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SUSPENSION OF THE POWER OF ALIENATION IN NEW YORK*

HORACE E. WHITESIDE†

The statutes against suspension of the power of alienation and the absolute ownership of property, which were adopted by the New York Legislature in 1828, have occasioned endless difficulty in the many controversies that have been before the courts of this state during almost a century, and have caused the failure of a large number of trusts and wills during this period. Nor does it seem that repeated adjudication has resulted in interpretations of these rules which may be readily understood by the bar or easily applied by the courts. Furthermore, the New York statutes against suspension

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The legislature authorized a general revision of the statutes of New York on Nov. 27, 1824. James Kent, Erastus Root and Benjamin F. Butler were appointed revisers, but Kent declined, and John Duer was appointed to the vacancy by Gov. Yates. In 1825 the two younger revisers, Duer and Butler, asked for and received a grant of larger powers, and thereafter they had practically a free hand in codifying the laws of the state. Root having retired, Henry Wheaton was substituted, but he resigned in 1827, and John C. Spencer was appointed to fill his place, April 21, 1827. All of Part One of the revised statutes and all of Part Two except Chapter I were adopted by the legislature in a special session, which began Sept. 11, 1827, and continued for fifty-three days. The work was continued in the regular session of 1828, and another special session in the autumn. The entire body of the Revised Statutes was adopted on December 10, 1828, to take effect on January 1, 1830. The notes of the revisers will be found in their report to the legislature (1828), and in the second and third editions of the Revised Statutes. An interesting and valuable account of the revisers and their work will be found in BUTLER, THE REVISION AND THE REVISERS (1889).

Gray states that from the adoption of the Revised Statutes to 1914, there were some four hundred and seventy cases reported in New York on questions of perpetuities. GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) 568.

In the last fifteen volumes of the New York Supplement, reporting cases from the Supreme Court and inferior courts, fifty cases appear which involve suspension of alienation by trust, accumulations, vesting or powers. Only four of these involved trusts not created by will. They cover a period of two years and seven months (Jan. 19, 1925 to Aug. 15, 1927).

Opinions were handed down in six cases on these subjects by the Court of Appeals between May 25, 1926 and July 20, 1927: In re Buttner's Will, 243 N. Y. 1, 152 N. E. 447 (1926); In re Chittick's Will, 243 N. Y. 304, 153 N. E. 83 (1926); Matter of Guaranty Tr. Co. v. Halsted, 245 N. Y. 447, 157 N. E. 739 (1927); In re Durbrow's Estate, 245 N. Y. 469, 157 N. E. 747 (1927); In re Perkin's Estate, 245 N. Y. 478, 157 N. E. 750 (1927); In re Water Front on Upper New York Bay, 246 N. Y. 1, 157 N. E. 911 (1927).
of the power of alienation were adopted, in whole or in part, in no less than thirteen jurisdictions, and have formed the basis of their so-called rule against perpetuities. These rules have been the subject of comment and criticism in a number of articles in law periodicals.

The object of the present discussion is primarily, to consider whether the interpretation of these statutes against suspension of the power of alienation and the judicial development of the rules under them has been in accordance with the intention of the framers of the Revised Statutes, or demanded by considerations of the public interest, or productive of a desirable and workable result. In this connection, certain modifications of the existing law will be suggested. Before directing our attention to the main purposes of the discussion, however, it will be necessary to make a preliminary study of the history and development of the rules under consideration, and to state them, as briefly as may be, in their present form. The limitations of space incident to periodical publication will compel us to confine the discussion largely to the New York cases and authorities. It will also be necessary to publish this paper in two installments, the first of which will be devoted to a consideration of those rules of law which exist in New York today in respect of suspension of the absolute power of alienation of real property and the absolute ownership of personal property, with particular emphasis on such suspension by trusts of real and personal property, respectively. In the second installment we will proceed to summarize the practical results of these rules in their actual operation, and to trace their development, and suggest certain modifications which seem to be urgently needed.

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4 Arizona, California, District of Columbia, Idaho, Indiana, Iowa, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Wisconsin. Citations to statutes will be found in Bogert, Trusts (1921) 172, n. 60.

5 Hohfeld, The Need of Remedial Legislation in the Calif. Law of Trusts and Perpetuities (1913) 1 Calif. L. Rev. 305; Canfield, The New York Revised Statutes and the Rule against Perpetuities (1901) 1 Col. L. Rev. 224; Dwight, Powers of Sale as Affecting Restraints on Alienation (1907) 7 Col. L. Rev. 589; Rundell, The Suspension of the Absolute Power of Alienation (1921) 19 Mich. L. Rev. 235; Goddard, Perpetuity Statutes (1923) 22 Mich. L. Rev. 95; Fraser, Future Interests in Property in Minnesota (1919) 3 Minn. L. Rev. 320; (1920) 4 ibid. 307; Fraser, The Rationale of the Rule against Perpetuities (1922) 5 ibid. 560; Fraser, The Rules against Restraints on Alienation, and against Suspension of the Absolute Power of Alienation in Minnesota (1924) 8 ibid. 185, 295; (1925) 9 ibid. 314; Trottman, Perpetuities under the Wisconsin Statutes (1922) 2 Wis. L. Rev. 14; Rundell, Perpetuities in Personal Property in Wisconsin (1926) 4 Wis. L. Rev. 1.
I. THE STATUTORY SYSTEM OF TRUSTS

Purposes for which trusts may be created. Only four classes of trusts of real property were authorized by section 55 of the New York Revised Statutes. The purposes for which trusts of real property might be created were:

1. to sell lands for the benefit of creditors;
2. to sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon;
3. to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this title;
4. to receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first Article of this title.

After the point had been in dispute some twenty years, it was settled in Leggett v. Perkins that a trust could be created under the third subdivision of section 55, to receive the rents and profits of lands and pay them over to designated beneficiaries. The argument of the court on this point is instructive and explains the theory underlying section 55:

"The statute in reference to express trusts is merely permissive. It creates nothing. We might infer from the argument addressed to us, that the legislature had in the first instance annulled all trusts, and then proceeded to a new creation. It is more correct to say that they abolished all that they have not recognized as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by the application of common law principles.

