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Suspension of the Power of Alienation by the Creation of Trusts

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SUSPENSION OF THE POWER OF ALIENATION BY THE CREATION OF TRUSTS.—In Matter of Rohr,[1] the testatrix left all her property to her executor, in trust, to distribute the income among her three sons during their lives. She made no disposition of the corpus of the trust either before or after the death of the last survivor. In a proceeding to construe the will it was held that the trust was void in that it suspended the absolute power of alienation beyond the statutory limitations.[2]

There are two ways by which the absolute power of alienation or ownership may be suspended; one is by the creation of a future estate, the vesting of which is dependent upon the occurrence of some future or contingent event, the other by the creation of a trust which vests the title in a trustee.[3] This discussion will be limited to the latter. As a general rule, the mere creation of a trust does not, of itself, suspend the power of alienation, because the trustee and the *cestui que trust* may, by uniting in a deed or contract, convey an absolute title.[4] But, as most general rules, this is subject to exceptions.

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[1] 130 Misc. 174 (Surr. Ct. 1927).

[2] N. Y. Real Prop. L. § 42. Suspension of power of alienation. The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, 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; except that 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 die under the age of twenty-one years or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority.

N. Y. Pers. Prop. L. § 11. Suspension of Ownership. The absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects, limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property.

[3] Steinway *v.* Steinway, 163 N. Y. 183, 57 N. E. 312 (1900); Wilber *v.* Wilber, 165 N. Y. 451, 59 N. E. 264 (1901), *In re* Roberts, 112 App. Div. 732, 98 N. Y. Supp. 809 (4th Dept., 1906).

[4] Robert *v.* Corning, 89 N. Y. 225 (1882); *Re* Sacrison, 19 N. D. 16, 26 L. R. A. (N. S.) 724, 123 N. W. 518 (1910); In Hope *v.* Brewer, 136 N. Y. 126, 32 N. E. 558 (1892), Testator devised and bequeathed the rest, residue and remainder of his estate to his executors and their sur-

Where the trust is created for a specific purpose which would be defeated by a conveyance during its effectuation, the trust will be void, if by its terms it may extend beyond the prescribed limitations.[5] The other exception is that brought about by § 93-3 of the New York Real Property Law[6] and similar statutes permitting the creation of what is generally known as the spendthrift trust.

Difficulty in determining whether the rule against perpetuities has been offended arises when the creator names more than two persons as beneficiaries. In such cases, we must look for the intention of the creator to see whether he intended to create a joint trust to last until the death of the last survivor, or whether he intended to create separate trusts and constitute the beneficiaries tenants in common of the property. If the former were the testator's intention, then the entire trust will be void and no part of it can be saved, because the trust is as much for the benefit of one *cestui que trust* as another, and it is impossible to grant any preferences.[7] If, however, the intention were to create separate trusts, then the rule will not be vio-

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vivors, in trust for the purpose of founding and endowing an infirmary for the care and relief of sick and infirm persons to be established in Scotland. He directed his executors upon the establishment of said infirmary, within a specified time to sell and convert into money all of the said property remaining unsold, as soon as practicable, and to pay over the whole of said trust fund to said infirmary; and if said infirmary was not established, within the prescribed period he directed the trustees to divide and pay over said fund to other charities. It was held "The fact that such conversion might require a period of time not measured by lives does not create an unlawful perpetuity. It was said in Robert *v.* Corning (89 N. Y. 225, 228) that such result is accomplished only when there are no persons in being by whom an absolute fee in possession can be conveyed, and that a discretionary power conferred upon executors, with respect to the time of sale, did not suspend the power of sale or the absolute ownership. It was within the legal power of the executors to convert the whole estate into money the day after their appointment and qualification, and to pay over the residuary fund to the foreign trustees."

[5] Robert *v.* Corning, *supra,* note 4; Underwood *v.* Curtis, 127 N. Y. 523, 28 N. E. 585 (1891), where the court said "And if the trust be created, by which the possession of personal property and the legal estate therein is vested in the trustees during the continuance of the trust, an absolute ownership of personal property is suspended within the meaning of the statute."

