927), *aff'g* 214 App. Div. 792, 210 N. Y. Supp. 824 (2nd Dept., 1925), *aff'g* 130 Misc. 196, 224 N. Y. Supp. 183 (1924); Matter of Perkins, 245 N. Y. 478, 157 N. E. 750 (1927); Matter of City of New York, 246 N. Y. 1, 157 N. E. 911 (1927); Matter of Gallien, 247 N. Y. 195, 160 N. E. 8 (1928); Calvary Presbyterian Church v. Putnam, 249 N. Y. 111, 162 N. E. 601 (1928); Matter of Drury, 249 N. Y. 154, 163 N. E. 133 (1928); Matter of Durand, 250 N. Y. 45, 164 N. E. 737 (1928); Matter of Manning, 252 N. Y. 540, 170 N. E. 135 (Mem., 1929), *aff'g* 227 App. Div. 644, 235 N. Y. Supp. 835 (3rd Dept., 1929), *aff'g* 133 Misc. 695, 234 N. Y. Supp. 109 (1929).

In the following pages, it is proposed to analyze, in the light of the decisions since 1914, the practical application of the New York rules against suspension in order to discover whether in fact the arbitrary limit of two lives in being has frustrated substantially the desires of the community with regard to the creation of future estates. We are of the opinion that if, on the whole, the statute has been applied satisfactorily, it would be error to reinstate the common law rule, with which our courts have been unfamiliar for a century, and to expose the Bar of the State to the necessity of revising its practice in connection with the delicate task of the drafting of wills and deeds intended to provide for the posterity of this generation.

The New York rules with regard to suspension render invalid two separate groups of future interests. On the one hand, we have bad trusts, the income of which is consecutively payable to more than two people in being, and, on the other hand, we have bad contingent future interests to persons unborn and whose birth might be delayed beyond two lives in being. It will be noted that in the first mentioned group it is necessary that the income of the trust be payable *consecutively* to more than two named persons in being, for it is now well settled that if the income from a trust is *divided* among any number of existing individuals, the trust is valid in spite of the fact that more than two lives might pass before it is entirely terminated. This is the result of a series of cases, beginning with Matter of Colgrove,[9] and has been literally carried out in every case in which the income from a trust fund was divided among more than two people. The uniformity with which the courts have held that where there is a division of income among more than two beneficiaries the testator intended separate trusts, suggests the conclusion that the doctrine of intended separate trusts is in reality *a fiction* devised to save certain desirable trusts from the condemnation of the statute. The decision of the Court of Appeals in Matter of Horner[10] first gave voice to this judicial statutory extrapolation and subsequent decisions have not hesitated to carry out the implications of that fiction. The

[9] Supra Note 8.
[10] *Supra* Note 8.

doctrine thus developed by the courts has helped enormously to overcome one of the major difficulties of the statute in that it is now possible for a testator who has more than two dependents whom he wishes to provide for to give to each an income for life out of his estate.

The danger with legal fictions, however, is apparent here as it is elsewhere, for since these trusts were only upheld on the supposed presumption that separate trusts were intended by the testator, a proportionate part of the trust must come to an end as each beneficiary dies and it is impossible, under that rule, for the testator to provide that the income upon the death of one of the beneficiaries should continue to be paid to the remaining beneficiaries, where there are more than two. Under the common law rule, of course, it will be perfectly possible for a testator to prevent the vesting of an estate until all of his children have died. Under the New York rule, the power of alienation must not be suspended for more than the lives of two of the children and consequently even when there are separate trusts, either real or presumed, each trust must come to an end upon the death of two beneficiaries and no more.

It will be argued that this difficulty, which is due entirely to the method by which the conclusion in Matter of Horner[11] was reached is an undesirable one and would by itself justify the repeal of the New York statutes. On the other hand, it is doubtful whether such conclusion necessarily follows. The purpose both of the common law rule against perpetuities as well as that of its statutory successor is the fostering of the policy of the common law to forward the circulation of property. Within reasonable limits, however, the law recognizes the desirability of permitting limitations upon the free circulation of property and the only problem which presents itself in choosing between the New York rule and the more ancient common law rule is involved in the choice between methods of measuring the duration of time within which the free circulation of property may be impeded by the owners of the property. If it is said that lives in being are a natural period of measurement, might it not be a complete

[11] *Ibid.*

answer that two lives in being if not natural are yet satisfactory in practice, and if the income from a trust fund, or that portion of a trust fund necessary to produce the income paid to a beneficiary, must be distributed upon the death of that beneficiary, it can only mean that from the point of view of the law it is unsatisfactory to permit property which has been used to pay income to two individuals during their lives to continue to be tied up any longer. Such a conclusion does not seem to be so unreasonable as to justify the repeal of the statute which has been expounded by courts and applied for more than one hundred years.