"The creation of the trust may direct specifically the performance of those things, which the trustee, . . . might himself perform in the lawful execution of the trust, if no specific directions were given."

The court also held that trusts under this subdivision were not limited to married women, infants and incompetents, but might be

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Footnotes:

5For convenience and brevity references to the Revised Statutes will give only the section (e.g., R. S. § 55). Unless otherwise indicated, all such references are to Chapter I of Title II of Part II. Chapter I contains the Article on Estates and the Alienation thereof, the Article on Uses and Trusts, and the Article on Powers, and the sections are numbered serially throughout. Section 55 is now embodied in section 96 of the Real Property Law (L. 1909 c. 52), hereinafter referred to as R. P. L., simply.

6The original section read "education and support, or either," changed to "use" by L. 1830, c. 320, § 10.


8At p. 307.
for "any person." After sixty years it was settled that a trust might be created under subdivision three for the payment of annuities out of rents and profits of lands, and that the interest of such annuitant was inalienable under section 63.10

The attempt to create an unauthorized trust may result in the creation of a power. Trusts of real property may not be created for purposes other than those authorized in section 55.11 If a grantor or testator attempts to create a trust for a purpose not authorized, and if the trustee can accomplish the object intended by means of a power, then legal title will vest in the beneficiary named or remain in the settlor, and the trustee will get only a power. In Manice v. Manice, where a testator devised his residuary real and personal property to executors in trust to receive income, rents and profits, and apply them during the life of his widow, then directed them to cause the estate to be appraised, to sell and divide into shares, without expressly giving the trustees any right to receive the rents and profits, the court said:

"The trusts to appraise, divide and convey the shares are not authorized by the statute, but are proper subjects of a power, and are not void because the testator has attempted to put them in the form of trusts."

So also in Morse v. Morse it was said that:

"Authority given to an executor to sell lands, unless accompanied with a right to receive the rents and profits, vests no estate in the executor, but the lands descend to the heirs or pass to the devisees of the testator, subject to the execution of the power."

A devise of a farm and personal property to trustees, in trust, to permit the widow to occupy the farm and have possession of the stock for her life, then to sell and convert into money, and invest, and after paying annuities to divide the residue on certain trusts, etc.,

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10R. S. § 63, now R. P. L. § 103.
12R. S. § 59; R. P. L. § 99.
13See cases cited, supra note 11; Heermans v. Robertson, 64 N. Y. 332 (1876); Weeks v. Cornwell, 104 N. Y. 325, 338, 10 N. E. 431 (1887); Steinhardt v. Cunningham, 130 N. Y. 292, 29 N. E. 100 (1891). See also R. S. §§ 58, 92, 107; R. P. L. §§ 99, 130, 147.
1443 N. Y. 303, 364 (1871).
1585 N. Y. 53 (1881).
was held to create a legal life estate in the widow, and a power in the trustees.\textsuperscript{16} A power may also result where a trust would render the estate inalienable and void, though the purpose indicated is within the scope of section 55.\textsuperscript{17} The contrary suggestion in \textit{Hawley v. James}\textsuperscript{18} does not now represent the law. On the other hand, as was said in \textit{Robert v. Corning},\textsuperscript{19}

"There are many authorities tending to sustain the proposition, that a trust will be implied in executors, when the duties imposed are active, and render the possession of the legal estate in the executors, convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain the dispositions of the will."

\textbf{A passive trust is executed by the statute.} In any case where the trust is merely passive, and the trustee has no active duties to perform, the statute will execute the trust and title will vest immediately in the beneficiary. Thus, where a testator directed trustees "to permit and suffer my son, William B. Slocum, to have, receive and take the rents, issues and profits thereof for the term of his natural life; and after his decease, I give, devise and bequeath the same part or share to the heirs at law of my said son," it was held that the son took a legal life estate.\textsuperscript{20} So also a conveyance of real property to E. A. R. "in trust for his wife Mary" was passive only, and the title passed absolutely to the wife.\textsuperscript{21} Many other cases might be cited for the same proposition,\textsuperscript{22} but it will be sufficient to mention one other;\textsuperscript{23}

\textsuperscript{16}DePeyster v. Clendening, \textit{supra} note ii.
\textsuperscript{17}Downing v. Marshall, 23 N. Y. 366, 377–380 (1861); Post v. Hover, 33 N. Y. 593, 601 (1865).
\textsuperscript{18}16 Wend. 61 (N. Y. 1836). See the opinion of Bronson, J., at p. 174–5.
\textsuperscript{20}Verdin v. Slocum, 71 N. Y. 345 (1877). But cf. Kiah v. Greiner, 56 N. Y. 220 (1874), where the testator directed property to be "used and held for support, education," etc., of the beneficiary, and a trust was created. See R. S. § 47; R. P. L. § 92.
\textsuperscript{22}See especially Denison v. Denison, 185 N. Y. 438, 443, 78 N. E. 162 (1906), where Cullen, Ch. J., said: "While the executors are directed to hold the shares of the beneficiaries who took immediately on the death of the testator during their respective lives, the provision for the issue of the life tenant is unlimited and unqualified, 'in trust for his, her or their child... heirs, her or their executors, administrators and assigns.' Surely the testator... never contemplated the continuance of a trust for the benefit of the assignee of the children." See also Sinnott v. McLaughlin, 198 App. Div. 630, 190 N. Y. Supp. 828 (1921); Murphy v. Cook, 11 S. D. 47, 51, 75 N. W. 387 (1898).
where lands were granted in trust for a designated person, his heirs and assigns, rents and profits to be paid to them, and the trustee promised to convey to the cestui que trust, his heirs and assigns upon demand. This was held to create a mere naked trust, executed by the statute, and the fee vested in the cestui que trust. Similarly, a provision for annuities or legacies may be given effect to as an equitable charge, and the beneficiary will take the estate subject to the charge.24

Trusts of personal property. The legislature has not, however, limited the purposes for which personal property trusts may be created in New York, and so they may be created for any lawful purpose, without writing, and the delivery of the property is sufficient to pass title to the trustee.25 Furthermore, as was said in Underwood v. Curtis:26


In Minnesota and Wisconsin, if the trustee may in his discretion convert to personal property, the trust is treated as a trust of personal property—In re Tower's Estate, 49 Minn. 371, 52 N. W. 27 (1892); Becker v. Chester, 115 Wis. 90, 91 N. W. 87, 650 (1902). For discussion of the situation in Minn. see Fraser, op. cit. supra note 4, (1925) 9 MINN. L. REV. 314, 327 et seq. Michigan requires a "power and mandate" in the trustee—Grand Rapids Tr. Co. v. Herbst, 220 Mich. 321, 190 N. W. 250 (1922); Michigan Tr. Co. v. Baker, 226 Mich. 72, 196 N. W. 976 (1924).
"It has long been the established rule that where executors are clothed with the power and duty to sell a testator's real estate and distribute the proceeds in the manner provided by the will that the real estate will be deemed converted into personalty. . .

