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# THE 1960 AMENDMENTS TO THE NEW YORK STATUTES ON PERPETUITIES AND POWERS OF APPOINTMENT

*Robert S. Pasley†*

This article is based upon two studies prepared by the author as consultant to the New York Law Revision Commission and submitted in 1959 and 1960.<sup>1</sup> For clarity of presentation, the two studies have been consolidated and, in a few places, condensed. In addition, the article has been brought down to date by indicating the recommendations actually made by the commission on the basis of the consultant's studies and the action taken by the legislature thereon. It should be emphasized, however, that nothing said herein purports to represent the official position of the Law Revision Commission (except where the latter's recommendations are actually quoted).

After an explanatory introduction, this article will treat four topics on which legislation has been enacted in 1960:

- (a) Addition of a twenty-one year period in gross;
- (b) Construction of certain limitations which would prima facie be invalid;
- (c) Incidental matters relating to powers of appointment;
- (d) The statutes limiting the creation of legal life estates and remainders thereon.

A subsequent article will treat the subject of accumulations for charitable purposes, on which the commission made certain recommendations which were not adopted by the legislature.

## I. HISTORICAL INTRODUCTION—1830 TO 1959

### 1. *The Revised Statutes of 1830*

As is well known, the New York law of future interests is in large measure the work of the revisers of 1828, whose revision of the New York substantive law was enacted in 1828, effective January 1, 1830.<sup>2</sup> Although their work has often been criticized, it was in fact a monumental achievement, representing as it did one of the first comprehen-

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† See Contributors' Section, Masthead p. 722, for biographical data.

<sup>1</sup> Rule Against Perpetuities and Related Matters, N.Y. Leg. Doc. No. 65(G) (1960); Accumulations of Rents and Profits of Real Property and Income of Personal Property, N.Y. Leg. Doc. No. 65(I) (1960).

<sup>2</sup> See Powell & Whiteside, "The Statutes of the State of New York Concerning Perpetuities and Related Matters," N.Y. Leg. Doc. No. 65(H) at 23-24, 48-56 (1936), reprinted in Report, Recommendations and Studies of N.Y. Law Rev. Comm'n (475), at (495)-(496), (520)-(528) (1936). [Hereafter cited as "Powell & Whiteside"].

sive codifications of a large body of substantive law ever undertaken in a common-law jurisdiction. But like all pioneer efforts it had its weak spots, particularly in the area of future interests. Of particular significance for our purposes were these:

(a) Limitation of the permissible period for suspension of the power of alienation to two lives in being;

(b) Omission of any period in gross;

(c) Rendering all trusts to collect and pay over rents and profits or income, spendthrift trusts and subjecting them *ab initio* to the two-lives rule.

The first two changes resulted in a much stricter and less flexible permissible period than eventually came to be recognized at common law. The third caused a tremendous expansion of the scope and applicability of the "Rule Against Perpetuities" or, as more properly described in terms of the New York statutory language, the "rule against suspension of the power of alienation."<sup>3</sup>

Criticism of these aspects of the Revised Statutes began almost at once and continued with unabated vigor throughout the 19th century and first half of the 20th.<sup>4</sup> Strangely enough, however, the bench and bar of New York seemed to develop a warm affection for their statutory scheme and its neo-Gothic complexities, and reform proved to be extraordinarily difficult to achieve.

## 2. *Report of Commission on Defects in the Law of Estates*

In 1933, the Commission to Investigate Defects in the Law of Estates, under the chairmanship of Surrogate James A. Foley, submitted to the legislature its Fourth Supplemental Report, which dealt with this subject.<sup>5</sup> Although a majority of those persons who expressed their views to the commission had favored some change in existing law, the commission recommended that no change be made.<sup>6</sup>

## 3. *Original Recommendations of the Law Revision Commission*

In 1936 the New York Law Revision Commission, on the basis of a comprehensive study made by Professors Richard R. Powell and Horace E. Whiteside, made a series of recommendations for amend-

<sup>3</sup> Powell & Whiteside *id.* at 54-56, Report, Recommendations and Studies of N.Y. Law Rev. Comm'n at (526)-(528).

<sup>4</sup> See criticisms of Chancellor Kent, Judge Pound, and Professors Gray, Whiteside, Powell, and Walsh, quoted in Powell & Whiteside *op. cit. supra* note 2, at 19-21, Report, Recommendations and Studies of N.Y. Law Rev. Comm'n at (491)-(493).

<sup>5</sup> N.Y. Leg. Doc. No. 55 (1933).

<sup>6</sup> Powell & Whiteside *op. cit. supra* note 2, at 22, Report, Recommendations and Studies of N.Y. Law Rev. Comm'n at (494).

ment of the New York statutes.<sup>7</sup> In 1938, on the basis of another study made by Professor Whiteside and Mrs. Laura Mulvaney, the commission modified these recommendations in some details and recommended further statutory amendments relating to spendthrift trusts.<sup>8</sup>

In summary, the 1938 recommendations of the commission would have accomplished the following:

(a) Change of the permissible period to multiple lives in being, plus actual minorities and actual periods of gestation or, *alternatively*, twenty-one years;

(b) Restriction of the application of the rule against suspension of the power of alienation to future estates and powers of appointment, exempting all estates in possession, whether in trust or not;

(c) Elimination of the rule making virtually all trusts in New York spendthrift trusts, but permitting the creation of spendthrift trusts under various limitations and safeguards;

(d) Clarification of the statutory definitions of vested and contingent remainders;

(e) Repeal of sections 43 through 47 of the Real Property Law, relating to certain legal life estates and remainders.

None of these recommendations was adopted at the time, or for twenty years thereafter.

#### 4. *The 1958 Legislation*

By chapter 152 of the Laws of 1958, section 42 of the Real Property Law and section 11 of the Personal Property Law were amended to change the period during which the absolute power of alienation of real property or the absolute ownership of personal property may lawfully be suspended from a period measured by two lives in being to a period measured by lives in being. Each section as amended included the following:

In no case shall lives or minorities measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

The amendments applied to all inter vivos transfers effective on or after September 1, 1958, and to estates or wills of persons dying on or

<sup>7</sup> Communication of the Law Revision Commission to the Legislature Relating to the Rule Against Perpetuities and Related Matters, N.Y. Leg. Doc. No. 65(H) (1936), reprinted in Report, Recommendations & Studies of N.Y. Law Rev. Comm'n (475), at (473)-(608) (1936).

<sup>8</sup> Recommendation of the Law Revision Commission to the Legislature Relating to the Rule Against Perpetuities and Spendthrift Trusts, N.Y. Leg. Doc. No. 65(M) (1938), reprinted in Report, Recommendations & Studies of N.Y. Law Rev. Comm'n (281)-(361) (1938).

after that date. Estates and interests created by or arising under inter vivos transfers effective prior to September 1, 1958, or wills or estates of persons dying before that date, continued to be governed by pre-existing law.

Although not specifically recommended by the Law Revision Commission, these amendments effected the most important of the reforms urged by the commission in 1936 and 1938, namely, the substitution of a permissible period measured by multiple lives in being for one measured by only two lives. The "evidentiary" test, prohibiting the designation of such a large number of lives as to make proof of their end unreasonably difficult, was included in almost the same language in the 1936 recommendations of the Law Revision Commission, but was omitted from the 1938 recommendations. It is, however, in accord with the common law of the United States<sup>9</sup> and is found, in very similar language, in the Model Rule Against Perpetuities Act,<sup>10</sup> which is intended to restate the American common-law rule, and has been adopted in California and Wyoming.<sup>11</sup>

The amendments made no other change in the existing New York rules on this subject which, either by express statutory provision or by judicial interpretation, continued to include the following:

(a) A "restricted minority" provision,<sup>12</sup> but no general minority provision and no period in gross.

(b) A rule that in some situations a trust might be continued, after lives in being, for the minority of the ultimate taker, on the theory that the power of alienation could be suspended in any event by appointment of a guardian.<sup>13</sup>

(c) A rule that actual periods of gestation may be included in the permissible period, either as lives or minorities in being at the creation of the estate,<sup>14</sup> or as an additional period or periods after lives in being.<sup>15</sup>

(d) A rule that the power of alienation is unlawfully suspended by a remote contingent future interest even if there are persons in being by whom a fee could be conveyed.<sup>16</sup>

<sup>9</sup> *Fitchie v. Brown*, 211 U.S. 321 (1908).

<sup>10</sup> 9C ULA 76 (1957).

<sup>11</sup> Cal. Civ. Code §§ 715.1, 715.2 (Deering Supp. 1959); Wyo. Comp. Stat. Ann §§ 34-39, 34-40 (1957).

<sup>12</sup> N.Y. Real Prop. Law § 42 (prior to 1960 amendment); N.Y. Pers. Prop. Law § 11 (prior to 1960 amendment); *Manice v. Manice*, 43 N.Y. 303 (1871).

<sup>13</sup> *Matter of Eveland*, 284 N.Y. 64, 29 N.E.2d 471 (1940); *Matter of Trevor*, 239 N.Y. 6, 145 N.E. 66 (1924); 5 Powell, *Real Property* ¶ 799 (1956).

<sup>14</sup> N.Y. Real Prop. Law § 42; N.Y. Pers. Prop. Law § 11.

<sup>15</sup> *Smith v. Edwards*, 88 N.Y. 92, 110 (1882); *Chaplin*, *Suspension of the Power of Alienation and Postponement of Vesting under the Laws of New York* § 109 (3d ed. 1928). Cf. *In re Havesgaard's Estate*, 59 S.D. 26, 238 N.W. 130 (1931).

<sup>16</sup> *Walker v. Marcellus & O.L. Ry.*, 226 N.Y. 347, 123 N.E. 736 (1919); *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909).

(e) A rule that the power of alienation is suspended by a trust to collect rents or profits of real property, or income of personal property, and apply them to the use of any person, and that any such trust which may by any possibility continue for more than lives in being (plus a possible minority, as explained in (b) above) is void *ab initio*, either *in toto* or, if the offending portion can be severed, at least in part.<sup>17</sup>

(f) A rule that the prohibitions of Real Property Law, section 42, and Personal Property Law, section 11, do not apply to possibilities of reverter or powers of termination,<sup>18</sup> or to options, whether in gross or appurtenant to a lease.<sup>19</sup>

Not so clear is whether various constructional devices, developed by the courts to ease the rigors of the old rule,<sup>20</sup> will continue to be invoked by the New York courts. Clearly there will be no further need for those which related solely to the two-lives rule, but as to the others the force of judicial precedent may give them continued vitality.<sup>21</sup>

#### 5. The 1959 Legislation—Powers of Appointment

The 1936 and 1938 recommendation did not cover powers of appointment, and the 1958 legislation was silent on this subject. Real Property Law, section 178, formerly provided:

##### § 178. Computation of term of suspension

The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed, not from the date of such instrument, but from the time of the creation of the power.

Real Property Law, section 179, formerly provided:

##### § 179. Capacity to take under a power

An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.

These statutes have been held applicable to personal property.<sup>22</sup>

It could be argued, although there are no cases reported, that so long as these statutes remained unchanged, the old perpetuities period

<sup>17</sup> *Matter of Horner*, 237 N.Y. 489, 143 N.E. 655 (1924); *Haynes v. Sherman*, 117 N.Y. 433, 22 N.E. 938 (1889).

<sup>18</sup> *Leonard v. Burr*, 18 N.Y. 96 (1858); 5 Powell, *Real Property* ¶ 769 (1956).

<sup>19</sup> *Matter of City of New York*, 246 N.Y. 1, 157 N.E. 911, reargument denied, 246 N.Y. 549, 159 N.E. 646 (1927), cert. denied, 276 U.S. 626 (1928); *Epstein v. Werbelovsky*, 193 App. Div. 428, 184 N.Y. Supp. 330 (2d Dep't 1920), aff'd, 233 N.Y. 525, 135 N.E. 902 (1922).

<sup>20</sup> Powell & Whiteside op. cit. supra note 2, at 85-108, Report, Recommendations and Studies of N.Y., Law Rev. Comm'n at (557)-(580).

<sup>21</sup> See Note, 43 Cornell L.Q. 703, 706-09 (1958).

<sup>22</sup> *Low v. Bankers Trust Co.*, 270 N.Y. 143, 200 N.E. 674 (1936); *Fargo v. Squiers*, 154 N.Y. 250, 258, 48 N.E. 509, 510 (1897); *Geneva Trust Co. v. Sill*, 27 N.Y.S.2d 289, 293 (Sup. Ct. Ontario County 1941).

of two lives in being (plus a restricted minority) would continue to be applicable to any interest given or limited by an instrument in execution of a power created prior to September 1, 1958, measured from the time of creation of the power, even though the instrument executing the power took effect on or after that date.

But on April 16, 1959, chapter 456 of the Laws of New York, 1959, took effect, amending these two sections of the Real Property Law to read as follows:

§ 178. Computation of term of suspension

The period during which the absolute right of alienation of *real property or the absolute ownership of personal property* may be suspended[,] by an instrument in execution of a power[,] must be computed, not from the date of such instrument, but from the time of the creation of the power, *provided, however, that the permissible number of lives under section forty-two of this chapter and under section eleven of the personal property law shall be determined under the law in effect at the time of the execution of the power and not the law in effect at the time of the creation of the power. . .*

§ 179. Capacity to take under a power

An estate or interest can not be given or limited to any person[,] by an instrument in execution of a power[,] unless it would have been valid[,] if given or limited at the time of the creation of the power, *provided, however, that the permissible number of lives under section forty-two of this chapter and under section eleven of the personal property law shall be determined under the law in effect at the time of the execution of the power and not the law in effect at the time of the creation of the power . . .*

The same act amended section 2 of chapter 163 and section 2 of chapter 152 of the Laws of 1958, which had made September 1, 1958, the effective date for the 1958 amendments to the Real Property Law, section 42, and the Personal Property law, section 11, discussed above. Under the 1959 amendments, the same effective date, September 1, 1958, is to be applied to all inter vivos instruments executed on or after that date, and to all wills of persons dying on or after that date, in so far as they exercise any powers granted or reserved prior to September 1, 1958.