[6] N. Y. Real Prop. L. § 96. An express trust may be created for one or more of the following purposes:

3. To receive the rents and profits of real property and apply them to the use of any person during the life of that person, or for any shorter time, subject to the provisions of law relating thereto.

[7] Fowler *v.* Ingersol, 127 N. Y. 472, 28 N. E. 471 (1891); Central Trust Co. *v.* Eglesten, 185 N. Y. 23, 77 N. E. 989 (1906); *Re* Beale *v.* Will, 207 N. Y. Supp. 257, 124 Misc. Rep. 96 (1926).

lated because on the death of one beneficiary, his share will either pass to his representatives, or revert to the creator in the absence of other disposition.[8] When considering the subject of intention, it must be borne in mind that the mere fact that the income is paid out of one undivided fund does not raise a joint trust; the rule being that though the income and principal are payable out of one fund kept *in solido* for mere convenience in investment, separate trusts may be created.[9] What was said by Chase, J., in Leach *v.* Goodwin[10] should be remembered in this connection, "In cases where a trust for the benefit of several persons is held in one fund, it is necessary for the purpose of holding that they constitute separate and independent trusts, that each part of the principal fund should be liberated from the trust fund upon the termination of the lives in being at the death of the testator for which the trust is held, and also to find from within the will itself that such was the intention of the testator."

There are cases in which the testator or creator, after creating separate trusts[11] for the benefit of more than two persons, provides that on the death of any one of the beneficiaries, the corpus of his share shall vest in his issue, and that in case of failure of issue, then said corpus shall be divided proportionately among the remaining beneficiaries, to be held upon the same conditions as their original shares. Again, in such cases, we must look for the intention of the creator, for if he intended that the subportion should be redivided upon the death of another beneficiary without issue, and so on, this provision would be void, although the main trusts, themselves, would be valid.[12] In determining the intention of the creator, the courts,

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[8] Leach *v.* Goodwin, 198 N. Y. 35, 91 N. E. 288 (1910); Schermerhorn *v.* Cotting, 131 N. Y. 48, 29 N. E. 980, (1892); Wells *v.* Wells, 88 N. Y. 323 (1882); Vanderpoll *v.* Law, *et al.*, 112 N. Y. 167, 19 N. E. 481 (1889).

[9] *Supra,* note 8.

[10] *Ibid.*

[11] Trusts referred to here are those allowed by N. Y. Real Prop. L. § 96-3.

[12] Shey *v.* Shey, 194 N. Y. 368, 87 N. E. 817 (1909); Corse *v.* Chapman, 153 N. Y. 368, 47 N. E. 812 (1897); Chastain *v.* Dickinson, 201 N. Y. 538, 94 N. E. 646 (1911).

Hiscock, J., in Shey *v.* Shey, "Again the terms employed by the testator rebut the idea that he intended that subshares created on the death of a child should be added to the principal of the respective trusts for the benefit of other children and then carried forward as part of such principal into still further subdivisions measured by and continued through other lives."

In Matter of Colgrove, 221 N. Y. 455, 117 N. E. 813 (1918), testator bequeathed $15,000 to one H. to be invested, and to apply the income to the use of three of his grandchildren, during their minority, and as they acquired majority to pay over one-third of the fund. In the event that

whenever possible, endeavor to hold valid the instrument of trust and to find in ambiguous declarations an expression of a lawful intent.[13] For example, in Shey *v.* Shey,[14] the testator directed the division of his residuary estate into five equal parts, one part to be held in trust for each of his five children until they should attain a certain age when they were to receive the principal. If any child should die before attaining said age, leaving issue, then his share was to go to the issue absolutely, but if he left no issue, then his share was to be divided among the four remaining, "for the same use and subject to the same conditions, as I have in this instrument directed or will direct their share of my estate to be held." It was held that the intention of the testator was that no further division of a subportion was to be made upon the death of any of the four surviving children, and that the trust ended as to each subportion upon the death of the child receiving it.