"It is necessary, of course, that the direction to convert be positive and explicit irrespective of all contingencies and independent of all discretion on the part of the donee of the power."

The determination of the time for the conversion depends upon the intention of the testator, but it usually takes place at the death of the testator unless the time of sale is postponed. If, by the provisions of the will or instrument creating the trust, an equitable conversion of real property into personal property has been accomplished, the trust will be treated as a trust of personal property. This point was clearly expressed by the court in *Russell v. Hilton* as follows:

"We concur with the court below that 'since the will worked an immediate equitable conversion of all the testator's real estate into personal property, the trusts set up by the will are to be considered as trusts of personal property, which are not fettered by the limitations prescribed for trusts of real estate, but may be created for any purpose not unlawful, subject only to the law against perpetuities. (Cochrane v. Schell, 140 N. Y. 516, 534.)'"

**Trusts for charitable purposes.** In respect of trusts which may be created under the New York statutes, it remains to consider whether trusts for charitable purposes may be created, and if so, whether such trusts are subject to the rules against suspension of the power of alienation. After a long period of uncertainty the New York statutes were held not to authorize charitable trusts of real or personal property, for three reasons: *First*, because, prior to the adoption

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28 *Supra* note 26, at 187.


Wisconsin held charitable trusts of personal property valid and not subject to the rule against suspension of the power of alienation. Dodge v. Williams, 46 Wis. 79, 1 N. W. 92, 50 N. W. 1103 (1879). It was held in Harrington v. Pier, 105 Wis. 485, 82 N. W. 345 (1900), that charitable trusts of real property were valid, but in Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258 (1903), the rule against suspending the power of alienation was applied to them. They were
of the Revised Statutes, the English Statute of Charitable Uses was rejected in New York, and a certain definite beneficiary was deemed essential to the creation of a valid trust; Second, because as to real property, trusts for charity were not within the permitted trust purposes of section 55; and Third, because trusts for indefinite beneficiaries were destroyed by the rule against suspension of the power of alienation, in that such trusts would suspend the power of alienation for a longer period than that permitted by law. It was always lawful, however, to make a gift directly to a charitable corporation for purposes within the scope of its charter, and a valid gift could be made to a charitable corporation to be formed within the period of two lives in being at the death of the testator, though such a gift was not permitted if the corporation was only to be organized in the discretion of the executors or of the legislature. No accumulation, however, was permitted for a charity. In 1893, as a result

excepted from the operation of the rule by L. 1905, c. 511 (now Wis. St., 1925, § 230. 15). See Maxcy v. Oshkosh, 144 Wis. 238, 275, 128 N. W. 899, 1136 (1910). For the common law of charitable trusts, see CHALLIS, REAL PROPERTY (3d ed. 1911) 194; GRAY, op. cit. supra note 2, c. XVIII and Appx. A; MARSDEN, RULE AGAINST PERPETUITIES (1883) 24, 295.


1L. 1788, c. 46; Beekman v. Bonsor, 23 N. Y. 298, 307 (1861).
2See last par. of note 29.
3See see first par. of note 29.
4Williams v. Williams, 8 N. Y. 525 (1853), donor may prescribe use within permitted corporate purposes; Wetmore v. Parker, 52 N. Y. 450 (1873); Driscoll v. Hewlett, 198 N. Y. 297, 91 N. E. 784 (1910); Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613 (1921), fund applied cy pres on dissolution of company. See also on cy pres, Trustees of Sailors' Snug Harbor v. Carmody, 211 N. Y. 286, 105 N. E. 543 (1914).
of the decision in *Tilden v. Green*, a statute was enacted permitting charitable trusts of real and personal property for uncertain beneficiaries, and this has been construed as abrogating the rule against suspension of the power of alienation as to such trusts.

**Personal property trust to be administered in another jurisdiction.** Where the designated trustee of a personal property trust is a corporation created by and located in another state; and the fund is to be there held and administered, and the trust is legal under the laws of the foreign state the courts of New York will transmit the fund to the foreign jurisdiction to be held on the trusts indicated, even though such trusts would be void as suspending the power of alienation in New York. As has been said, “it is no part of the policy of the state of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California.” The same result was reached in a case where realty was directed to be converted into personal property, to be paid over to trustees in Scotland for a charitable use which would have been void in New York but was authorized in Scotland. Where a testator domiciled in a foreign jurisdiction has disposed of real and personal property located in New York on trusts which are void in New York, the New York court will not aid in enforcing the real property trust but will transmit the personal property to the state where the testator died domiciled, to be there administered in accordance with the laws of the foreign jurisdiction.