In all other respects, these amendments took effect immediately, that is, on April 16, 1959.

These amendments pose two problems of retroactivity:

(a) The first and more general question is whether, under the doctrine of "relation back," codified in section 178 of the Real Property Law, it is permissible to substitute a new and more liberal test for determining the validity of an estate or interest given or limited after the effective date of the amendments by an instrument executing a

power created or reserved prior to that date.<sup>23</sup> For this type of retroactivity there is support in the statutes of other jurisdictions and in learned comment,<sup>24</sup> but there seem to be no judicial precedents.

(b) The second and more limited question of retroactivity is presented by that feature of the amendments which makes them effective as to estates or interests given or limited by instruments taking effect between September 1, 1958, and April 16, 1959, exercising powers created or reserved prior to September 1, 1958. This problem could arise only in the case of an instrument (i) taking effect between September 1, 1958, and April 16, 1959, (ii) exercising a power created or reserved prior to September 1, 1958, (iii) so as to give or limit an estate or interest which would be void under the two lives rule but which would be valid under the multiple lives rule. In the nature of things, this combination of circumstances has probably not been present in more than a fraction of cases, if at all. Various arguments can be advanced to support this type of retroactivity,<sup>25</sup> but there are no statutes or judicial precedents squarely on the question.

The 1959 amendments made no other changes in the rather complex statutory system of powers created by the Revised Statutes of 1830.

#### 6. *The 1959 Legislation—Accumulations*

The 1936 and 1938 recommendations of the Law Revision Commission said nothing about accumulations. Prior to 1959, the New York statutes on accumulations, dating from 1830, but amended several times thereafter, were very strict. All provisions directing accumulation were invalid, except in the case of

(a) an accumulation for the benefit of one or more minors, to terminate at or before the expiration of their minority, provided (i) such minors were then in being or (ii) if the accumulation was directed to

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<sup>23</sup> The argument would be that the taker in default, or intestate distributees, had a vested right, under the doctrine of relation back, in the permissible period effective where the power was created.

<sup>24</sup> See, e.g., Vt. Rev. Stat. Ann. tit. 27 § 502 (1959); Powell, "Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal," 58 Colum. L. Rev. 1196, 1204 (1958). But cf. Report No. 290, N.Y. County Lawyers Ass'n, Committee on Surrogates' Court, on S. Intr. No. 2668, Print No. 2793 (Mar. 24, 1960).

<sup>25</sup> For example: The amendment serves to validate rather than invalidate gifts and to carry out, rather than frustrate, the intent of the person exercising the power. Or, that the amendment only clarified the intention of the Legislature in enacting the 1958 amendments. The 1945 amendments (N.Y. Sess. Laws 1945, ch. 558, §§ 1, 2) to § 61-a of the N.Y. Real Property Law and § 16-a of the N.Y. Personal Property Law (since repealed) were intended to apply to existing instruments. (See Report of N.Y. Law Rev. Comm'n, Leg. Doc. No. 65(I) (1945)). The California statute abolishing the doctrine of worthier title, enacted on the recommendation of the California Law Revision Commission, is expressly made applicable to existing instruments. (Cal. Civ. Code, § 1073 (Deering Supp. 1959)). See Cal. Law Rev. Comm'n, Recommendations and Study Relating to the Doctrine of Worthier Title, D-6 (Jan. 1959).

begin in the future, it was so limited as to begin and end within the time allowed for the vesting of future estates;

(b) certain accumulations for charitable or educational purposes, with various limitations and restrictions as to type, amount, and duration; and

(c) accumulations arising under pension, disability or death benefit, or profit-sharing plans, subject to certain limitations and restrictions.

(d) certain funded insurance trusts.<sup>26</sup>

(e) certain other statutory exemptions, which will be mentioned below.

Chapters 453 and 454 of the Laws of 1959 amended the relevant statutes in the following respects:

(a) Personal Property Law, section 16, was amended to delete everything up to the first proviso and to insert the following:

All directions for the accumulation of the income of personal property except such as are allowed by statute shall be void. A direction for the accumulation of the income of personal property contained in any instrument sufficient to pass such property is valid, if such accumulation be directed to commence within the time allowed for the suspension of the absolute ownership of such property and to terminate at or before the expiration of such time. If a direction for any such accumulation be for a period extending beyond the expiration of such time, it shall have the same effect as if such accumulation were directed to terminate upon such expiration.

(b) Real Property Law, section 61, was amended in the same manner, with the substitution of the words "rents and profits" for "income," "real property" for "personal property," and "vesting of future estates"<sup>27</sup> for "absolute ownership of such property."

(c) Personal Property Law, section 16-a, and Real Property Law, section 61-a, providing for the disposition of accumulations on the death of a minor during his minority, were repealed.

(d) Personal Property Law, section 17(1), providing for anticipation of a directed accumulation where deemed necessary for support or education, was amended to substitute the word "person" for "minor" wherever the latter appeared, and to add the words "or committee" after the word "guardian."

(e) Real Property Law, section 62, which parallels section 17(1) of the Personal Property Law, was amended in the same manner with some additional changes of language.

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<sup>26</sup> N.Y. Real Prop. Law § 61; N.Y. Pers. Prop. Law § 16.

<sup>27</sup> This language is inept, because elsewhere the New York statutes talk in terms of "suspension of the power of alienation" rather than "vesting of future estates." See Sparks, "Future Interests," 1959 Annual Survey of New York Law, 34 N.Y.U.L. Rev. 1499, 1505 (1959). However, the same language was used in N.Y. Real Prop. Law § 61, prior to its amendment.

These amendments took effect September 1, 1959, applying to all inter vivos transfers effective on or after that date and to estates or wills of persons dying on or after that date. Inter vivos transfers effective prior to September 1, 1959, and estates and wills of persons dying prior to that date, continued to be governed by the old law.

The amendments made no other changes in the New York statutes relating to accumulations, which continue to include the following:

(a) Complex provisos in Real Property Law, section 61, and Personal Property Law, section 16, permitting accumulations for various educational and charitable purposes, subject to certain limitations and restrictions.

(b) Provisos in Real Property Law, section 61, and Personal Property Law, section 16, permitting accumulations under employee stock bonus plans, pension plans, disability or death benefit plans, or profit-sharing plans.

(c) A proviso in Personal Property Law, section 16, permitting funded insurance trusts.

(d) Provisions in Personal Property Law, section 13-d, exempting from the laws against accumulation a trust created under a retirement plan for which provision has been made under the laws of the United States exempting such trust from federal income tax, and permitting accumulation of income from such trust until the period set for distribution.

(e) Provisions in the Decedent Estate Law, section 47-e (5) and (6), authorizing accumulation of income in the case of a testamentary gift to an unincorporated association to preserve the property pending incorporation.

(f) Provisions in the Insurance Law, section 200 (9), authorizing accumulation of income in the case of a trust created under a "retirement system" authorized by said section 200 until, in the opinion of the trustees, a sufficient sum exists to accomplish the purposes of the trust.

(g) A rule, set forth in Real Property Law, section 63, that where there is a valid suspension of the power of alienation or of ownership, during which rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits belong to the persons presumptively entitled to the next eventual estate, with a proviso that where any person shall legally begin to receive any such undisposed rents or profits, under said section 63 or otherwise, he shall continue to receive the same notwithstanding the birth thereafter of a child or children to any person or persons receiving all or any part of such rents

and profits. (The rule laid down in this section is equally applicable to future interests in personal property.<sup>28</sup>)

(h) A provision in Personal Property Law, section 17-a, to the effect that, unless otherwise directed, stock dividends arising under a trust shall be treated as principal rather than income, and that addition of such stock dividends to principal shall not be deemed an accumulation of income.

(i) A provision in Personal Property Law, section 17-b, for the distribution of income from real or personal property earned during the period of administration of the estate of a testator.

(j) Provisions in Personal Property Law, section 17-c, setting forth rules for apportionment of principal and income arising from mortgage investments under trusts and arising from mortgage salvage operations.

(k) Provisions in Personal Property Law, section 17-d, for the apportionment as between principal and income under trusts consisting of bonds or other obligations bought with a premium or discount or maturing with loss or gain.

(1) Provisions in Personal Property Law, section 17-e, for determining the date of accrual of dividends on stock held in an estate, trust, or other fund, for purposes of apportionment as between principal and income.

### 7. *The 1959 Legislation—Legal Life Estates; Remainders in or on Terms of Years*

Chapter 452 of the Laws of New York, 1959, amended sections 43, 45, and 46 of the Real Property Law in the following respects:

(a) Section 43 of the Real Property Law, which formerly restricted the number of successive life estates to two, voided any additional life estates, and accelerated any remainders limited thereon,<sup>29</sup> was amended to delete all these restrictions. All that remained was a rule that successive life estates could be limited only to persons in being at the creation thereof.

(b) Section 45 of the Real Property Law, which formerly provided that where a remainder was created on an estate *pur autre vie* for more than two lives, the remainder should take effect on the death of the two persons first named, was amended so as to prohibit a remainder which followed an estate *pur autre vie* measured by an unreasonably large number of lives (using the same "evidentiary test" now found in section 42 of the Real Property Law), with the proviso that if any such pro-

<sup>28</sup> Matter of Harteau, 204 N.Y. 292, 97 N.E. 726 (1912).

<sup>29</sup> The acceleration provision has been construed as applying only to vested remainders. Purdy v. Hayt, 92 N.Y. 446 (1883).

hibited remainder was created, it would take effect immediately, as if no life estates had been created.

(c) Section 46 of the Real Property Law, which formerly restricted contingent remainders on terms of years to those which must vest not later than the termination of two lives in being, was amended to delete the limitation to two lives, and to substitute a reference to "lives in being," subject to the same "evidentiary test" already provided in section 42 of the Real Property Law.

(d) All three amendments took effect on September 1, 1959, and applied to inter vivos instruments executed on or after that date and to wills of persons dying after that date (including instruments exercising powers of appointment granted or reserved prior to that date).

The amendments did not affect section 44 of the Real Property Law, which restricted a remainder following an estate *pur autre vie* to a remainder in fee, and a remainder following a life estate in a term of years to a remainder for the whole residue of such term. Nor did they affect section 47 of the Real Property Law, which restricted the limitation of a remainder for life following a term of years to a remainder in a person in being at the creation of such interest.

The literature on the 1958 and 1959 amendments is already extensive,<sup>30</sup> and it is unnecessary to review it here.

## II. SCOPE OF CHANGES RECOMMENDED IN 1960

Given this situation, the question presented itself what further changes, if any, should be recommended by the New York Law Revision Commission. There appeared to be three alternatives:

(1) Substantial adoption of the 1938 recommendations of the commission, with only such changes as were necessary to reflect the amendments made in 1958 and 1959. Ideally, this was the most desirable course. The commission's prior recommendations were a comprehensive, well thought out, and integrated set of amendments, which would bring the New York statutes in line with the common law and the law of the majority of the states. It was believed, however, that this alternative was impracticable. It did not seem likely that the legislature, after making the

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<sup>30</sup> See, e.g., Dorris, "Perpetuities Legislation in New York: A Partial Return to the Fold," 22 Queens B. Bull. 70 (1958); Hesson, "The New Rule Against Perpetuities," 22 Albany L. Rev. 263 (1958); Klorfein, "Public Policy and the Rule Against Perpetuities," 5 N.Y.L.F. 169 (1959); Niles, "Two Lives Down—And Goal to Go," 98 Trusts & Estates 104 (1959); Powell, "Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal," 58 Colum. L. Rev. 1196 (1958); Sparks, "Future Interests," 1958 Annual Survey of New York Law, 33 N.Y.U.L. Rev. 1193, 1201-02 (1958) and in 1959 Annual Survey of New York Law, 34 N.Y.U.L. Rev. 1499-1505 (1959); Notes, 22 Albany L. Rev. 413 (1958); 24 Brooklyn L. Rev. 344 (1958); 43 Cornell L.Q. 703 (1958); 57 Mich. L. Rev. 303 (1958); 34 Notre Dame Law. 123 (1958).

first really basic changes in the New York law of perpetuities in 128 years, would be willing to repeal its amendments within less than two years in favor of an ideal plan of reform, however carefully worked out. This seemed especially true when it was realized that the strongest argument in favor of reform, the unsatisfactory working of the two-lives rule, had been removed.

Furthermore, as a matter of substance, it seemed doubtful that the 1938 plan of reform would commend itself to the legislature at this time, or win the support of bench and bar. Essentially, it involved going back to the common law, not only as to the permissible period (already substantially accomplished), but also as to applicability of the rule against perpetuities itself. Under the 1938 proposals, the rule against perpetuities would apply only to remote future interests which suspend or fetter alienation (contingent remainders and executory interests), but not to present interests, that is to say, trusts would cease to be spendthrift trusts as a matter of law, and the interest of the beneficiary would be freely alienable. It would still be possible to create spendthrift and indestructible trusts by special provision in the instrument of creation, but their duration—as to the spendthrift and indestructible features—would be strictly limited to the lives of the beneficiaries. However desirable such a reform might be, it seemed doubtful that it would gain wide support in New York at this time.<sup>31</sup>

(2) The second alternative was to go beyond the common law approach and adopt one or more of the recent, radical reforms such as "wait-and-see," "cy pres," or "discarding the vest."