As has been said above, courts favor that construction of an instrument which will render it valid, or as much of it valid as possible, and this is especially so in the case of a will. Thus where part of the trust is valid and part invalid, if the good can be separated from the bad, the courts will uphold that which is valid.[15] Where the primary intention of the creator accords with the rules of law, an ulterior limitation whereby he attempts to effect an invalid suspension may be disregarded.[16] Thus in Carrier *v.* Carrier,[17] the

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any of the beneficiaries died before majority leaving issue, then his share was to go to such issue, if he left no issue, then the trustee was directed to apply the income and profits thereof to the use of the survivor or survivors of said beneficiaries until said survivor or survivors should attain majority when the trust fund should be disposed of in whole or in equal shares in accordance with previous provisions. The court held that the last mentioned provision was void. Crane, J., "These clauses taken in connection with other parts of the will indicate an intention upon the part of the testator to keep the trust fund in the event stated tied up until the youngest of the three grandchildren arrives at the age of twenty-one."

[13] Mee *v.* Gordon, 187 N. Y. 400, 80 N. E. 353 (1907); DuBois *v.* Ray, 35 N. Y. 162 (1886); Manice *v.* Manice, 43 N. Y. 368.

[14] *Supra,* note 11.

[15] Harrison *v.* Harrison, 36 N. Y. 543 (1867); Matter of Murray, 75 N. Y. App. Div. 246, 78 N. Y. Supp. 165 (1902); James *v.* Beasley, 14 Hun 520 (1878), "It is perfectly well settled that if the purposes of a trust are separable, and some of them must arise within two lives, and there are others which must or may become operative only after the expiration of two lives, the former may be sustained, but the latter cannot.

[16] Carrier *v.* Carrier, 226 N. Y. 114, 143 N. E. 655 (1919). In Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924), Cardozo, J., said, "The provision that in given circumstances a share shall fall back into the general body of the trust, and remain unsevered from the bulk is so

income of a trust was to be used for the maintenance of a family. On the death of the husband the income was to be paid to the wife; and after her death the fund was to be divided into two equal parts and held in trust for the benefit of each of two daughters. It was held that although the trusts for the benefit of the daughters were void, yet the trust for the family purpose was valid. In his opinion, Cardozo, J., stated, "The grantor's purpose is not doubtful. He wished to maintain the family as a unit while he and his wife or either of them lived. During that time there was to be a single trust."

A. M. L.

MORTGAGE OR CONDITIONAL SALE?

In New York, the Court of Appeals has said that, "Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights." [1] Was the New York Court of Appeals alive to the real opportunity for amelioration presented to it in the very recent Youssoupoff case?

In Youssoupoff *v.* Widener,[2] the plaintiff, a destitute and exiled Russian prince residing in London delivered to defendant two valuable Rembrandts under a contract giving the plaintiff a right to repurchase within a certain period, provided that "this privilege of repurchase will be exercised only in case he (Youssoupoff) finds himself in the position again to keep and personally enjoy these wonderful works of art."

Before the expiration of the stipulated period, plaintiff tendered a sum which he had borrowed and which would make defendant whole. This the defendant refused, on the ground that the right of redemption had been lost since the plaintiff could not fully comply with the terms of the contract.

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subordinate in importance and so separable in function that we are at liberty to cut it off, and preserve what goes before."

"What he had in mind was a primary desire that each child at majority should have an equal share of the principal, a fourth of the entire fund, with a secondary desire that if this became impossible, the fourth should go to issue, and in default of issue should be retained, as an accretion to the whole. * * * We carry out his purpose when we treat the four shares of principal as having a several existence in his thought, from the beginning to the vicissitudes of several limitations."

[17] *Supra,* note 14.

[1] Oppenheim *v.* Kreidel, 236 N. Y. 156, 165; 140 N. E. 227, 230 (1923).

[2] Youssoupoff *v.* Widener, 246 N. Y. 174; 158 N. E. 65 (1927).