**Trusts for the purpose of accumulations.** Under the Revised Statutes accumulations of the rents and profits of land, or the income of personal property, are permitted only “during minority and for the benefit of the minor during whose minority the accumu-

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38 *Supra* note 28.
39 L. 1893, c. 701; now R. P. L. § 113, and P. P. L. § 12. See also R. P. L. §§ 114, 115; P. P. L., §§ 13, 14. Similar statutes have been enacted in Michigan and Wisconsin. For these and the Minnesota statutes, see *Bogert, Trusts* (1921) 198.
45 *§ 37, 38, now R. P. L. § 61.*
lation is directed, and such accumulation must be for the sole benefit of the infant, and must be paid to him absolutely upon his majority. The minor for whose benefit the accumulation is directed need not, however, be in esse at the death of the testator, but the accumulation cannot begin before the birth of the infant for whose benefit it is directed, and it must begin within the period permitted for suspension of the absolute ownership of personal property and the power of alienation of real property, respectively. These questions were involved in the leading case of Manice v. Manice, where Rapallo, J., said:

"Neither do the provisions authorizing accumulations require that the minor for whose benefit the accumulation is to be made should be in being at the death of the testator, unless the accumulation is to commence at his [the testator's] death. If it is to commence at a subsequent period, the beneficiary must be in being at the time of the commencement of the accumulation, otherwise it cannot be said to commence during the minority of the person for whose benefit it is directed. An accumulation for an unborn child, to commence after the birth of the child, and to terminate with his minority, is lawful, provided that it is also to commence within the time permitted for the vesting of future estates, that is to say, on the expiration of two lives in being; but an accumulation for the benefit of an unborn child, to commence before his birth, is not permitted under any circumstances. . . . It is also requisite that the accumulation be for the benefit of the minor during whose minority it is to commence and continue."

So an accumulation for the purpose of paying a mortgage is unauthorized, as is also an accumulation during the life of a minor, but partly or wholly for the benefit of others, and an accumulation for charity, and a direction to add income to the capital of a business. The result of an unauthorized accumulation is not, however,

46Pray v. Hegeman, 92 N. Y. 508, 515 (1883); Hawley v. James, supra note 18; Hascall v. King, 162 N. Y. 134, 56 N. E. 515 (1900). The real property rule as to accumulation is not applied to personal property in Michigan—Toms v. Williams, 41 Mich. 552, 562 (1879).
47Pray v. Hegeman, supra note 46.
4843 N. Y. 303, 376 (1871).
52Thorn v. De Breteuil, 179 N. Y. 64, 71 N. E. 470 (1904). As to whether an insurance trust provides for an illegal accumulation, see Bogert, Funded Insurance
to destroy the estate or interest created, but the funds so accumulated must be paid immediately and directly to "the person presumptively entitled to the next eventual estate," and where an accumulation is directed for the benefit of an infant until he reach 25 years, only the portion after he reaches 21 is cut off.

II. INCIDENTS OF AUTHORIZED TRUSTS OF REAL OR PERSONAL PROPERTY

Estate of the trustee. By virtue of the provisions of sections 60, 61 and 62 of the Revised Statutes, the trustee of every express trust acquires the whole estate, in law and equity. The cestui que trust takes no estate or interest in the lands, but only a personal right to enforce performance of the trust in equity. The statute does not mean, however, that every trustee of an express trust takes an absolute and indefeasible fee in the premises, but only such estate as is necessary for the execution of the trust in question. It is competent for the testator to dispose of the remainder after the determination of the trust, or to direct to whom lands shall pass on

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*Trusts and the Rule against Accumulations (1924) 9 Cornell Law Quarterly 113; and L. 1927, c. 384.*

5Kilpatrick v. Johnson, supra note 50; St. John v. Andrews Inst., supra note 37; statutes, supra note 45.

*Thorn v. De Breteuil, supra note 52.

6Now R. P. L. § § 100, 101, 102.

7Marx v. McGlynn, 88 N. Y. 357, 376 (1882), devise to trustees for alien cestui que trust valid; Van Cott v. Prentice, 104 N. Y. 45, 52, 10 N. E. 257 (1887).

8"Although the legal estate is in the trustee, he but possesses a naked right, which is to be exercised, not for his own benefit, but for that of another. His estate is commensurate with the trust duties... The whole beneficial proprietorship, or interest, is in the cestui que trust, for whom he holds the estate and who has the right to enforce the performance of the trust." Metcalfe v. Union Tr. Co., 181 N. Y. 39, 44, 73 N. E. 498 (1905), holding statute constitutional which permitted destruction of trust in certain cases, and not a taking of trustee's property without due process.

See also Hawley v. James, supra note 18, at 148; Genet v. Hunt, 113 N. Y. 158, 169, 21 N. E. 91 (1889), estate of trustee limited to trust term; Matter of Estate of Straut, 126 N. Y. 201, 27 N. E. 259 (1891), beneficiary not a necessary party to an action by trustee against third party; Cochrane v. Schell, supra note 9, at 536; Losey v. Stanley, 147 N. Y. 560, 567, 42 N. E. 8 (1895), legal estate in remainder following trust is valid; Kernochan v. Marshall, 165 N. Y. 472, 59 N. E. 293 (1901), no trust where creator directed that legal estate be in beneficiary; Doscher v. Wyckoff, 132 App. Div. 139, 143, 116 N. Y. Supp. 389 (1903), trustee has "not every possible interest in the land, but the estate necessary to make the trust effective"; Brearley School v. Ward, 201 N. Y. 358, 371, 94 N. E. 1001 (1911), statute taking ten per cent. of income of trust for creditors is valid against trustee.
failure or invalidity of the trust. So a trustee to collect rents and profits for the life of a beneficiary will take only an estate for the life of such beneficiary, and the reversion or remainder will vest in the persons entitled thereto by the provisions of the deed of trust or the will. But a trustee to sell for the benefit of creditors or legatees, or with imperative power of sale, will take the whole estate to enable him to convey an absolute fee. There is no inconsistency in a trust which vests the estate in the trustee for the life of a designated "cestui que trust," and a power in the same trustee to dispose of the remainder. The tendency of the cases has been to apply the same principles to trusts of personal property, as to which, however, even at common law the trustee with power to sell and invest or to exchange, was held to have the whole estate or interest in the property. As was said in a leading case, "The statute of uses and trusts declares this to be so in respect of lands (1 R. S. p. 729, sec. 60), and as to money or personal property it is so by the rules of the common law."

The same idea was well expressed in Rhodes v. Caswell, as follows:


Embury v. Sheldon, 68 N. Y. 227, 234 (1877); Goebel v. Wolf, 113 N. Y. 405, 21 N. E. 388 (1889), beneficiaries for life had vested remainder in fee; Townshend v. Frommer, 125 N. Y. 446, 455, 26 N. E. 805 (1891); Matter of Tienken, 131 N. Y. 391, 30 N. E. 109 (1892), settled that "trustee takes a legal estate commensurate with the equitable estate, and that... there may be remainders and future estates, or powers of sale adequate to terminate the trust;" Knowlton v. Atkins, 134 N. Y. 313, 31 N. E. 941 (1892); Locke v. Farmers’ L. & T. Co., 140 N. Y. 135, 146, 35 N. E. 578 (1893); Matter of Brown, 154 N. Y. 313, 325, 48 N. E. 537 (1897); Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828 (1900), remainder following trust vested and subject to action by creditors; Toms v. Williams, supra note 46, at 566, remainder after trust vested without conveyance by trustee.