(a) "Wait-and-See." The basic idea here is a repudiation of the common-law rule, followed in New York, that a future interest is void if by any possibility it may vest, if at all, beyond the permissible period, without regard to the inherent probability of the invalidating event and without regard to the actual course of events. Under an absolute wait-and-see rule the interest is valid if in fact it vests within the permissible period and is void only if the permissible period expires without the interest vesting. Under a modified wait-and-see approach, although the same basic principle is applied, the waiting period consists of the lives of persons in being during or at the end of which the interest is to take effect, rather than the full permissible period in the abstract. The former is now law in Pennsylvania, Vermont, and (applicable to trusts only) Washington;<sup>32</sup> the latter in Kentucky, Massachusetts, Connecticut,

<sup>31</sup> For a persuasive argument in favor of such a change, see Sparks, "Policy Considerations: Alienability of the Beneficial Interest in a Trust in New York," 9 Buffalo L. Rev. 26 (1959).

<sup>32</sup> Pa. Stat. Ann. tit. 20, §§ 301.4, 301.5 (Purdon, 1950); Wash. Rev. Code §§ 11.98.010-11.98.900 (Supp. 1959); Vt. Rev. Stat. Ann. tit. 27, §§ 501-503 (1959).

and Maine.<sup>33</sup> A modified version of "wait-and-see" has been recommended by the English Law Reform Committee.<sup>34</sup>

Although "wait-and-see" is enthusiastically supported by Professor Leach and others,<sup>35</sup> its soundness has been questioned by Professor Simes, Professor Sparks, and other writers.<sup>36</sup> The most recent criticism, based on the Pennsylvania statute, has been voiced by Professor Mechem.<sup>37</sup>

The literature on this subject is already extensive, but actual experience has been minimal. It did not seem wise to recommend that New York adopt such a radical change, still in the experimental stage, while that state is only beginning to recover from some of the unfortunate and unforeseen consequences of the legislative experiment of the last century.

(b) "Cy pres." Professor Simes and others have recommended that some of the harsh results of strict application of the common-law Rule Against Perpetuities could be ameliorated by giving the courts power to modify limitations in wills or other instruments so as to eliminate any invalid features while carrying out as near as may be the intentions of the testator or settlor.<sup>38</sup> Legislation to this effect has been recently enacted in Vermont, Idaho, and Kentucky.<sup>39</sup> More limited, but to the same end, are the provisions of the English Law of Property Act of 1925

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<sup>33</sup> Conn. Gen. Stat. §§ 45-95 to 45-100 (1958); Ky. S. Bill 180, Reg. Sess. 1960; Mass. Ann. Laws c. 184A, §§ 1-6 (1955); Me. Rev. Stat. Ann. c. 160, §§ 27-33 (Supp. 1959).

<sup>34</sup> Law Reform Comm., Fourth Report (The Rule Against Perpetuities), Cmd. No. 18 (1956).

<sup>35</sup> Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 Harv. L. Rev. 721 (1952); Leach, "Perpetuities Legislation, Massachusetts Style," 67 Harv. L. Rev. 1349 (1954); Leach, "Perpetuities: New Absurdity, Judicial and Statutory Correctives," 73 Harv. L. Rev. 1318 (1960); Tudor, "Absolute Certainty of Vesting Under the Rule Against Perpetuities—A Self-Discredited Relic," 34 B.U.L. Rev. 129 (1954); Tudor, "The Impact of Recent Statutory Adoption of the 'Wait and See' Principle on the Common Law Rule Against Perpetuities," 38 B.U.L. Rev. 540 (1958); Brégy, "A Defense of Pennsylvania's Statute on Perpetuities," 23 Temp. L.Q. 313 (1950).

<sup>36</sup> Simes, Public Policy and the Dead Hand 65-66, 71-82 (1955). Simes, "Reform of Rule Against Perpetuities: Qualified Endorsement," 92 Trusts & Estates 770 (1953); Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 Mich. L. Rev. 179 (1953); Simes, "The Policy Against Perpetuities," 103 U. Pa. L. Rev. 707, 732-33 (1955); Sparks, "A Decade of Transition in Future Interests, II," 45 Va. L. Rev. 493, 495-500 (1959); Sparks, Book Review, 32 N.Y.U.L. Rev. 636 (1957); Fratcher, Book Review, 55 Mich. L. Rev. 149, 152-53 (1956).

The recent Montana amendments expressly adopt the common-law certainty of vesting rule. Mont. Rev. Codes Ann. § 67-406(b) (Supp. 1959).

<sup>37</sup> Mechem, "Further Thoughts on the Pennsylvania Perpetuities Legislation," 107 U. Pa. L. Rev. 965 (1959).

<sup>38</sup> Simes, Public Policy and the Dead Hand 74-79 (1955); Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 Mich. L. Rev. 179, 193 (1953); Quarles, "The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation," 21 N.Y.U.L.Q. Rev. 384 (1946).

<sup>39</sup> Idaho Code Ann. § 55-111 (1957); Ky. S. Bill 180, Reg. Sess. 1960; Vt. Stat. Ann. tit. 27, § 501 (1959).

and of the Massachusetts, Connecticut, and Maine legislation, that in certain cases age limitations beyond twenty-one years are to be reduced to twenty-one when this is necessary to save a gift.<sup>40</sup> (New Hampshire has reached the same result by judicial decision.<sup>41</sup>)

There is much to be said for this approach. For two reasons, however, it was believed that it would be premature to advocate it for New York at this time, except in the limited form of reducing age contingencies to twenty-one years:

(i) It seemed too soon after the recent reforms to advocate another, vague and uncertain in scope, and as yet relatively untried in those jurisdictions which have adopted it.

(ii) The New York courts have been quite liberal as it is in excising and, on occasion, modifying by constructional devices provisions in wills and other instruments in order to avoid invalidity, while carrying out as closely as possible the testator's or settlor's supposed intention.<sup>42</sup> While this is not exactly *cy pres*, as envisaged by Professor Simes and others, it comes close to it. It is true that the New York courts adopted this approach largely to avoid the strictness of the two-lives rule, and they may not be willing to follow it under the relaxed rule now in effect. On the other hand, it was not necessarily limited to provisions void solely because of the two-lives rule and has sometimes been invoked to save limitations which would have been equally invalid under a multiple lives rule.<sup>43</sup> There is no reason to suppose that this approach will be abandoned under the amended rule, to the extent it may be applicable.

(c) "Discarding the Vest." Whereas the other two proposals are in the direction of relaxing the common-law rule against perpetuities, this one would make it stricter by applying the rule to all non-possessory future interests (except perhaps reversions, powers of termination, and possibilities of reverter). In other words, the requirement would not be one of *vesting* (if at all) within the permissible period, but of *taking effect in possession* (if at all) within that period.

This recommendation goes as far back as Gray.<sup>44</sup> It is supported by Professor Simes,<sup>45</sup> and has most recently been propounded at length by

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<sup>40</sup> Conn. Gen. Stat. § 45-96 (1958); Mass. Ann. Laws c. 184A, § 2 (1955); Me. Rev. Stat. § 28 (Supp. 1959); Law of Property Act, 1925, 15 & 16 Geo. 5, § 163, 20 Halsbury, Stats. of England 770 (2d ed. 1950).

<sup>41</sup> *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891).

<sup>42</sup> See Powell & Whiteside, *op. cit. supra* note 2, at 98-103, Report, Recommendations and Studies of N.Y. Law Rev. Comm'n at (570)-(575).

<sup>43</sup> *Schettler v. Smith*, 41 N.Y. 328 (1869). Cf. *Estate of Heard*, 25 Cal. 2d 322, 153 P.2d 553 (1944).

<sup>44</sup> Gray, *The Rule Against Perpetuities*, app. M., 819-22 (4th ed. 1942).

<sup>45</sup> Simes, *Public Policy and the Dead Hand* 80-82 (1955); Simes, "The Policy Against Perpetuities," 103 U. Pa. L. Rev. 707, 737-38 (1955).

Mr. Daniel M. Schuyler of the Illinois Bar.<sup>46</sup> It has the great advantage of simplifying the law, making it more realistic (non-possessory future interests act as a practical restraint on alienation even when vested, although perhaps not to the same extent as when contingent), and of removing one of the principle remaining distinctions in practical effect between vested and contingent remainders. Nevertheless, it was not recommended for New York at this time for the following reasons:

(i) It seemed too soon after the 1958 and 1959 amendments to introduce such a radical change in the whole theory of the Rule Against Perpetuities.

(ii) It would not have much practical effect in New York, so long as the chief impact of the statutory rule against suspension of the power of alienation is on the duration of trusts, rather than on contingent future interests. The vast majority of "perpetuities" cases in New York involve the duration of trusts rather than the problem of contingent future interests. It is unusual to find cases involving the latter which do not also involve the former. True, there have been cases in New York of future interests held valid because they would necessarily become vested, if at all, within the permissible period, which might have been invalid if the rule required a taking effect in possession,<sup>47</sup> but, overall, such cases have not been numerous.

(3) The third alternative was the adoption of minor amendments designed to improve the law within the general framework of the 1830 Revised Statutes, as amended in 1958 and 1959, completing the reforms initiated by the latter. This alternative was the one recommended by the commission. The specific changes recommended and enacted will now be taken up.

### III. ADDITION OF A PERIOD IN GROSS

The 1936 and 1938 recommendations of the Law Revision Commission included a recommendation that the permissible period for suspension of the power of alienation (or of absolute ownership) be, alternatively, (i) lives in being plus actual minorities at the end of such lives and one or more actual periods of gestation, or (ii) twenty-one years. The present "restricted minority" provision would have been deleted.

In 1959 the legislature passed a bill<sup>48</sup> which would have amended section 42 of the Real Property Law, as previously amended, to delete the restricted minority provision, and to authorize a gross "term of not

<sup>46</sup> Schuyler, "Should the Rule Against Perpetuities Discard Its Vest?," 56 Mich. L. Rev. 683, 887 (1958).

<sup>47</sup> See, e.g., *Matter of Brewster*, 246 App. Div. 192, 283 N.Y. Supp. 707 (4th Dep't 1935), *aff'd*, 271 N.Y. 599, 3 N.E.2d 204 (1936).

<sup>48</sup> S. Intr. No. 623, Print No. 4022 (1959).

more than twenty-one years" in addition to the period of lives in being. This amendment was to take effect on September 1, 1959. A companion bill, to make corresponding amendments to section 11 of the Personal Property Law,<sup>49</sup> failed of passage during the closing sessions of the legislature. For this reason the Governor vetoed the bill which had passed, stating that, while the change which it sought to accomplish was desirable, considerable confusion in the administration of trusts and estates would be created if the real property law were to be amended without a corresponding change in the personal property law.<sup>50</sup>

There is little question of the desirability of (i) eliminating the complex provisions of the restricted minority rule now in effect in New York, and (ii) allowing an additional or alternative period of twenty-one years. The 1936 and 1938 recommendations of the commission would have allowed an additional period measured by actual minorities, or an alternative period of twenty-one years in gross. It may be that the commission thought that to go further than this would be too drastic a change in the New York law. The commission did say that its proposal "would remove many of the present difficulties and still put a reasonable limitation upon suspension of alienation and upon the fettering of alienation."<sup>51</sup>

Three states formerly provided for a period in gross as an *alternative* to a period measured by lives in being, namely California, North Dakota, and Oklahoma,<sup>52</sup> but all three have since substituted an *additional* period of twenty-one years in gross. California has adopted the Model Rule Against Perpetuities Act, based on the common law,<sup>53</sup> and in 1959 repealed its surviving statutes on suspension of the power of alienation.<sup>54</sup> North Dakota has had the common law period since 1953.<sup>55</sup> In 1941 Oklahoma repealed its alternative period in gross, which was applicable only to the duration of trusts,<sup>56</sup> but the resulting situation is still confused.<sup>57</sup>

The Mississippi situation is *sui generis*. There is a peculiar statute, which permits a gift to a "succession of donees then living" (formerly limited to two donees).<sup>58</sup> Its exact effect is obscure and there is considerable confusion in the cases whether it supplements or is exclusive

<sup>49</sup> S. Intr. No. 624 (1959).

<sup>50</sup> Memorandum filed with S. Intr. No. 623, Print No. 4022 (April 16, 1959).

<sup>51</sup> N.Y. Leg. Doc. No. 65(H) 7 (1936), reprinted in Report, Recommendations and Studies of the N.Y. Law Rev. Comm'n (479) (1936).

<sup>52</sup> Powell & Whiteside, *op. cit. supra* note 2, at 130-31, Report, Recommendations and Studies of N.Y. Law Rev. Comm'n at (603).

<sup>53</sup> Cal. Civ. Code § 715.2 (Deering, Supp. 1959).

<sup>54</sup> Cal. Stats. 1959, ch. 470.

<sup>55</sup> N.D. Laws 1953, ch. 274, amending N.D. Rev. Code § 47-0227 (1943).

<sup>56</sup> Okla. Laws 1941, § 47, at 264; Okla. Stat. Ann. tit. 60, § 176.47 (1949).

<sup>57</sup> See Browder, "Perpetuities in Oklahoma," 6 Okla. L. Rev. 1 (1953).