The courts have found no difficulties in sustaining these so-called separate trusts. Beginning with Matter of Colgrove,[12] Green v. Fitzgerald[13] and Matter of Horner,[14] the Court of Appeals has handed down a series of decisions in which individual trusts, the income of which was divided among a number of beneficiaries, were sustained. In Matter of McGeehan,[15] the income was divided among three nephews and a niece during their lives after a life estate to a sister of the testatrix. In Matter of Trevor,[16] the income was to be paid first to the widow for her life and thereafter to the four children. In Matter of Drury,[17] the income of the trust was to be paid to the testator's daughter and to two grandsons; and, finally, in Matter of Buttner,[18] the income was divided among three named beneficiaries.

In all of the cases listed, no difficulty was encountered in sustaining the trusts insofar as they provided for gifts of income to named beneficiaries during their lives. On the other hand, in several instances, the Court held invalid provisions which provided for the payment of the same income consecutively to more than two beneficiaries.[19]

One class of cases presents difficulties which make the statutory rule seem somewhat unsatisfactory. Reference is

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[12] *Supra* Note 8.
[13] *Supra* Note 8.
[14] *Supra* Note 8.
[15] *Supra* Note 8.
[16] *Supra* Note 8.
[17] *Supra* Note 8.
[18] *Supra* Note 8.
[19] Matter of Perkins, 245 N. Y. 478, 157 N. E. 750 (1927); Matter of Gallien, 247 N. Y. 195, 160 N. E. 8 (1928); Matter of Durand, 250 N. Y. 45, 164 N. E. 737 (1928).

made to cases like Carrier v. Carrier[20] where the trust fund was to be held and the income to be paid to the husband and wife during their respective lives and, after the death of both husband and wife, the income was to be divided into two parts and distributed between two daughters. The Court sustained the trust during the life of the husband and wife, but held illegal the suspension of the power of alienation for any period beyond the lives of the husband and wife. It is obvious, of course, that if the trust were to endure after the death of both husband and wife the income would be consecutively payable first to one and then to the other, and finally to the daughters, who would constitute a third life. This direct violation of the statute rendered impossible the creation of a trust fund for the support of the husband and wife and their two children; a form of bequest which occurs readily to many. There can be no doubt that the case would have been differently decided under the common law rule, and this case affords one instance in which a reasonable disposition of property was apparently prevented by the application of the New York rules as interpreted by the courts.[21]

In the case of Mount v. Mount,[22] a will which attempted to leave the income of a trust fund to a group of children, some of whom were not yet in being, was held to be invalid. Here we find the application of the New York statutes in their full vigor, invalidating a gift which would have been good at common law. But it is a case of infrequent occurrence and affords no real argument against the statutory scheme. In Benedict v. Salmon,[23] a trust estate consisting of a residence was limited to continue during the lives of eight daughters, ostensibly to provide a home for them. It is plain that here we had a trust with consecutive division of benefits

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[20] *Supra* Note 8.

[21] A way out of this dilemma is afforded when an attempt is made by a settlor to create a trust for his own life and that of another and thereafter to divide the income among named beneficiaries. If the trust is revocable by the settlor during his own life, the power of alienation is obviously not suspended during his life and some leeway is thus afforded. Thus, if a husband wishes to create a trust *inter vivos* to endure during his own life and that of his wife and to have the income divided among his children thereafter the trust will be valid if it is revocable during the life of the husband. Equitable Trust Co. v. Pratt, 117 Misc. 708, 193 N. Y. Supp. 152 (1922).

[22] *Supra* Note 8.

[23] *Supra* Note 8.

among more than two beneficiaries. By our canons of construction it therefore properly failed. But we cannot help feeling that here is a case in which a contrary decision would have been more pleasant to contemplate. Perhaps a little more freedom with the use of the fiction of separate trusts would have pointed a way. In Matter of Perkins,[24] the Court invalidated provisions of a will which attempted, after a bequest of a life income to a named beneficiary, to continue the trusts during the lives of more than one additional named beneficiary. The case again points to one of the limitations on the doctrine of separate trusts and the inability of the courts to supply a felt need of testators in the face of positive statutory prohibitions.