Briggs v. Davis, 21 N. Y. 574 (1860), trust for sale, subsequent grantee from settlor gets no right to redeem land; Duvall v. English, etc., 53 N. Y. 500 (1873); Brennan v. Willson, 71 N. Y. 502 (1877); Bennett v. Garlock, 79 N. Y. 302 (1880), where trustees with power and duty to sell barred by adverse possession, contingent remainders barred; People ex rel. Short v. Bacon, 99 N. Y. 275, 279, 2 N. E. 4 (1885), trustee to sell for creditors gets perfect and exclusive estate; Salisbury v. Slade, 160 N. Y. 278, 54 N. E. 741 (1899), where trust for conversion, remaindermen not entitled to possession of land on determination of precedent estates, and cannot reach reality.

Crooke v. County of Kings, 97 N. Y. 421, 434 (1884).


Gilman v. Reddington, 24 N. Y. 9 (1861).

Supra note 62, at 234.
"'If, however, the subject matter of the gift to trustees is personal estate, the whole legal interest will vest in them without words of limitation. They may generally dispose of personal estate absolutely, being compelled to account for it' (Perry Trusts, sec. 318). ... assuming that a trust may be created in personalty in which the estate of the trustee would be confined to the duration of the trust, we think it can only be so created in a specific chattel or chose in action, which may endure beyond the trust term. Where the trust estate is of the character of that given by this testator, a fund that is to be invested and necessarily reinvested, the securities representing which the trustee may collect or dispose of, we think the doctrine laid down by Mr. Perry must obtain... In trusts of this character ... the whole title to the trust fund is in the trustee, and ... all the remaindermen have is a right to an account."

By section 60 the revisers seem to have intended to abolish the technical rules regarding legal and equitable estates, during the continuance of a valid express trust. Unfortunately, in 1896 the wording of section 60 was amended to provide that the trustee takes the "legal estate," and the cestui que trust shall not take any "legal estate." 65

Interest of cestui que trust inalienable. Exceptions. By section 63 66 the interest of the cestui que trust in trusts for the receipt of rents and profits of lands was expressly made inalienable, but the rights and interest of a cestui que trust for receipt of a sum in gross was expressly made assignable. This section has been applied ruthlessly by the courts so that the beneficiary of a trust for the receipt of rents and profits of lands, or the income of personal property, is unable by any conveyance, assignment or release, voluntarily or involuntarily, to dispose of his interest in the rents and profits or income of the trust. 67 Nor can that result be accomplished by the application of doctrines of laches, waiver, or estoppel. 68 No distinction has been made between trusts of personal property and those involving real property. Long before a statute was enacted expressly making the interest of the beneficiary of a personal property trust inalienable, his interest was held inalienable under the real property

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65This change does not seem to have been considered by the courts, and was probably not intended to change the meaning of the original section (60). See Vol. IV, REPORT OF THE BOARD OF STATUTORY CONSOLIDATION (1909) p. 4900.
This matter will be discussed in some detail below. Since 1897 the Personal Property Law has contained an express provision which clearly brings the law as to personal property into line with section 63. This section has been applied not only to trusts where the trustee was directed to apply the rents and profits to the use of the cestui que trust, and where the cestui que trust was an infant or married woman or might be incompetent to manage his own affairs, but also to trusts where the trustee was directed to pay over the rents and profits to a competent cestui quo trust. The creator of the trust cannot by any direction or permission confer upon the cestui que trust the power of alienating his interest. Nor can the Supreme Court order or consent to a termination of the trust or a conveyance by the cestui que trust. Nor can the creditors of a cestui qu trust of such a trust reach his interest except in accordance with the provisions of special statutes which enable such creditors to reach the surplus rents and profits over and above such as are necessary for the support and maintenance of the cestui que trust, and that maintenance and support is necessary to which the cestui que trust has been accustomed by reason of prior luxurious surround-
ings or habits. By another statute creditors can reach ten per cent of the income of such trusts, and apparently this remedy is in addition to that discussed above.

But the courts have, with apparent reluctance, held that a legacy of a fixed amount payable under a testamentary trust is a sum in gross, and therefore alienable by the "cestui que trust." The same is necessarily true of the interests of the "cestui que trust" under trusts of the first and second classes of section 55, since these are not trusts for the receipt of rents and profits. Likewise, the interest of an annuitant is alienable if it is in the nature of a sum in gross payable out of income and principal indiscriminately, under the third subdivision of section 55, or if provided for under the second subdivision, or if in the nature of an equitable charge, but not if payable out of and dependent upon the receipt of income and profits.

Furthermore, it has been held that where an accumulation of the income of property is directed, or results incidentally, in violation of the statute which permits accumulations only during the minority of an infant and for the benefit of the infant during whose minority the accumulation was made, and consequently such accumulation is payable to the "person presumptively entitled to the next eventual estate," this interest does not fall within the purview of section 63 and is alienable.

It is worth while to quote the language of Whitney, J., in the New York Supreme Court, Special Term, in a case so holding:

"Williams v. Thorn, supra note 75, at 278; Schuler v. Post, 18 App. Div. 374, 46 N. Y. Supp. 18 (1897). See also Magner v. Crooks, 139 Calif. 649, 73 Pac. 555 (1903)."

"Brearley School v. Ward, supra note 57, construing § 1391 C. C. P., as amended by L. 1908, c. 148, and holding it applicable to pre-existing trust.

"Radley v. Kuhn, 97 N. Y. 26, 31 (1884); Matter of Trumble, 199 N. Y. 454, 92 N. E. 1073 (1910), sum in gross payable in installments. See also Matter of Bloodgood, 184 App. Div. 798, 172 N. Y. Supp. 509 (1918), beneficiary to receive comfortable income and support can alienate.