<sup>58</sup> Miss. Code Ann. § 838 (1956).

of the common-law rule, so that it cannot be said with certainty whether Mississippi recognizes a period in gross or not.<sup>59</sup>

Louisiana, a civil law jurisdiction, is also *sui generis*, but now allows trusts limited to ten years or the life of the beneficiary, whichever is longer.<sup>60</sup>

Only two states still do not recognize any period in gross, either in addition to lives in being or as an alternative period. They are Minnesota (two-life statutory rule, but applicable only to duration of certain trusts in land; common-law rule applicable to personalty; apparently no restriction on creation of remote future interests in land)<sup>61</sup> and South Dakota.<sup>62</sup> Montana added a period in gross only last year.<sup>63</sup>

The vast majority of jurisdictions, either by statute or judicial decision, recognize the common law period of lives in being, plus one or more periods of gestation, plus a period in gross of twenty-one years. Two have extended the period in gross beyond twenty-one years. They are Idaho (twenty-five years)<sup>64</sup> and Wisconsin (thirty years).<sup>65</sup>

The English Law Reform Committee has recommended an alternative period in gross of eighty years.<sup>66</sup> But this is for the purpose of discouraging the use of the "royal lives" clause (*e.g.*, all living descendants of King George VI).<sup>67</sup> The royal lives clause, or its equivalent, is not used in this country. It seems to be used in England, not so much to designate a period *at the end of which* certain future interests are to take effect, as to provide an outside limit of time *within which* various interests may shift, under a mode of property settlement quite unlike our own. There seems to be no real need, under American practice, for any such extended period in gross.

There seems to be general agreement that a period in gross would be desirable in New York.<sup>68</sup> The following cases, cited with many others

<sup>59</sup> See *Carter v. Sunray Mid-Continent Oil Co.*, 231 Miss. 8, 94 So. 2d 624 (1957); *Custy & Brand*, "Future Interests—The Mississippi Two Donee Statute and the Common Law Rule Against Perpetuities," 30 Miss. L.J. 221 (1959); Note, 28 Miss. L.J. 88 (1956).

<sup>60</sup> La. Const. art. IV, § 16 (1954); La. Rev. Stat. §§ 9.1794 (1950); 5 Powell, Real Property ¶ 817 (1956).

<sup>61</sup> Minn. Stat. Ann. §§ 501.11, 501.13, 501.195, 501.20, 502.73 (1947 & Supp. 1959); 5 Powell, Real Property ¶ 819 (1956).

<sup>62</sup> S.D. Code §§ 51.0231, 51.0232, 51.0411, 51.0418, 59.0315, 59.0316, 59.034 (1939); 5 Powell, Real Property ¶ 825 (1956); Phipps, "Perpetuities in South Dakota," 1 S.D.L. Rev. 1 (1956).

<sup>63</sup> Mont. Rev. Codes Ann. § 67-406 (Supp. 1959).

<sup>64</sup> Idaho Code Ann. § 55-111 (1957).

<sup>65</sup> Wis. Stat. § 230.15 (1959).

<sup>66</sup> Law Reform Comm., Fourth Report (The Rule Against Perpetuities), Cmd. No. 18 at 7 & 30 (1956).

<sup>67</sup> See *In re Villar* [1929] 1 Ch. 243; *Re Leverhulme* [1943] 2 All E.R. 274.

<sup>68</sup> See Powell, "Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal," 58 Colum. L. Rev. 1196, 1205 (1958); 5 Powell, Real Property ¶ 807A (1959 Supp.); Simes, Public Policy and the Dead Hand, 69-70 (1955).

by Professor Powell,<sup>69</sup> are illustrative of limitations held invalid in New York which would have been upheld if a twenty-one-year period in gross had been permitted: *Beekman v. Bonsor* (fifteen years);<sup>70</sup> *Garvey v. McDevitt* (four years);<sup>71</sup> *Henderson v. Henderson* (five years);<sup>72</sup> *Smith v. Chesebrough* (two years);<sup>73</sup> *Matter of Hitchcock* (five years);<sup>74</sup> *Matter of Roe* (two years).<sup>75</sup>

It is true that the result in many of these cases could have been avoided by more careful draftsmanship. The fact remains that most testators, and unfortunately some lawyers, were unfamiliar with the intricacies of the New York law on this subject, with the consequence that perfectly innocent testamentary dispositions, which would be valid almost everywhere else, have been frustrated in New York.<sup>76</sup> This was especially the case where the will was originally drawn in another state but the testator died domiciled in New York. Professor Powell cites several such cases.<sup>77</sup> It seemed unreasonable that New York should be out of line with almost every other jurisdiction in this regard.

Two questions however remained: (a) Should the period in gross be in addition to multiple lives, or alternative thereto? (b) Should it be twenty-one years or a longer period?

On the first question, it was decided to recommend a period in addition to, rather than alternative to, multiple lives, for the following reasons:

(a) If an alternative period in gross were authorized, it would still be desirable to delete the provision for a restricted minority and substitute a period measured by an actual minority or minorities, in addition to multiple lives. This seemed unnecessarily complicated.

(b) At the time of the 1936 and 1938 recommendations of the commission, proposing an alternative period, there were three jurisdictions, California, North Dakota, and Oklahoma, which so provided. All three have since changed this feature of their law to substitute an *additional* period in gross.

(c) The 1959 actions of the legislature and the Governor indicated

<sup>69</sup> 5 Powell, *Real Property* ¶ 800 (1956); See also Whiteside, "Suspension of the Power of Alienation in New York," 13 *Cornell L.Q.* 31, 67 (1927).

<sup>70</sup> 23 N.Y. 298 (1861).

<sup>71</sup> 72 N.Y. 556 (1878).

<sup>72</sup> 113 N.Y. 1, 20 N.E. 814 (1889).

<sup>73</sup> 176 N.Y. 317, 68 N.E. 625 (1903).

<sup>74</sup> 222 N.Y. 57, 118 N.E. 220 (1917).

<sup>75</sup> 281 N.Y. 541, 24 N.E.2d 322 (1939), 49 *Yale L.J.* 1112 (1940).

<sup>76</sup> See 5 Powell, *Real Property* ¶ 800 (1956).

<sup>77</sup> *Guaranty Trust Co. v. Goetting*, 185 N.Y. Supp. 663 (Sup. Ct. N.Y. County 1921); *Woolley v. Hutchins*, 114 Misc. 11, 186 N.Y. Supp. 769 (Sup. Ct. Erie County 1920), *aff'd* 198 App. Div. 964, 189 N.Y. Supp. 959 (4th Dep't 1921); *Matter of Green*, 167 N.Y. Supp. 1084 (Surr. Ct. N.Y. County 1917).

that favorable action could probably be had on a recommendation for an additional period in gross.

Of course, authorization of an *additional* period of twenty-one years in gross, does not preclude the use of a flat period not in excess of twenty-one years, without any reference to lives in being. This is the common-law rule, universally recognized.<sup>78</sup>

On the second question, it was decided to recommend a period of twenty-one years, rather than a longer period, for the following reasons:

(a) In general, it was believed undesirable to recommend changes in the New York law which went beyond the common law.

(b) Any extension of the permissible period would affect not only the possible duration of trusts and the time for vesting of future interests, but also the period during which income may be lawfully accumulated, under the 1959 amendments to the Real Property Law, section 61, and to the Personal Property Law, section 16. It was not believed that accumulations (except perhaps for charitable and similar purposes) should be authorized beyond the common-law perpetuities period.

(c) Only two other states, Idaho and Wisconsin, now authorize a period in gross longer than twenty-one years.

(d) The justification commonly given for a period longer than twenty-one years is that under modern conditions young people are not always prepared to assume full control of large amounts of property on attaining their legal majority and for that reason many testators desire to tie property up until the ultimate beneficiaries are twenty-five or even thirty. Although this is a plausible consideration, it has been pointed out that it would actually apply only to a small fraction of cases, namely those involving grandchildren taking interests at some time after the end of all designated lives in being. Even here, a testator could in most cases accomplish his purpose by providing for a continuance of the trust and distribution to the grandchildren at, say, age thirty *or* twenty-one years after the death of the last beneficiary living at the date of his death, whichever alternative should happen first.<sup>79</sup>

Accordingly, the commission recommended that section 42 of the Real Property Law and section 11 of the Personal Property Law be amended to delete the restricted minority provisions and to substitute "a term of not more than twenty-one years," in addition to lives in being at the creation of the estate or interest. It was also recommended that

<sup>78</sup> 6 American Law of Property § 24.14 (Casner ed. 1952); 3 Simes & Smith, Law of Future Interests § 1225 (2d ed. 1956); Leach, "Perpetuities in a Nutshell," 51 Harv. L. Rev. 638, 641 (Example A-1) (1938).

<sup>79</sup> Schuyler, "Should the Rule Against Perpetuities Discard Its Vest?" 56 Mich. L. Rev. 683, 710-11 (1958).

sections 178 and 179 of the Real Property Law, relating to the validity of interests created by the exercise of powers of appointment, be amended to include appropriate reference to the new period.<sup>80</sup>

These recommendations were adopted and enacted into law by chapter 448 of the Laws of 1960. The act took effect on April 12, 1960. It applies to all estates and interests created by instruments taking effect on or after that date, including instruments in execution of a power reserved or created before that date. Estates and interests created by instruments taking effect prior to April 12, 1960, continue to be governed by the old law. The commission saw no reason to recommend a postponed effective date,<sup>81</sup> but on the other hand did not think it wise to recommend a retroactive date.<sup>82</sup>

#### IV. CONSTRUCTION OF LIMITATIONS WHICH ARE PRIMA FACIE INVALID

Much of the recent criticism of the common-law Rule Against Perpetuities has been directed at the harsh workings of the certainty of vesting rule, coupled with the raising of certain artificial presumptions and the citing of extremely remote possibilities, *e.g.*, the presumption that any person of any age or physical condition is capable of having issue, the possibility that a man's "widow" may turn out to be a person not in being when the gift took effect, the possibility that a will may not be probated within twenty-one years, and so on. In a number of classical cases, perfectly reasonable dispositions have been held invalid because of remote possibilities of this sort. New York does not seem to have been particularly troubled by such cases, probably because they were overshadowed by the harsh working of the two-lives rule. But the rules applied in these cases were presumably law in New York and it was possible that they might assume increased importance under the new multiple lives rule.

The existence of this body of cases has been the principal argument in support of "wait-and-see" legislation.<sup>83</sup> But it has been pointed out that less drastic surgery would cure most of the alleged ills. Adoption of a series of presumptions against such remote possibilities would remove many of the difficulties without any basic change in the philosophy of the common-law rule.<sup>84</sup>

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<sup>80</sup> N.Y. Leg. Doc. No. 65(G) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, pp. A-114-15 (Mar. 25, 1960).

<sup>81</sup> 1960 McKinney's Sess. Law News of N.Y., No. 4, at A-118.

<sup>82</sup> *Ibid.*

<sup>83</sup> See, *e.g.*, ABA Section on Real Property, Probate and Trust Law, Legislators' Handbook on Perpetuities, 5-7, 24-29 (1958).

<sup>84</sup> *Id.* at 8, 34, 36.

### 1. *Conclusive Presumption of Fertility*

Absurd results have been reached (or barely avoided) in a few cases by applying an absolute presumption of fertility to persons of very advanced age,<sup>85</sup> or to very young children.<sup>86</sup> Such results have sometimes been avoided by construing the will to exclude such possibilities as a matter of the testator's intention,<sup>87</sup> or by ruling that offspring of very young children would be illegitimate as a matter of law and therefore not qualified to take.<sup>88</sup> Other suggested remedies are adoption of a statute or judge-made rule (i) raising a presumption that persons under or over certain ages are incapable of procreation, or (ii) permitting introduction of medical testimony on the possibility of procreation, or (iii) combining both these provisions.

There are some caveats here which should be considered. One is the obvious fact that persons who are unable to have children of their own can still adopt children. It is true that under the present law of New York adopted children do not have all the rights of inheritance through their adoptive parents that natural children have, and are not included in the phrase "lawful issue" unless such was the intention of the testator.<sup>89</sup> But it has been held that an adopted child who was known to the testator is included in the term "lawful issue" in the absence of a contrary intention.<sup>90</sup> (Of course this would not present a perpetuities problem, since such an adopted child would by hypothesis be "in being.") Moreover, there is always the possibility that the adoption statutes of New York might be broadened to broaden the rights of inheritance of adopted children. This has happened recently in Massachusetts, New Jersey, and Pennsylvania.<sup>91</sup>

Secondly, with advances in medical science, while more is known about problems of fertility, it is becoming less certain than ever that in any given case the possibility of procreation is absolutely excluded. In this connection, there seems to have been no discussion in the literature of the possible impact of artificial insemination on the rule against per-

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<sup>85</sup> *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

<sup>86</sup> *Re Gaité's Will Trusts* [1949] 1 All E.R. 459.

<sup>87</sup> *In re Wright's Estate*, 284 Pa. 334, 131 Atl. 188 (1925).

<sup>88</sup> *Re Gaité's Will Trusts*, *supra* note 86.

<sup>89</sup> N.Y. Dom. Rel. Law § 115. See *Matter of Ward*, 14 Misc. 2d 903, 180 N.Y.S.2d 429 (Surr. Ct. Westchester County 1958); *Matter of Smith*, 14 Misc. 2d 205, 177 N.Y.S.2d 280 (Surr. Ct. Nassau County 1958); *Matter of Cook*, 8 Misc. 2d 103, 165 N.Y.S.2d 806 (Surr. Ct. Westchester County 1957); *Matter of Price*, 4 Misc. 2d 1023, 163 N.Y.S.2d 34 (Surr. Ct. Westchester County 1956).

<sup>90</sup> *Matter of Upjohn*, 304 N.Y. 366, 107 N.E.2d 492 (1952); *Matter of Camp*, 6 Misc. 2d 593, 161 N.Y.S.2d 252 (Surr. Ct. N.Y. County 1957).