Since the period of remoteness at common law consists of twenty-one years and lives in being, an estate which will vest within twenty-one years is valid at common law.[25] On the other hand, since the New York period beyond which the suspension of the power of alienation may not be attempted is limited to two lives, it follows that a suspension of the power of alienation for any fixed period, no matter how short, will violate the rule and, indeed, the courts have so held.[26] Whenever the duration of a trust is measured by a period of time, the courts have not hesitated to invalidate it. The result cannot be subject to criticism because twenty-one years is itself an arbitrary estimate of time and there does not seem to be any substantial reason why the courts should favor the limitation of future interests for any fixed time. It seems more logical to permit the creation of future estates that prevent the circulation of property within the limits fixed by future events rather than by definite periods of time.

When we turn to the second group of cases, in which the validity of the testamentary provision has been challenged on the ground that future estates have been created which are not alienable because appointed to unborn people whose

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[24] *Supra* Note 8.

[25] *Supra* Note 1 at 198, 199.

[26] Matter of Manning, *supra* Note 8. A distinction is drawn, in some cases, between suspension of the power of alienation for a fixed period and the retention of custody by executors for a fixed period. See, generally, Matter of Hitchcock, 222 N. Y. 57, 118 N. E. 220 (1917); Deegan v. Wade, 144 N. Y. 573, 39 N. E. 692 (1895).

birth may not occur within the statutory period, we find that the courts of New York have interposed but few obstacles which were not already fully known and interposed by the common law courts themselves. Both at common law and under the New York statutes, a gift to unborn children of a living child would be valid; at common law because since it would necessarily vest within a life in being; and under the New York statutes because the power of alienation is only suspended during one life. Ignoring, for the moment, periods of gestation, it was not possible to go further at common law nor is it under the New York statutes.

That a contingent future estate must vest, if at all, within two lives in being is the result of the decision in the leading case of Matter of Wilcox.[27] "I am, therefore, of opinion," wrote Chief Judge Cullen, "that for a contingent remainder in personal property to be valid, the contingency must be such as necessarily to occur within two lives in being at the death of the testator." [28] The decision in that case was subjected to scathing and pitiless criticism by eminent commentators on the law of real property and, indeed, it was said that the conclusion quoted above is "entirely obiter dictum and only important as an expression of a great tribunal upon important doctrines relating to future estates." [29] Indeed, if we view the opinion of the Court in that case in the light of more recent decisions, we cannot escape the conclusion that a different result would in all likelihood have been reached, were that case at the bar for present disposition. There we had a case in which a trust was established to pay the income to *A* for life and after his death to divide the income between *B* and *C* but if *B* and *C* died before attaining the age of twenty-one, then the principal was to go to *D*. Even in Matter of Wilcox[30] it was conceded by the Court that the doctrine of separate trusts might have saved the will "if it could be assumed that the trust was several as to the share of each issue." [31] But the doctrine of separate trusts has been applied with like facility to trusts of personalty as to those

[27] 194 N. Y. 288, 87 N. E. 497 (1909).
[28] *Ibid.* at 306, 87 N. E. at 503.
[29] Fowler, Real Property (2nd ed., 1904), p. 277.
[30] *Supra* Note 27.
[31] *Ibid.* at 293, 87 N. E. at 498.

of realty. Indeed, in the case of realty, the fiction is more apparent. Yet in Matter of McGeehan[32] the doctrine of separate trusts was applied to a gift of realty. We have already discussed numerous cases in which the trusts of personal property were sustained on a parity of reasoning. It follows that the gift to the issue in Matter of Wilcox[33] would have been sustained if the Court had viewed the trusts as several, and in that case the remainder would have vested within the statutory period. The language of the Court above referred to with reference to the vesting of estates within two lives in being becomes, therefore, in this view of the case, entirely unnecessary to the decision.

The authority of that case is thus signally weakened and, there being no other support for the proposition that the New York statutes have saved the rule against remoteness of vesting, there remains an open question for future adjudication with regard thereto. In the light of these considerations, the criticism of the decision of the Court in Matter of Wilcox[34] assumes renewed importance and a serious doubt arises as to whether or not the rule in that case would be followed at the present time.

The review of the cases here attempted affords the conclusion that, on the whole, the purposes of testators have in this jurisdiction been adequately served by the existing statutory scheme; that while a few wills have failed which would probably have been sustained under the common law rule, the situation is not sufficiently serious to justify a wholesale revision of our rules against suspension of the power of alienation. No doubt a carefully planned scheme of curative legislation, designed to put the fiction of separate trusts on a basis of positive law would remove many obstacles that now make the drafting of wills a treacherous escapade.*

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[32] *Supra* Note 8.
[33] *Supra* Note 27.
[34] *Ibid.*

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