"Clark v. Clark, 147 N. Y. 639, 42 N. E. 275 (1895); Buchanan v. Little, supra note 24; Peoples Trust Co. v. Flynn, 188 N. Y. 385, 80 N. E. 1098 (1907).


"Livingston v. Tucker, 107 N. Y. 549, 552, 14 N. E. 443 (1882), accumulation resulting from sale ordered by court.

"Beneficiaries may alienate except so far as the statute prohibits... Literally read, the statute as it existed at the date of the Bell will prohibited any assignment (R. S. 730, sec. 63), but I do not think that a literal reading is necessary since the object of the provision was merely to protect the persons who were the object of the grantor's or testator's bounty until the next eventual estate falls in. Meanwhile the income is derived from a statute analogous to the Statute of Distribution.

"The purview of the nonassignability clause should not be extended, for in its application to this class of trusts it extends a class of extravagance-free and luxury-free, but judgment-proof and execution-proof, incomes, that, in the case of beneficiaries sui juris, are contrary to the present views of the public policy in this state... are disapproved by high authority elsewhere (Gray on Restraint on the Alienation of Property [2d ed.] Appendix 1A), and quite probably were never intended by the revisers who drew or the legislature which adopted the statute whose protection this lady seeks."

It was finally decided by a divided court that the interest of a beneficiary of a trust for the receipt of rents and profits, who was himself the settlor of the trust, could be reached by his creditors, even though the trust was created while the settlor was solvent, and the claims of his creditors arose thereafter. And "it necessarily follows from that decision (Schenck v. Barnes, 156 N. Y. 316) that the prohibition against the alienation by a life beneficiary of rents, issues and profits, contained in section 63 of article 2 of title 2 of chapter 1 of part 2 of the Revised Statutes, does not apply where the life beneficiary is the settlor of the trust; and it necessarily follows that it was competent for the settlor of the trust to assign her interest in the income, as she did in the case at bar, by giving a mortgage thereon." And when the cestui que trust could demand the corpus at any time his creditors could also reach it, and the remainder after a valid trust is alienable by the owner thereof and can be

ability of the beneficiaries' interest to cases where the income or rents and profits are to be applied to his use, thereby excluding trusts for accumulation. But see Vol. IV, REPORT OF THE BOARD OF STATUTORY CONSOLIDATION (1909) p. 4900.

86Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 (1898).


88Where the beneficiary has absolute control of the fund, or an absolute right to reach the corpus, his creditors can reach both income and corpus, whether beneficiary was also settlor or not. Hallett v. Thompson, supra note 74, personal property, express provision against alienation; Wainwright v. Low, 132 N. Y. 313, 319, 30 N. E. 747 (1892), held no trust; Ullman v. Cameron, 186 N. Y. 339, 78 N. E. 1074 (1906), personal property.
reached by his creditors. It seems that an assignment by the beneficiary of accrued income, in the form of a direction to the trustee to pay it over to the assignee, will protect the trustee in making such payment, the statute being directed at an assignment by way of anticipation.

The trustee is prohibited from alienating. By section 65 of the Revised Statutes the trustee of a real property trust could not convey in contravention of the trust. It is believed that this section expresses little more than a rule of courts of equity which would be applied to alienation by trustees even in the absence of the statute, with the additional feature that by the statute a purchaser from the trustee cannot be a bona fide purchaser for value where the trust is declared in the instrument vesting the estate. No corresponding statute has been enacted with reference to trusts of personal property. This, however, could have made little difference in the results of the decided cases. Section 65 has been interpreted as prohibiting alienation by the trustee of the particular trust property in contravention of the trust, and also as a prohibition against terminating or destroying the trust, and as so construed, it has been applied to trusts of real and personal property alike. It was held in Hawley v. James, the first case on this point to reach the Court of Errors, that the statutory prohibition against alienation by a trustee rendered his estate inalienable within the meaning of the statute against suspending the power of alienation; furthermore, that the same result would follow even though the trustee could exchange the property or sell

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90Estate of Valentine, 5 Misc. 479, 26 N. Y. Supp. 716 (1893); Heise v. Wells, 211 N. Y. 1, 104 N. E. 1120 (1914), revocable power of attorney; Matter of Yard, 116 Misc. 19, 189 N. Y. Supp. 190 (1921), where assignment by anticipation was upheld; Matter of Oakley, 116 Misc. 494, 190 N. Y. Supp. 157 (1921); see also Slater v. Slater, supra note 74, assignment to son of percentage of income void; Seeley v. Fletcher, 63 Misc. 448, 117 N. Y. Supp. 86 (1909), duty of trustee to disregard power of attorney to creditor.
91Section 63 does not apply to a trust created in another state, and trustee appointed there—First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 472, 51 N. E. 398 (1898).
93Bogert, Trusts (1921) § 88.
95McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411 (1887); Cochrane v. Schell, supra note 9, at 534, semble; Matter of Wentworth, supra note 68.
96Supra note 18, at 163.
it and reinvest the proceeds. As was said by Chancellor Walworth when this case was before the Court of Chancery:96

"The mere exchange of one piece of property for another, by a trustee, under a valid power in trust, is not considered an alienation of the estate or interest of the cestui que trust...
The rules of law... have reference to the substance, and not merely to the shadow. And for every substantial purpose, the land received in exchange for that of which the testator died seized, can be considered in no other light than as the same estate. A mere power to exchange land, whether such exchange is made directly or by means of a sale and new purchase, is not a power to alien the estate, within the intent and meaning of the... revised statutes on this subject. As well might it be contended that a bequest of personal property was not rendered inalienable, because the trustee who held it for the benefit of another had the right to loan it out from time to time, and to receive other money, when it became payable, instead of that which was lent; although he had no right to dispose of the fund itself."