<sup>91</sup> Mass. Ann. Laws c. 210, § 8 (Supp. 1959); N.J. Stat. Ann. 9:3-30(B) (Supp. 1959); Pa. Stat. Ann. tit. 20, § 180.14(6) (Purdon Supp. 1958). See generally Note, 31 Notre Dame Law. 451 (1956); Annot., 70 A.L.R. 621 (1931).

petuities, although its other legal ramifications have been explored at some length.<sup>92</sup>

## 2. *The "Unborn Widow"*

The problem here is that a will which is not skillfully drafted may create a trust for the "widow" of a beneficiary, without designating her by name, or make a gift contingent on the death of someone's unnamed "widow." It is possible that the named beneficiary's present wife (if any) may die and that he may remarry someone not in being when the testator died, who might then become the "widow" mentioned in the will. This could void the gift.<sup>93</sup> This result has been avoided by a process of construction, *i.e.*, it will be presumed that the testator meant the word "widow" to refer only to his son's present wife.<sup>94</sup> In at least one case the problem, though present, was overlooked by counsel and the court.<sup>95</sup> That the possibility is not altogether fanciful is demonstrated by *Matter of Vingut*,<sup>96</sup> which involved a real unborn widow, although this did not void the gift on the facts of that case.

The difficulty could be avoided, in most situations, by a statute adopting the presumption mentioned above.

## 3. *The "Administration Contingency"*

The difficulty here arises when a gift is made contingent upon an event, most commonly the probate of a will, which will probably, but by remote possibility may not, take place within the common law permissible period of lives in being and twenty-one years. Since it is usually not possible to relate such event to any particular life in being, the question is whether the event must necessarily take place within twenty-one years.

One jurisdiction, Connecticut (before its present "wait-and-see" statute), had a judge-made rule that it would be deemed that a will would be probated within a "reasonable time" (*e.g.*, less than seven years).<sup>97</sup> Illinois by statute allows a permissible period measured by admission of a will to probate.<sup>98</sup>

The problem can be ameliorated, although not completely solved, by a statute listing the administration contingencies most apt to be selected and raising a presumption that they will happen within the permissible period.

<sup>92</sup> See, *e.g.*, Weinberger, "A Partial Solution to Legitimacy Problems Arising from the Use of Artificial Insemination," 35 Ind. L.J. 143 (1960).

<sup>93</sup> *Matter of Milhau*, 151 Misc. 283, 271 N.Y. Supp. 214 (Surr. Ct. Kings County 1934).

<sup>94</sup> *Matter of Friend*, 283 N.Y. 200, 28 N.E.2d 377 (1940).

<sup>95</sup> *In re Stevenson's Trust*, 127 N.Y.S.2d 626 (Sup. Ct. N.Y. County 1954).

<sup>96</sup> 10 Misc. 2d 160, 172 N.Y.S.2d 32 (Sup. Ct. N.Y. County 1958).

<sup>97</sup> *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585 (1893).

<sup>98</sup> Ill. Ann. Stat., ch. 30, § 153a (Smith-Hurd Supp. 1959).

#### 4. Reduction of Age Contingencies

At common law it often happens that a gift is invalid because conditioned upon a child reaching some age beyond twenty-one. This may be more than twenty-one years after any life in being. This has an especially severe impact on class gifts, where the rule is that if there is any possibility that the interest of any member of the class may not vest indefeasibly within the permissible period, then the entire class gift is void.<sup>99</sup>

A solution is to apply a kind of cy pres to the will or other granting instrument and reduce any such age contingency to twenty-one where necessary to save the gift. This was done by judicial fiat in *Edgerly v. Barker*.<sup>100</sup> Statutory authorization for such action is found in the English Law of Property Act of 1925,<sup>101</sup> and in the recent Massachusetts, Connecticut, and Main legislation.<sup>102</sup>

#### 5. Recommendations of the Law Revision Commission

The commission decided to make no recommendation on the presumption of fertility. On the problems of the "unborn widow" and the administration contingency, the commission recommended legislation which would raise a presumption that the creator of the interest intended to comply with the Rule Against Perpetuities.<sup>103</sup> With respect to age contingencies, the commission recommended legislation similar to the Massachusetts, Maine, and Connecticut statutes.<sup>104</sup>

These recommendations were adopted and are reflected in chapter 452 of the Laws of 1960. Effective April 12, 1960, this statute does the following:

(a) Adds a new section, 42-b, to the Real Property Law, reading:

§ 42-b. Reduction of age contingency. Where an estate or interest would, except for this section, be invalid because made to depend either for its vesting or for its duration upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to all persons subject to the same age contingency.

(b) Adds a new section, 11-a, to the Personal Property Law, almost identical in wording.

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<sup>99</sup> *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 Ch. 1817).

<sup>100</sup> 66 N.H. 434, 31 Atl. 900 (1891).

<sup>101</sup> 15 & 16 Geo. 5, c. 20, § 163, 20 Halsbury, Stats. Eng. 770 (2d ed. 1950).

<sup>102</sup> Conn. Gen. Stat. § 45-96 (1958); Mass. Ann. Laws ch. 184A, § 2 (1955); Me. Rev. Stat. Ann. § 28 (Supp. 1959).

<sup>103</sup> N.Y. Leg. Doc. No. 65(G) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, p. A-117-18 (Mar. 25, 1960).

<sup>104</sup> 1960 McKinney's Sess. Law News of N.Y., id. at A-117.

(c) Adds a new section, 42-c, to the Real Property Law, reading:

§ 42-c. Determination of period of suspension of absolute power of alienation by instrument creating estate or interest; rules of construction.

1. In the construction of an instrument by which an estate or interest is created, the rules of construction provided in this section shall govern for the purpose of ascertaining the intention of the person by whom the estate or interest was created with respect to matters determining the period during which the absolute power of alienation is suspended by such estate or interest.

2. It shall be presumed that such person intended the estate or interest to be valid.

3. Where an estate or interest would, except for this subdivision, be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate or interest, and such person is described in the instrument as the spouse of another person, without other identification, it shall be presumed, unless a contrary intention appears, that such phrase was intended to refer to a person in being on the effective date of the instrument.

4. Where the duration or vesting of an estate or interest is conditioned upon the probate of a will, the appointment of an executor or trustee, the location of an heir, the payment of debts, the sale of assets, the settlement of an estate, or the determination of questions relating to estate or transfer tax, or the happening of any like contingency, it shall be presumed that the person who created the estate or interest intended that such contingency must occur, if at all, within twenty-one years from the effective date of the instrument.

(d) Adds a new section, 11-b, to the Personal Property Law, to the same effect but with minor changes in wording.

The following comments seem pertinent:

(a) The provision for reduction of age contingencies, although applicable only where necessary to save an otherwise invalid interest, is mandatory in those instances. While this has been criticized as involving a rewriting of the instrument and a possible frustration of the testator's intent, similar legislation has been in effect in England since 1925,<sup>105</sup> in Massachusetts since 1954,<sup>106</sup> and in Connecticut<sup>107</sup> and Maine<sup>108</sup> since 1955, apparently without widespread objection on this score. Presumably the average testator or settlor would prefer to see his wishes carried out in part rather than frustrated *in toto*.<sup>109</sup>

(b) The remainder of the statute, raising presumptions as to intent, although it follows a pattern often recommended, is new so far as actual legislative enactment (with minor exceptions) is concerned.<sup>110</sup>

<sup>105</sup> Supra note 101.

<sup>106</sup> Supra note 102.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Cf. Opinion of Chief Justice Doe in *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891).

<sup>110</sup> As noted above, Illinois has such a statute, limited to the probate of a will. Supra note 98.

(c) There is a basic presumption that the creator of the interest intended a valid gift. This replaces the traditional canon of neutrality, that the instrument is first to be construed without regard to the rule against perpetuities, and then the rule is to be applied "remorselessly."<sup>111</sup>

(d) The presumptions serve to define the terms of the gift, and are *not* presumptions as to what will or will not happen as a matter of fact. In other words, they operate to read into the gift such saving language as "provided such spouse is a life in being," or "provided such event happens within twenty-one years," language which a careful draftsman would insert in any event. If the remote contingency should happen, as where the spouse turns out to be an unborn widow after all, or the will is not in fact probated for twenty-five years, the gift *by its own implied terms* would fail to take effect,<sup>112</sup> and this would be resolved within the permissible period.

(e) The term "spouse" was intended by the draftsman to embrace such terms as "wife," "widow," "husband," "widower," or any other word of like import.<sup>113</sup>

(f) These presumptions are to be invoked *only* for the purpose of determining the governing perpetuities period; if no perpetuities problem is present, the statute is inapplicable.

(g) The presumption that the word "spouse" was intended to refer to a living person is not to be applied where a contrary intention appears.

One caveat should be noted. Because of technical difficulties in drafting, the statutory presumption concerning the intended meaning of the word "spouse" is applicable only where such spouse is a person to whom an estate or interest is given or limited. If the "spouse" is a measuring life but takes no interest, literally the statute would not apply. Such a case is not apt to arise,<sup>114</sup> but if it should the court would still be free to apply the presumption without the aid of a statute, and would have judicial precedent for doing so.<sup>115</sup>

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<sup>111</sup> Gray, Rule Against Perpetuities § 629, at 599 (4th ed. 1942).

<sup>112</sup> Unless its wording permitted the construction, say, that the gift was to take effect in any event upon the expiration of 21 years.

<sup>113</sup> N.Y. Leg. Doc. No. 65(G) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, p. A-118 (Mar. 25, 1960).

<sup>114</sup> In nearly all cases, the widow would be the beneficiary of a trust and thus would take an "interest" which might be invalid if the presumption of the statute were not applied.

<sup>115</sup> Matter of Friend, *supra* note 94.

## V. FURTHER CHANGES—POWERS OF APPOINTMENT

The New York statutory system of powers, adopted by the Revisers in 1830 and subsequently amended from time to time, is set forth in article 5 of the Real Property Law, sections 130-183. It differs in many respects from the common law system of powers. Consideration of it as whole was beyond the scope of the study undertaken by the author for the Law Revision Commission. It did seem desirable, however, to consider the relationship between powers of appointment and the statutes against suspension of the power of alienation and against accumulations.

The basic provisions are set forth in section 178 and 179 of the Real Property Law. As noted above,<sup>116</sup> these sections were amended in 1959. The amendments provided that, while the principle of relation back would continue to govern, the newer and more liberal permissible period should control whenever the power was exercised after September 1, 1958, even though the power was created prior to that date.<sup>117</sup> The amendments left a number of questions unanswered, namely:

- (1) The scope of the doctrine of relation back;
- (2) The applicability of the doctrine of the "second look";
- (3) The relationship between the doctrine of relation back and the liberalized rule on accumulations.

### 1. *Scope of Relation Back in New York*

The 1959 amendments did not change the New York rule on the scope of the doctrine of relation back, applied in determining the validity of an interest given or limited by the exercise of a power of appointment. In most common law jurisdictions the doctrine is applied to all special powers, and to general testamentary powers, but not to general powers presently exercisable. In the case of the latter the perpetuities period is measured from the date of exercise, without relation back.<sup>118</sup> The theory is that the holder of a general power presently exercisable has substantially all the rights of ownership, and the policy reasons for applying the doctrine of relation back do not apply. A minority American view, which is also followed in England and Ireland, goes further and applies the doctrine of relation back only to special powers, and not to general powers, whether testamentary or presently exercisable.<sup>119</sup>

<sup>116</sup> See text p. 684 supra.

<sup>117</sup> It must be remembered, however, that the measuring lives have to be lives which were in being at the time the power was created.

<sup>118</sup> *Mifflin's Appeal*, 121 Pa. 205, 15 Atl. 525 (1888); 6 American Law of Property § 24.34 (Casner ed. 1952); 5 Powell, Real Property ¶ 787 (1956); 3 Simes & Smith, Law of Future Interests § 1275 (2d ed. 1956).

<sup>119</sup> *Miller v. Douglass*, 192 Wis. 486, 213 N.W. 320 (1927); *Rous v. Jackson*, L.R. 29 Ch. Div. 521 (1885); 6 American Law of Property § 24.34 (Casner ed. 1952); 5 Powell, Real Property ¶ 788 (1956); 3 Simes & Smith, Law of Future Interests § 1275 (2d ed. 1956).

Neither exception, as such, was clearly applicable by the statute law of New York. Section 178 of the Real Property Law drew no distinction and, if the statute was read literally, the permissible period had to be measured from the date of creation of the power in all cases.<sup>120</sup> But the cases indicated that the doctrine of relation back was not applicable to an "absolute power of disposition" given to the owner of a particular estate for life or for years which is changed into a fee absolute under section 149 of the Real Property Law, or to a "power of disposition" which is considered a fee under sections 150-151 of the Real Property Law.<sup>121</sup> However, the cases indicate this only by way of dictum. Moreover, it has been held that section 149 of the Real Property Law has no application to a power of appointment accompanied by a trust.<sup>122</sup> It seemed desirable to clarify the New York law on this point.

Minnesota, which has a statutory system of powers based originally on the New York Revised Statutes of 1830, in 1943 amended its statute on this point to read as follows:

Right of alienation suspended, where

The period during which the absolute right of alienation may be suspended by any instrument in execution of a power is to be computed from the time of the creation of the power and not from the date of the instrument, except that in the case of a general power presently exercisable, the period is to be computed from the date of the instrument.<sup>123</sup>

Professor Powell calls this a drastic but wise revision.<sup>124</sup>

The Law Revision Committee recommended a similar amendment for New York, to become a new section, 179-a, of the Real Property Law. This was enacted by chapter 450 of the Laws of 1960, effective April 12, 1960. The new section reads as follows:

§ 179-a. Computation of term of suspension in the case of absolute powers of disposition granted or reserved.

1. Notwithstanding section one hundred seventy-eight and section one hundred seventy-nine of this chapter, the period during which the absolute power of alienation of real property or the absolute ownership of personal property may be suspended by an instrument in execution of an absolute power of disposition exercisable at any time after the creation of the power shall not be computed from the time of the creation of the power but shall be computed from the date such instrument takes effect unless subdivision two of this section is applicable.

2. Where an absolute power of disposition exercisable at any time is reserved by a grantor, the period during which the absolute power of alien-

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<sup>120</sup> See 6 American Law of Property § 25.13, at 197 (Casner ed. 1952); Walsh, *Future Estates in New York* § 27, at 161 (1931).

<sup>121</sup> *Farmers' Loan & Trust Co. v. Kip*, 192 N.Y. 266, 276-77, 85 N.E. 59, 62 (1908).

<sup>122</sup> *Farmers' Loan & Trust Co. v. Kip*, *supra* note 121; *Cutting v. Cutting*, 86 N.Y. 522 (1881); 3 Powell, *Real Property* ¶ 390, at 316 (1952).

<sup>123</sup> Minn. Stat. Ann. § 502.73 (1947).

<sup>124</sup> 5 Powell, *Real Property* ¶ 819, at 807 (1956).

ation of real property or the absolute ownership of personal property may be suspended shall be computed from the date upon which said reserved power terminates, whether by reason of the death of the grantor, release or otherwise.

It should be noted that subsection (1) of this statute refers not to a "power of appointment" but to "an absolute power of disposition." This is defined in section 153 of the Real Property Law as follows:

§ 153. When power of disposition absolute

Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

This would of course include a general beneficial power of appointment (as those terms are defined in sections 134 and 136 of the Real Property Law) which is presently exercisable. (The term "grantee" is defined in section 132 of the Real Property Law as "designating the person in whom the power is vested, whether by grant, devise, or reservation"). Presumably it would not include a power accompanied by a trust because ordinarily the beneficiary of the trust would have no power to terminate the trust and convey the entire fee.

Subsection (2) of the statute is intended to preserve the existing rule that, where a grantor has reserved an absolute power of disposition in himself, it is not necessary to apply the rule against suspension of the power of alienation, or of absolute ownership, so long as such absolute power of disposition remains effective.<sup>125</sup> A person having such a reserved power of disposition is in substantially the same position as an outright owner.

It is probable that this statute serves only to clarify what is now the law in any event. The commission in its recommendation to the legislature stated that it was "designed to settle rather than change the law, and no provision is included to limit [its] application to interests created after the effective date of the amendments."<sup>126</sup>

## 2. *Doctrine of the "Second Look"*

This doctrine, which is recognized in most common-law jurisdictions, ameliorates somewhat the rigors of the rule of relation back. Under the "second look" doctrine, not only the terms of the instrument exercising the power are related back to the time of its creation, but also the facts

<sup>125</sup> *Morgan v. Keyes*, 302 N.Y. 439, 99 N.E.2d 230 (1951); *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 133, 51 N.E.2d 674, 676 (1943); *Schenectady Trust Co. v. Emmons*, 261 App. Div. 154, 160, 25 N.Y.S.2d 230, 235 (3d Dep't), aff'd, Mem. 286 N.Y. 626, 36 N.E.2d 461 (1941).

<sup>126</sup> N.Y. Leg. Doc. No. 65(G) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, p. A-118 (Mar. 25, 1960).

and circumstances existing at the time of its exercise. This means that, in considering the validity of an interest given by the exercise of a power, possible events which might have invalidated the interest if the latter were viewed wholly prospectively from the time of creation of the power, but which have not happened at the time of its exercise, and cannot thereafter happen, may be disregarded.<sup>127</sup> (It should be emphasized that this is *not* the same as "wait-and-see," with which it is sometimes confused.)

It is generally recognized that this is a desirable amelioration of the rigors of the strict rule of relation back as applied to the rule against perpetuities and powers of appointment. It serves to validate many interests which otherwise would be invalid. It does not violate the policy of the certainty of vesting rule, namely, that validity of an interest must be determined at the creation of the interest in the light of all possibilities without regard to the subsequent course of events. This is because in the case of a power of appointment it is necessary to wait until the power is exercised before one knows what interest is being created. There is no occasion to apply the certainty of vesting rule until it is known what the interest is, and therefore there can be no objection to disregarding contingencies which may have existed when the power was created but which have been resolved by the time the power is exercised.<sup>128</sup>

There seems to have been no decision of the Court of Appeals which squarely repudiates the doctrine of the "second look," but neither is there any which has clearly adopted it as the law of New York. It can be argued that the doctrine was recognized in *Hillen v. Iselin*,<sup>129</sup> but repudiated in *Bishop v. Bishop*,<sup>130</sup> but neither case is clear-cut on the question. There are a number of lower court cases invalidating gifts which could have been saved if the doctrine had been invoked; instead, it was not even discussed.<sup>131</sup> On the other hand, the doctrine was applied in *Matter of Dodge*.<sup>132</sup> A recent case, *In re Patterson's Will*,<sup>133</sup> upheld a gift under the two lives rule, apparently by applying the

<sup>127</sup> 6 American Law of Property § 24.35 (Casner ed. 1952); 5 Powell, Real Property ¶ 788, at 655-57 (1956); 3 Simes & Smith, Law of Future Interests § 1274, at 211-12 (2d ed. 1956).

<sup>128</sup> Gray, Rule Against Perpetuities §§ 523-523.6 (4th ed. 1942); 5 Powell, Real Property ¶ 788, at 657 (1956); Restatement, Property § 392, comment a (1944).

<sup>129</sup> 144 N.Y. 365, 39 N.E. 368 (1895).

<sup>130</sup> 257 N.Y. 40, 177 N.E. 302 (1931).

<sup>131</sup> *Matter of Baiter*, 152 Misc. 177, 273 N.Y. Supp. 962 (Surr. Ct. Suffolk County 1934); *Matter of Hayman*, 134 Misc. 803, 237 N.Y. Supp. 215 (Surr. Ct. N.Y. County 1929). Cf. *In re Fuller's Will*, 131 N.Y.S.2d 402 (Surr. Ct. Westchester County 1954). See 6 American Law of Property § 25.13, p. 197 (Casner ed. 1952); Sparks, "Future Interests," 24 N.Y.U.L. Rev. 1222-24 (1949); Note, 21 Cornell L.Q. 646 (1936).

<sup>132</sup> 129 Misc. 390, 222 N.Y. Supp. 247 (Surr. Ct. N.Y. County 1927).

<sup>133</sup> 162 N.Y.S.2d 446 (Sup. Ct. N.Y. County 1957).

"second look" doctrine. At least one of the treatises regards this case as authority for the "second look" doctrine in New York.<sup>134</sup>

There is no authority in New York for applying the "second look" doctrine to a gift in default of appointment, as the Supreme Court of Massachusetts did in *Sears v. Coolidge*.<sup>135</sup> Application of the doctrine in this situation is supported by Morris and Leach in their text, *Rule Against Perpetuities*.<sup>136</sup> But they cite only *Sears v. Coolidge*, and have to rely on the argument that there is no inconsistent authority. The same position was taken by Professor Leach in 1952 in the *American Law of Property*, but his co-author, Mr. Tudor, dissented.<sup>137</sup> The 1958 Supplement to this work notes *Sears v. Coolidge* as supporting Professor Leach's view.<sup>138</sup>

Whether the doctrine should be made the subject of a statute is another question. No statute has been found in any other jurisdiction which specifically incorporates it. The doctrine as it stands is entirely judge-made. It has not been expressly repudiated by any court. It has been suggested that the few decisions in which it was not applied where it might have been were the result of inadvertence.<sup>139</sup> This certainly seems to be true of the New York cases. Moreover, the doctrine seems to be one which readily lends itself to application under a multiple lives rule. It is much easier to overlook it in applying the rigorous two-lives rule. This may explain the apparent conflict in the New York cases.

The study made by the author pointed out that, because of the very nature of the problem and the difficulty of explaining the true scope of the doctrine, any statute on the subject might be misunderstood and might give rise to unforeseen problems. He did however suggest the matter for the consideration of the commission, and the commission decided to recommend a new section, 179-b, to be added to the Real Property Law. This recommendation was adopted and the new section enacted by chapter 451 of the Laws of 1960, effective April 12, 1960. The section reads:

§ 179-b. Rule for determining whether estate or interest would have been valid if given or limited at time of creation of power. In applying section forty-two of this chapter and section eleven of the personal property law to an estate or interest given or limited by an instrument in execution of a power, facts and circumstances existing at the effective date of the

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<sup>134</sup> 3 Simes & Smith, *Law of Future Interests* § 1420 (Supp. 1959).

<sup>135</sup> 329 Mass. 340, 108 N.E.2d 563 (1952).

<sup>136</sup> Morris & Leach, *Rule Against Perpetuities* 152-55 (1956).

<sup>137</sup> 6 *American Law of Property* § 24.36, at 104 (Casner ed. 1952).

<sup>138</sup> *Id.* (Supp. 1958).

<sup>139</sup> 6 *American Law of Property* § 24.35, p. 101 (Casner ed. 1952); Gray, *Rule Against Perpetuities* § 523.2 & n.3 (4th ed. 1942).

instrument in execution of the power shall be taken into account, notwithstanding that the period during which the absolute power of alienation of real property or the absolute ownership of personal property may be suspended under such sections must be computed from the time of the creation of the power.

In recommending the new section the commission made the same observation as in the case of section 179-a, that it was intended to settle rather than to change the law, and that accordingly no provision was included to limit its application to interests created after the effective date of the amendment.<sup>140</sup>

### 3. *Powers of Appointment and Accumulations*

Under Real Property Law, section 61, as amended, and Personal Property Law, section 16, as amended, it is now possible to provide for accumulation of rents, profits, or income, so long as such accumulation is directed to commence within the time allowed for the vesting of future estates (or suspension of the absolute ownership of personal property) and to terminate at or before the expiration of such time.

Prior to the effective date of the 1959 amendments, accumulations (with certain exceptions) were subject to two further limitations: (a) they could be directed only for the benefit of one or more minors then in being, for the period of their minority, or (b) if directed to begin at a future time, they had to begin and end within the perpetuities period and, again, could only be for the benefit of one or more minors during the period of their minority. In situation (b), two different periods might apply, depending on whether the accumulation was directed by an instrument taking effect before September 1, 1958, when the perpetuities period was two lives in being plus a restricted minority, or on or after September 1, 1958, when the period was multiple lives in being plus a restricted minority.<sup>141</sup>

No particular problem arose when the accumulation was directed by an ordinary instrument passing property which took effect on or after September 1, 1959. But when the instrument was one which passed property by the exercise of a power of appointment created prior to September 1, 1959, a problem was created by the wording of Real Property Law, section 179. Before the 1960 amendments, this read as follows:

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<sup>140</sup> N.Y. Leg. Doc. No. 65 (G) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, p. A-118 (Mar. 25, 1960).

<sup>141</sup> A further complication might arise in the case of an instrument taking effect before September 1, 1958, but directing an accumulation for the benefit of a minor to begin after September 1, 1958. Would the overall limiting period be two lives or multiple lives? The statute does not provide an answer. It may be assumed that such a case would be very rare.

An estate or interest can not be given or limited to any person by an instrument in execution of a power unless it would have been valid if given or limited at the time of the creation of the power, provided, however, that the permissible number of lives under section forty-two of this chapter and under section eleven of the personal property law shall be determined under the law in effect at the time of the execution of the power and not the law in effect at the time of the creation of the power.

The statute, both before and after the 1959 amendment, was silent on the subject of accumulations and its effect on a provision directing an accumulation was uncertain. A hypothetical example will pose the problem more clearly.

Donor H, by a will taking effect on January 1, 1950, created a trust for the benefit of his wife W for her life, remainder as she should by will appoint. The donee, W, died December 1, 1959, exercising the power of appointment by creating a further trust for the benefit of the three children of H and W, A, B, and C, to last until the death of the longest liver, with a provision for accumulation of income for each child until he or she reached twenty-five. When W died, A was twenty-two, B and C were still minors. Under the law in effect in 1950, when the power was created, the secondary trust would be bad because, when added to the primary trust, it would suspend the power of alienation for four lives.<sup>142</sup> Under the law in effect in December, 1959, when the power was exercised, the secondary trust would be good, because even when the interest is related back to 1950, the two trusts together suspend the power of alienation for only four (a reasonable number) lives, all of which were in being in 1950 (the children of H and W necessarily had to be in being when H died). The amended statutes (Real Property Law, sections 178 and 179) permit use in such a case of the measuring period in effect in December, 1959, although still requiring that the period be measured from 1950.

But what of the direction for accumulation? Under 1950 law it would (i) be bad as to B and C, because extending beyond the minority of those two minor children (although bad only as to the excess), and (ii) wholly bad as to A because not for the benefit of a minor. If related back to 1950, it might also be bad because not directed to begin and end within two lives in being (unless each share was treated separately). Under 1959 law it would be good, even when related back, because

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<sup>142</sup> The secondary trust might be saved, in part, by invoking the doctrine of separable trusts, dividing the trust into three shares, for A, B, and C, respectively, and releasing each share on the death of the life beneficiary. See *Matter of Goldstein*, 3 App. Div. 2d 16, 157 N.Y.S.2d 778 (2d Dep't 1956), motion for leave to appeal denied, 3 N.Y.2d 705, 142 N.E.2d 430, 160 N.Y.S.2d 828 (1957); *Matter of Horner*, 237 N.Y. 489, 143 N.E. 655 (1924). But this was not what testatrix provided, and it would involve fairly drastic surgery.

directed to begin and end within four lives, all of which were in being in 1950.