The case was expressly affirmed as to this point in the Court of Errors, and this result has never been departed from in subsequent cases.97 Likewise, where real property is conveyed on trust for one life to be then sold and converted into personal property and held for other lives, it was held that "estates cannot be tied up during one life by a trust in lands, and then for two lives more as personal property, by means of a direction to convert them into money or personalty, and then impressing on them new limitations in that form."98

While therefore, it is perfectly possible for the creator of the trust to confer on the trustee a power of sale or exchange,99 which will not be in violation of section 65 since the trustee is only forbidden to sell in contravention of the trust, (though this result was reached only after considerable argument), yet "such a power would not obviate the objection as to inalienability within the rule against

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965 Paige, 318, 444-5 (N. Y. 1835).
perpetuities." The trust attaches to the funds produced by the sale, or the property received in exchange, and the objection is to a trust which may not be destroyed or terminated at will. However, as appears more fully elsewhere in this paper, there is no suspension of the power of alienation if the trustee is empowered to sell and free the fund from the trust, or to convey the property to the cestui que trust.

Revocation by settlor. While the reservation of a power of revocation in the creator of a trust or the giving of a power to the trustee to destroy the trust at will, is not inconsistent with the existence of a valid trust, saving rights of creditors, yet in the absence of such a reservation the settlor may not revoke the trust. The creator may, however, reserve such large rights of control and enjoyment that no trust will result. So long as an unconditional power of revocation exists in the creator, or a power to destroy the trust rests in the trustee, there can be no suspension of the power of alienation.

III. MEANING OF "SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION" AND "SUSPENSION OF THE ABSOLUTE OWNERSHIP."

The terms "suspension of the absolute power of alienation" and "suspension of the absolute ownership" seem to have been coined by the revisers, though somewhat similar phrases may be found in the reported cases from early times in connection with the common
law rule against perpetuities. Section 42 of the New York Real Property Law provides: 165

"The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; . . ."

Section 11 of the New York Personal Property Law provides, 167

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

Section 42 of the Real Property Law, as we have seen, defines suspension of "the absolute power of alienation." It was said in an early case that "the term 'suspense of absolute ownership', applied to personal property, means the same thing as 'suspense of the power of alienation' applied to real property." 168 The power of alienation or absolute ownership is suspended only while there are no persons in being and ascertained, by whom an absolute interest can be conveyed.

165 Formerly, R. S. §§ 14, 15 and 16:
§ 14. "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

§ 15. "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section of this Article.

§ 16. "A contingent remainder in fee, may be created on a prior remainder in fee, to take effect in the event that the person to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain that age."

167 Formerly, R. S., Part II, Title IV, c. IV, §§ 1 and 2, without substantial change.

168 Gott v. Cook, supra note 7, at 543; Emmons v. Cairns, 3 Barb. 243, 244-5 (N. Y. 1848).
As was said in Sawyer v. Cubby, "the statutory test of what constitutes a suspension . . . of absolute ownership as to personal property, is that it occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed." This statement was amplified somewhat by Vann, J., in Williams v. Montgomery, in considering whether the absolute ownership of stock could be suspended by agreement of the owners. He said:

"There was no suspension of absolute ownership, because the statute expressly declares that the 'Power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.' (R. S. 723, Sec. 14.) While this applies primarily to real estate, by a subsequent chapter it is made applicable to personal property also. (I R. S. 773, Sec. 2.) The test of alienability of real or personal property is that there are persons in being who can give a perfect title. . . . Where there are living parties who have unitedly the entire right of ownership, the statute has no application. . . . The ownership is absolute whether the power to sell resides in one individual or in several."

Since 1899 it seems that suspension of the absolute ownership and suspension of the absolute power of alienation also include the idea of remoteness of vesting.

Common law rule against restraints on alienation distinguished. The statutory rule against suspension of the power of alienation should not be confused with the common law rule against restraints on the alienation of property. The statutory rule is directed at suspension of the power of alienation for a longer period than during two lives in being at the creation of the estate or interest. If the power of alienation is not suspended, or if it is suspended only during one life in being or two lives in being, the statutory rule is not violated. If by any possibility the statutory rule may be violated, the whole

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109 146 N. Y. 192, 196, 40 N. E. 869 (1895). Cf. Wells v. Squires, supra note 80, at 503-4, "It is perfectly well settled that there can be no suspension of absolute ownership when there are persons in being who can convey an absolute title."

110 148 N. Y. 519, 525-6, 43 N. Y. 57 (1896).


112 See, generally, Gray, Restraints on the Alienation of Property (2d ed. 1895); Gray, op. cit. supra note 1, §§ 118a, 119, 268 et seq.; Kales, Estates, Future Interests and Illegal Conditions and Restraints (2d ed. 1920) Chaps. XXVII, XXVIII; Sweet, Restraints on Alienation (1917) 33 L. Q. Rev. 236, 342.

113 Robert v. Corning, supra note 19.
estate or interest is void ab initio. The common law rule against restraints on alienation is directed primarily at restraints on the alienation of vested absolute interests, as for example, when a fee simple is conveyed and in the deed the grantee is forbidden to alienate or encumber his interest on pain of forfeiture. In such case the power of alienation is not suspended, the grantee can convey good title, and in the normal case the restraint is itself void, but the deed good.

It is beyond the scope of this paper to discuss in detail the limits of the rule that restraints on the alienation of fee simple interests in land or similar interests in chattels are void, or to what extent such restraints partial as to time or as to persons, or restraints on the alienation of estates for years and for life or other qualified interests, or restraints on equitable interests, may be valid.

Attention should be called, however, to the fact that much of the common law rule remains in force in New York, but it does not cover the same field which is covered by the statutory rule.

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14R. P. L. § 42, quoted supra; Schettler v. Smith, 41 N. Y. 328, 334 (1869).

"The rule is that where, by the terms of an instrument creating an estate, there may be an unlawful suspension of the power of alienation or of the absolute ownership, the limitation is void, although it turn out by subsequent events that no actual suspension beyond the prescribed period would have taken place. In other words, to render such future estates created by will valid, they must be so limited that in every possible contingency they will absolutely terminate within the period of two lives in being at the death of the testator, or the estate will be held void." Martin, J., in Hertzog v. Title G. & T. Co., 177 N. Y. 86, 99, 69 N. E. 283 (1903).

"To render a trust valid, it must be so limited that in every possible contingency there will be an absolute termination thereof within the period prescribed by statute." Matter of Hitchcock, 222 N. Y. 57, 71, 118 N. E. 220 (1917).