It could be argued that there was no requirement that the validity of the provision for accumulation be determined under the law of 1950, and since it was to begin and end within the permissible period, and was incident to a trust otherwise valid, it should be upheld. On the other hand, a strict reading of the statutory language, "An estate or interest can not be given or limited to any person by an instrument in execution of a power unless it would have been valid if given or limited at the time of the creation of the power,"<sup>143</sup> so as to include a direction for accumulation, would result in a holding of invalidity. This would be true even under the statute as amended in 1959.

Although no New York case was found squarely in point, two cases which appear relevant indicated that the New York courts might well have taken the latter, and stricter, view.

In *Dempsey v. Tylee*,<sup>144</sup> the creator of the power was a married woman. Under the law then in effect, a married woman was not permitted to convey or devise her real property to her husband, so as to cut off her heirs at law. Apparently in order to circumvent this rule, the wife united with the husband in a deed to a trustee, reserving a power to appoint the property by will. By her will she then exercised the power by appointing the property to her husband.

A majority of the three-judge court stated that this was invalid, relying *inter alia* on the statute which preceded section 179 of the Real Property Law (1 Rev. Stat. 737, section 129), which then read: "No estate or interest can be given or limited to any person, by an instrument in execution of a power which such person would not have been capable of taking, under the instrument by which the power was granted."

Writing for the majority, Justice Bosworth said:

I do not understand the prohibition of this section to refer merely to estates void by reason of an illegal suspension of the power of alienation (§ 128 id.), but to estates which may be lawfully created, but which the appointee of the power is incompetent to take by deed directly from the person creating or reserving the power.

Daniel E. Tylee, the husband, could not have taken a remainder in fee under the trust deed . . . for the reason that the wife cannot convey directly to him. Being incapable in law of taking any estate under the deed creating the power, no estate can be vested in him by any execution of the power.<sup>145</sup>

<sup>143</sup> N.Y. Real Prop. Law § 179 (as it read prior to the 1960 amendment).

<sup>144</sup> 3 Duer 73 (N.Y. Super. Ct. 1854).

<sup>145</sup> Id. at 98.

Actually this was dictum. A separate conveyance by the wife and husband to a third person, and a reconveyance by that person to the husband, followed by a mortgage by the husband, were upheld on other grounds. Concurring in this result, Justice Duer dissented from the majority's reasoning on the validity of the appointment:

As I construe that section [Rev. Stat., section 129], it only means that no person shall take an estate under a power that, if limited to him by the instrument creating the power, would have involved an undue suspension of the power of alienation; in other words, where its direct limitation would have been void, as too remote. Section 129 merely declares the legal consequences of the rule which § 128 [now Real Property Law, section 178] establishes, and is to be construed, precisely as if the word "hence" had connected the sections, by following the first, and preceding the second; and both the sections are expressed very nearly in the words in which the rule and its consequence will be found to be stated by the most approved text-writers on this abstruse branch of the law, Fearn, Sugden, and Cruise. As I construe the section, therefore, it refers only to the nature of the estate granted, and not at all to any personal incapacity of the grantee, other than that which the rule, declared in § 128, necessarily creates, although it cannot be denied that the words of the section are quite susceptible of the interpretation that my brother Bosworth has given to them.<sup>146</sup>

In *Matter of Berwind*,<sup>147</sup> a New York testator created a trust for the lives of his sister and his nephew. He authorized his niece to appoint by will 1/30th of the net income and also to appoint the disposition of the principal of that fractional share. The niece, who died domiciled in Pennsylvania, provided by her will that the principal of such 1/30th share should be held on further trusts for life, to begin after the trust term created by the donor, and directed that the income of such 1/30th share be retained as principal under her will, to be invested and reinvested as capital, the income on such accumulated income to be paid to various beneficiaries. Surrogate Foley held that the attempted exercise of the power was invalid *in toto*, the disposition of principal as violating the New York statutes on suspension of the power of alienation, and the disposition of income as violating the New York statutes on accumulations. It seems that both features of the niece's will were valid under the law of Pennsylvania with respect to her own property. But they were held invalid as to the appointive property since as to that property New York law was controlling.

Although not conclusive on the point, these two cases are persuasive authority for the proposition that, in determining the validity of an accumulation directed by the exercise of a power of appointment, the

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<sup>146</sup> *Id.* at 101-02.

<sup>147</sup> 181 Misc. 559, 42 N.Y.S.2d 58 (Surr. Ct. N.Y. County 1943).

law in effect at the time of creation of the power, rather than at the time of its exercise, would govern. A recent law review article, published after completion of the study made by the author, and citing different cases, reached the same result.<sup>148</sup> This seemed inconsistent with the spirit and intention of the 1958 and 1959 amendments, and therefore a further amendment appeared to be in order.

The commission accordingly recommended another addition to the Real Property Law, section 179-c, which was enacted as chapter 458 of the Laws of 1960, effective April 12, 1960. It reads as follows:

§ 179-c. Accumulation directed by an instrument in execution of a power. The validity of a direction for the accumulation of the rents and profits of real property, or the income of personal property, contained in an instrument in execution of a power heretofore or hereafter created, shall be determined under the law in effect at the time of the execution of the power and not the law in effect at the time of the creation of the power.

In its recommendation to the legislature, the commission made it clear that this amendment, like the other two relating to powers of appointment, was intended to remove uncertainty and to clarify, rather than necessarily to change, existing law.<sup>149</sup> Accordingly, although expressly applicable only to instruments executed on or after April 12, 1960, exercising powers of appointment created prior to that date, the courts will be free to apply the same rule to instruments executed between September 1, 1959, and April 12, 1960, if they conclude that this was the true meaning and intention of the 1959 legislation liberalizing the restrictions on accumulations, or that the rule of relation back does not apply to the validity of an accumulation in any event.<sup>150</sup>

## VI. FURTHER CHANGES—LEGAL LIFE ESTATES AND REMAINDERS IN OR FOLLOWING TERMS OF YEARS

In 1936 and 1938 the Law Revision Commission recommended repeal of Real Property Law, sections 43 through 47.<sup>151</sup>

In 1959 the legislature amended Real Property Law, sections 43, 45 and 46, to delete the reference in each of these sections to "two lives" and substitute a reference to multiple lives, and to make some other

<sup>148</sup> Newman, "Exercise of Powers of Appointment as Affected by Recent Legislative Amendments in New York," 5 N.Y.L.F. 368 (1959).

<sup>149</sup> N.Y. Leg. Doc. No. 65(I) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, p. A-129 (Mar. 25, 1960).

<sup>150</sup> For a critical view of the whole idea of the amendment, as well as of the 1959 amendments on powers of appointment, raising a doubt as to their constitutionality, see N.Y. County Lawyers' Ass'n, Comm. on Surrogates' Court, Report No. 290 (March 24, 1960).

<sup>151</sup> N.Y. Leg. Doc. (1936) No. 65(H), at 12, reprinted in Report, Recommendations and Studies of N.Y. Law Rev. Comm'n (1936) at (484); N.Y. Leg. Doc. No. 65(M), 5 (1936), reprinted in Report, Recommendations and Studies of N.Y. Law Rev. Comm'n (285) (1938).

relatively minor changes.<sup>152</sup> No change was made in Real Property Law, section 44 or section 47.

The precise reason for these amendments is not apparent. It would seem that they were based on the notion that consistency with the 1958 amendments to Real Property Law, section 42, and Personal Property Law, section 11, required substitution of multiple lives for two lives.<sup>153</sup> There is however no real connection between the rule against suspension of the power of alienation contained in Real Property Law, section 42, or against suspension of absolute ownership contained in Personal Property Law, section 11, and the rules set forth in Real Property Law, sections 43, 44, 45, and 47.<sup>154</sup> The original restriction to two lives in both sets of rules seems more or less fortuitous, although the revisers undoubtedly believed it a convenient measure to use throughout, and there was a definite connection between Real Property Law, section 42, and Real Property Law, section 46.

Nor is it altogether clear why the Revisers proposed these sections in the first place. Real Property Law, section 46, restricting contingent remainders on terms of years to those which must vest not later than the termination of two lives in being, was a specific application of the New York rule against perpetuities, perhaps considered necessary to obviate the argument that a remainder, even though contingent, limited to take effect at the end of a definite period of time, would not come within the literal prohibition of Real Property Law, section 42. Real Property Law, section 43, restricting successive life estates to two, given to persons in being at the creation thereof, and Real Property Law, section 47, restricting a life estate limited as a remainder on a term of years to one given to a person in being at the creation thereof, may have been attempts to restate in more drastic terms the so-called "Old Rule Against Perpetuities," which is supposed to have prevented the limitation of more than one life estate to a person not in being, or stated more accurately, if an estate is limited to an unborn person for life with remainder to his issue, the last remainder is void. The very existence of such a rule has been a matter of learned controversy,<sup>155</sup>

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<sup>152</sup> N.Y. Sess. Laws 1959, ch. 452.

<sup>153</sup> See Memorandum of Governor Rockefeller, filed with S. Intr. No. 622, Print No. 4244 (April 6, 1959); N.Y. County Lawyers' Ass'n, Comm. on Real Property Law, Report No. 45 on S. Intr. No. 622, Print No. 622 (Feb. 11, 1959); Ass'n of the Bar of the City of N.Y., Comm. on State Legislation, Bull. No. 3, p. 199 (Feb. 16, 1959).

<sup>154</sup> See *In re Chapman's Will*, 94 N.Y.S.2d 325 (Surr. Ct. Broome County 1950); 6 *American Law of Property* § 25.92 (Casner ed. 1952); Klorfein, *Estates in Expectancy* § 61, at 49 (1958); 3 *Simes & Smith, Law of Future Interests* § 1416 (2d ed. 1956); Walsh, *Future Estates in New York 197-200* (1931).

<sup>155</sup> See, e.g., Gray, *Rule Against Perpetuities*, App. K, 800-08 (4th ed. 1942); Sweet, "Contingent Remainders and Other Possibilities," 27 *Yale L.J.* 977 (1918).

but it had been stated by many text-writers as a rule of common law designed to outlaw the ancient "perpetuity" (a series of unbarrable remainders in successive generations), and these writings may have influenced the revisers. The existence of the rule was affirmed in *Whitby v. Mitchell*,<sup>156</sup> but it has since been abolished in England.<sup>157</sup> The rule of *Whitby v. Mitchell* is said not to be the law anywhere in the United States.<sup>158</sup> The rule was discussed by the Court of Appeals in *Jackson ex dem. Nicoll v. Brown*,<sup>159</sup> but that case was actually decided under Real Property Law, section 43.

In any event, these statutes have not been of great importance in New York. McKinney's annotated edition of the Consolidated Laws cites, under section 43 of the Real Property Law, seven decisions of the Court of Appeals, eight decisions of the Appellate Division, and seventeen lower court cases. In many of these it was held that the section had no application. Only two cases are cited for the past ten years. Under Real Property Law, section 44, three cases are cited; under section 45, two; under section 46, one; and under section 47, three.

These statistics are not conclusive; some of the cases cited under particular sections are irrelevant; some cases which have arisen under Real Property Law, section 43, are omitted altogether. They do, however, give some idea of the relative infrequency with which these statutes have been litigated. One reason is that Real Property Law, section 43 (and by implication sections 44, 45, and 47), have been construed as applying only to legal interests, and not to equitable interests under a trust.<sup>160</sup> (They did, however, apply to personalty as well as realty.<sup>161</sup>) The reason of course is that the legal life estate is not often used today, having been almost entirely supplanted by the trust. (There has, however, been an interesting revival in estate planning, apparently for tax reasons, of the legal life estate with power to consume.<sup>162</sup> This development may result in a wider use of legal life estates in New York, but it

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<sup>156</sup> 42 Ch. Div. 494 (1889), Appeal dismissed 44 Ch. Div. 85 (1890).

<sup>157</sup> Law of Property Act of 1925, 15 & 16 Geo. 5, c. 20, § 161(1) 20 Halsbury, Stats, Eng. 768 (2d ed. 1950).

<sup>158</sup> 3 Simes & Smith, Law of Future Interests § 1219 (2d ed. 1956); Restatement, Property § 370, comment q (1944).

<sup>159</sup> 13 Wend. 437 (N.Y. 1835).

<sup>160</sup> In re Chapman's Will, 94 N.Y.S.2d 325 (Surr. Ct. Broome County 1950); Matter of Terwilligar, 135 Misc. 170, 237 N.Y. Supp. 390 (Surr. Ct. Kings County 1929), aff'd Mem., 230 App. Div. 763, 243 N.Y. Supp. 898, appeal denied Mem., 230 App. Div. 846, 244 N.Y. Supp. 808 (2d Dep't 1930).

<sup>161</sup> Matter of Bogardus, 43 Misc. 473, 89 N.Y. Supp. 478 (Surr. Ct. N.Y. County 1904); Purdy v. Hayt, 92 N.Y. 446 (1883).

<sup>162</sup> See Note, "Federal Estate Tax Consequences of a Life Estate with the Power to Consume," 46 Ky. L.J. 586 (1958); Note, "Estate Planning—Life Estate with Power of Disposal," 32 Notre Dame Law. 141 (1956); Note, 29 Rocky Mt. L. Rev. 132 (1956). Cf. *Pipe's Estate v. Commissioner*, 241 F.2d 210 (2d Cir. 1957), cert. denied, 355 U.S. 814 (1957); *Brunton v. Easthampton Sav. Bank*, 336 Mass. 345, 145 N.E.2d 696 (1957).

is doubtful whether it would have presented any special problems under Real Property Law, sections 43-47. The general subject of life estates with power to consume is covered by Real Property Law, sections 149-153.<sup>163</sup>)

It remains to consider the status of these statutes under the 1959 amendments.

### 1. *Real Property Law, section 43*

As amended in 1959, this statute required only that successive life estates be limited to persons in being at the creation thereof. Nothing was provided as to the effect of a violation, but presumably any life estate limited to a person not in being would be void, and any remainder following such invalid life estate would be accelerated if vested, void if contingent. This would have been the result under the statute before amendment, and would be the normal result of applying the Rule Against Perpetuities to such a remainder.<sup>164</sup>

Under the amendment, it would have been possible to create more than two legal life estates to persons in being. This changed the rule of such cases as *Woodruff v. Cook*,<sup>165</sup> and *Purdy v. Hayt*.<sup>166</sup> It would still have been illegal to limit a life estate to a person not in being, as was held in *Matter of Manley*.<sup>167</sup> The *Manley* case seems to be one of the very few reported cases involving an attempt to create a secondary life estate in a person not in being. Even there it was only a possibility (if there should be an afterborn child of the primary life tenant) which the court held should be excised. It seems fair to conclude that the effect of the statute as amended would have been minimal.

It is interesting to observe that, under the 1959 amendments, the rule as to secondary life estates to unborn persons was the same as to legal estates and equitable interests under a trust. Both were void, the former as a direct violation of Real Property Law, section 43, the latter as an unlawful suspension of the power of alienation beyond lives in being. Although the same policy considerations did not apply (a legal life estate is alienable, an equitable life interest under a trust is not), there was perhaps something to be said for this parallelism.

A number of other jurisdictions formerly had statutes comparable to Real Property Law, section 43, with either a reference to two lives

<sup>163</sup> See Whiteside & Edelstein, "Life Estates with Power to Consume: Rights of Creditors, Purchasers and Remaindermen," 16 Cornell L.Q. 447 (1931).

<sup>164</sup> *Purdy v. Hayt*, 92 N.Y. 446 (1883); *Vandenburgh v. Vandenburgh*, 85 Misc. 131, 147 N.Y. Supp. 244 (Sup. Ct. Warren County 1914).

<sup>165</sup> 61 N.Y. 638 (1875).

<sup>166</sup> 92 N.Y. 446 (1883).

<sup>167</sup> 1 Misc. 2d 61, 145 N.Y.S.2d 687 (Surr. Ct. Kings County 1955).

or multiple lives, but such statutes have been repealed in California, Indiana, Michigan, Minnesota, Montana, and Wisconsin.<sup>168</sup> They survive in the following jurisdictions:

Arizona (to the same effect as New York Real Property Law, section 43, prior to the 1959 amendment);<sup>169</sup> Idaho;<sup>170</sup> North Dakota;<sup>171</sup> Oklahoma;<sup>172</sup> South Dakota;<sup>173</sup> (the four last named being similar to New York Real Property Law, section 43, as amended in 1959, with provisions for voiding any life estates limited to persons not in being, and acceleration of vested remainders).

California's former statute was identical to that of Idaho, North Dakota, Oklahoma, and South Dakota. In 1956, the California Law Revision Commission recommended repeal of this statute and two related statutes (Civil Code sections 774, 775, 777).<sup>174</sup> The reason given was that the common-law Rule Against Perpetuities is a sufficient restriction on the vesting of contingent remainders, whether in fee or for life. The California legislature repealed all three sections in 1959.<sup>175</sup>

## 2. Real Property Law, section 44

This statute placed two limitations on remainders following estates *pur autre vie*: (i) the remainder had to be in fee, or (ii) if the estate was in a term of years, the remainder had to be for the whole residue of the term. The commission recommended repeal of this statute in 1936 and 1938.<sup>176</sup> The 1959 amendments did not affect it.

Estates *pur autre vie* are not common, and there has been very little litigation under this statute. It is cited in *In re Atkinson's Will*,<sup>177</sup> but the only case which seems to have been decided squarely under the statute is *Matter of Bogardus*.<sup>178</sup> That case involved (i) a primary legal life estate *pur autre vie*, (ii) two secondary trusts for the benefit of the daughters of the primary life tenant for their lives, and (iii) remainders to the residuary legatees. The trusts were held void as remainders in

<sup>168</sup> See 6 American Law of Property § 25.97 (Casner ed. 1952) for references to repealer statutes in Indiana, Michigan, Minnesota, and Wisconsin; Cal. Stats. 1959 ch. 470, § 7, repealing Cal. Civ. Code § 774; Mont. L. 1959 ch. 213, § 3, repealing Mont. Rev. Codes Ann. §§ 67-515 to 67-518.

<sup>169</sup> Ariz. Rev. Stat. Ann. § 33-232 (1956).

<sup>170</sup> Idaho Code Ann. § 55-203 (1957).

<sup>171</sup> N.D. Rev. Code § 47-0415 (1943).

<sup>172</sup> Okla. Stat. Ann. tit. 60, § 36 (1949).

<sup>173</sup> S.D. Code § 51.0415 (1939).

<sup>174</sup> Recommendations and Study re Suspension of the Absolute Power of Alienation, 1 Cal. L. Rev. Comm'n Rep. G-29 to G-32 (1956); Turrentine, "The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California," 9 Hastings L.J. 262, 287 (1958).

<sup>175</sup> Cal. Stats. 1959 ch. 470, § 7.

<sup>176</sup> Note 151 *supra*.

<sup>177</sup> 91 N.Y.S.2d 631 (Surr. Ct. Queens County 1949).

<sup>178</sup> 43 Misc. 473, 89 N.Y.S.2d 478 (Surr. Ct. N.Y. County 1904).

less than a fee following an estate *pur autre vie*. There seemed to be no justification for this harsh result other than the express command of the statute.

The other jurisdictions which copied the New York statutory scheme, and which have not since repealed it, have a similar statute, but it purports to apply to all remainders following successive life estates, and not just to remainders following estates *pur autre vie*.<sup>179</sup> The California Law Revision Commission recommended repeal of the corresponding statute in California, and this has been done.<sup>180</sup>

### 3. Real Property Law, section 45

Real Property Law, section 45, related back to section 44. Prior to 1959, it provided that where a remainder was created on an estate *pur autre vie*, and more than two persons were named as the persons during whose lives the life estate shall continue, the remainder should take effect on the death of the two persons first named. Apparently, there are no reported cases in which this statute has been litigated. Of the two cases cited in McKinney's annotation, one did not involve the section at all, and the other merely mentioned it in passing.

In 1936 and 1938 the commission recommended repeal of section 45.<sup>181</sup> In 1959 the legislature amended it to delete the reference to two lives, so as to permit an estate *pur autre vie* measured by any reasonable number of lives, with the proviso that if an unreasonable number of lives are used, the remainder shall take effect immediately on its creation as if no life estates had been created.<sup>182</sup>

It is possible that the Legislature intended the amended section 45 to impose a limit on the number of life estates which may be created under section 43, as well as under section 44. This is the effect of the corresponding legislation in Idaho, North Dakota, Oklahoma, and South Dakota. But it is hard to place this construction on the statute as it read.

### 4. Real Property Law, section 46

This statute formerly provided that a contingent remainder could not be created on a term of years unless it was certain that the remainder must vest within two lives in being. As amended in 1959, the statute invalidated a contingent remainder on a term of years which was not certain to vest within a reasonable number of lives.

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<sup>179</sup> Idaho Code Ann. § 55-204 (1957); N.D. Rev. Code § 47-0416 (1943); Okla. Stat. Ann. tit 60, § 37 (1949); S.D. Code § 51.0416 (1939).

<sup>180</sup> Note 175 *supra*.

<sup>181</sup> Note 151 *supra*.

<sup>182</sup> N.Y. Sess. Laws 1959, ch. 452.

Only one case has been found construing this statute as it stood before amendment.<sup>183</sup> A contingent remainder following a trust measured by the minority of four children was held invalid. The result could have been and was in fact also justified under Real Property Law, section 42. It may be questioned whether section 46 had any application, since a trust measured by the minority of four children, some or all of whom might never attain their majority, is hardly a "term of years." (The court also cited Real Property Law, section 43, clearly inapplicable).

In 1936 and 1938 the commission recommended repeal of Real Property Law, section 46.<sup>184</sup> This was accompanied by other recommended provisions which would clearly have stated the Rule Against Perpetuities in terms of remoteness of vesting and would have made Real Property Law, section 46, superfluous.

#### 5. *Real Property Law, section 47*

This statute formerly provided that an estate for life could not be limited as a remainder on a term of years except to a person in being at the creation of the estate. In 1936 and 1938 the commission recommended repeal of this section.<sup>185</sup> The 1959 amendments made no change in it.

Of the three cases cited in McKinney's annotation to this section, one held it inapplicable,<sup>186</sup> one actually involved section 57 (at one time numbered section 47),<sup>187</sup> and the third was decided under Real Property Law, section 42, and Personal Property Law, section 11, without mention of Real Property Law, section 47.<sup>188</sup>

California repealed its corresponding statute in 1959, on the recommendation of the California Law Revision Commission.<sup>189</sup> But it is interesting that Michigan, although it has repealed its other statutes on legal life estates, borrowed from New York, has retained this one.<sup>190</sup>

#### *Recommendations of Law Revision Commission*

The commission recommended that all five sections be repealed.<sup>191</sup> The commission pointed out that sections 43, 44, 45, and 47 had no

<sup>183</sup> *Whitefield v. Whitefield*, 123 App. Div. 233, 108 N.Y. Supp. 110 (1st Dep't 1908).

<sup>184</sup> Note 151 *supra*.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Gilman v. Reddington*, 24 N.Y. 9 (1861).

<sup>187</sup> *Tuthill v. Davis*, 121 App. Div. 290, 105 N.Y. Supp. 672 (2d Dep't 1907).

<sup>188</sup> *Matter of Trowbridge*, 124 Misc. 317, 208 N.Y. Supp. 662 (Surr. Ct. N.Y. County 1924).

<sup>189</sup> *Supra*, note 175.

<sup>190</sup> Mich. Stat. Ann. § 26.21 (1957). See comment by Munson, "Recent Changes in Statutory Rules Against Perpetuities," 38 Cornell L.Q. 543, 558 (1953).

<sup>191</sup> N.Y. Leg. Doc. No. 65(G) (1960), reprinted in 1960 McKinney's Sess. Law News of N.Y., No. 4, p. A-115 (Mar. 25, 1960).

real connection with the rule against suspension of the power of alienation and were not of great importance, being limited to legal life estates and not being applicable to trusts. It further recommended that section 46 be repealed and the substance thereof transferred to section 50 of the Real Property Law, which already limited the creation of certain future contingent estates (*i.e.*, shifting executory limitations) to those which must occur, if at all, within the permissible perpetuities period. These recommendations were adopted and are reflected in chapter 449 of the Laws of 1960, effective April 12, 1960.

It should be noted that, with these statutes out of the way, it will be legal in New York to create a secondary legal life estate in an unborn person because (assuming no other contingency) it would be certain to vest, if at all, not later than the death of the primary life tenant. Any further life estates in unborn persons would nearly always violate both the New York and the common-law Rules Against Perpetuities.<sup>192</sup> On the other hand, a secondary income trust in favor of an unborn person will continue to violate the New York statutes, although not the common law.

#### CONCLUSION

The 1960 amendments do not effect any radical changes in the New York rules relating to perpetuities, powers of appointment, and accumulations, as they stood prior to April 12, 1960. In particular, they do not change the statutory scheme under which nearly all income trusts are automatically spendthrift trusts and are subject to the statutory restrictions on suspension of the power of alienation or of absolute ownership.<sup>193</sup> But these restrictions have themselves been liberalized. The permissible period is now identical with that of the common law, namely, lives in being, one or more periods of gestation, and 21 years. In other respects as well, the law has been clarified and brought much closer to the law prevailing in the other forty-nine states and the rest of the Anglo-American legal world. While some may fear that the liberalized rules are too great a concession to accumulated wealth, the control of the dead hand, and the alleged interests of the large metropolitan trust companies,<sup>194</sup> most practitioners and teachers who work in the field will welcome the changes as the culmination of a reform which began in 1936 and 1938 with the pioneer studies of the Law Revi-

<sup>192</sup> *Whitby v. Mitchell*, 42 Ch. Div. 494 (1889) appeal dismissed, 44 Ch. Div. 85 (1890), was an example of a limitation which violated the "old" rule against perpetuities but did not violate the "modern" rule. Such cases are very rare.

<sup>193</sup> See Sparks, "Policy Considerations: Alienability of the Beneficial Interest in a Trust in New York," 9 *Buffalo L. Rev.* 26 (1959).

<sup>194</sup> See Klorfein, "Public Policy and the Rule Against Perpetuities," 5 *N.Y.L.F.* 169 (1959).

sion Commission, bore fruition in the 1958 and 1959 amendments, and is now rounded out. No longer will the strictures of Chancellor Kent and of Professors Gray, Walsh, Whiteside, and Powell<sup>195</sup> be valid. No longer will the New York law in this area be a reproach among the nations. As Lord Chancellor Nottingham said in the famous Duke of Norfolk's case: "Pray let us so resolve Cases here, that they may stand with the Reason of Mankind, when they are debated abroad."<sup>196</sup>

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<sup>195</sup> *Supra* note 4.

<sup>196</sup> 3 Ch. Cas. 1, 33, 22 Eng. Rep. 931, 951 (Ch. 1682).