15Re Posher, 26 Ch. D. 801 (1884); Re Dugdale, 38 Ch. D. 176 (1888), equitable estate in fee; Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005 (1890); Murray v. Green, 64 Calif. 363, 28 Pac. 118 (1893); Davis v. Hutchinson, 282 Ill. 523, 118 N. E. 721 (1918); Schermerhorn v. Negus, 1 Denio, 448 (N. Y. 1845); DePeyster v. Michael, 6. N. Y. 467 (1852), money penalty for alienation and reservation of pre-emptive right of purchase.

16Fears v. Brooks, 12 Ga. 195 (1852), alienation of separate estate of married woman may be restrained; First Universalist Soc. v. Boland, 155 Mass. 171, 29 N. E. 524 (1892), restraint on alienation by a charity valid.

17See (1920) 5 CORNELL LAW QUARTERLY 361, and Mandlebaum v. McDonnel, 29 Mich. 78 (1874).

18Supra note 112. See also Cowell v. Springs Co., 100 U. S. 55 (1879); Plumb v. Tubbs, 41 N. Y. 442 (1869).

19Schermerhorn v. Negus, supra note 115, restraints on alienation by children except to each other, void; DePeyster v. Michael, supra note 115; Greene, v. Greene, 125 N. Y. 506, 512, 26 N. E. 739 (1891), where trust for three sons failed by merger and sons took fee, restraints against alienation and partition for six
IV. How the Power of Alienation May be Suspended

The language of the courts. It has been frequently stated that suspension of the power of alienation is caused in two ways, by the creation of contingent future interests, and by the creation of a trust. Thus in Leonard v. Burr, Denio, J., used this language:

"There are two methods by which the absolute ownership and power of alienation may be suspended. One is by creating a future estate by way of executory devise or contingent remainder. In such cases, as it cannot be known in whom the future estate will ultimately vest, and as the person in whom it will so vest may not be in existence, no person can convey an absolute fee. The present case belongs to this class... The other manner is by annexing to a present absolute estate in fee a trust, which by the general provisions of law would render it inalienable (R. S. 730, Sec. 60), or by directing the income or profits to be applied in perpetuity to some charitable purpose, in which case an alienation would be hostile to the object of the conveyance."

It should be noted that Judge Denio was dealing with a case which involved possible suspension of the power of alienation by reason of the attempted creation of a future contingent interest, where the contingency was as to the person, and his statement that contingent future interests may suspend the power of alienation is expressly limited to future interests, contingent as to the person. It is obvious that suspension of the power of alienation must result from the creation of a future contingent interest vesting upon the happening of some future uncertain event, and in respect of which that person in whom the estate may vest cannot now be ascertained or may not be in esse. Since suspension of the power of alienation by a trust was not involved in Leonard v. Burr, we will examine the language of Earl, J., in Murphy v. Whitney, where he said:

"Estates can be rendered inalienable by vesting them in trustees upon some one of the valid trusts mentioned in section 55 of the..."
article upon trusts, so that they become inalienable under section 65 for a period of more than two lives in being at the creation of the trust, or by the creation of future, contingent or expectant estates so that there are no persons in being during the two lives who can convey a perfect title. (Smith v. Edwards, 88 N. Y. 104.) Here none of these conditions existed.”

While no trust existed in Murphy v. Whitney, Judge Earl’s statement has been selected because it expresses the way in which the power of alienation may be suspended by a trust more accurately than is done in many cases. It is to be noted that such suspension results only where the estate is vested in trustees upon one of the valid trusts mentioned in section 55, and in respect of which inalienability results under sections 63 and 65 for a period of more than two lives in being. As we have seen, the interest of the beneficiary in trusts of the third and fourth classes under section 55 was rendered inalienable by section 63. Likewise, the interest of the trustee, who had the whole estate under section 60 was rendered inalienable by section 65. It is by reason of these provisions that the power of alienation was suspended by the creation of a trust under the third and fourth subdivisions of section 55. Suspension of the power of alienation by contingent future interests and by trusts will be discussed in detail below. It should be noted at this point that suspension of the power of alienation is not caused by the attempt to create a passive trust which is executed by the statute, nor by an equitable charge, nor by the mere creation of a power.

Suspension of Alienation by powers. It remains to consider whether the power of alienation may be suspended in any other manner. It

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12R. S. § 55; now, R. P. L. § 96.
14See supra page 43. The power of alienation cannot be suspended by trusts of the first and second classes where the trustee must at all times have the power to sell and terminate the trust. See Radley v. Kuhn, supra note 78. But see note 85, supra.
11Supra, p. 41.
12Supra, p. 47.
13Denison v. Denison, supra note 22; Wendt v. Walsh, supra note 23.
14See cases cited, supra note 24.
15Tucker v. Tucker, 5 N. Y. 408 (1851); Henderson v. Henderson, supra note 11; Quade v. Bertsch, 65 App. Div. 600, 607, 72 N. Y. Supp. 916 (1901), aff’d, 137 N. Y. 615, 66 N. E. 1115, where the court said, “Even if the testator did attempt to create a trust estate, the trust would be illegal, and could have no force or effect upon the question at bar (Smith v. Edwards, 88 N. Y. 92, 102, 103), while the deferring of payment, through the creation of a power in trust meanwhile, is not a suspension of the absolute ownership of the property.”
was said by Chief Judge Parker in Wilber v. Wilber,127 "there are only two methods by which such a result can be accomplished: 1. by the creation of a trust which vests the estate in trustees; 2. by the creation of future estates vesting upon the occurrence of some future and contingent event." It should be noted that Judge Parker did not limit the second part of his statement to contingent remainders which were contingent as to the person, as Judge Denio had carefully done in Leonard v. Burr.128 Nor did he limit the first part of his statement as Judge Earl had done in Murphy v. Whitney.129 Unfortunately, the courts have not always been careful to qualify their language in speaking of the ways in which the power of alienation may be suspended.130 Furthermore, it should be noted that suspension of the power of alienation may also be caused by the creation of a power. The extremely technical and complex rules of the common law of powers were swept away by the Revised Statutes, and a statutory system of powers substituted. Any detailed consideration of this system is beyond the scope of this paper, but attention must be directed to two sections of the Article on powers and their effect in causing suspension of the power of alienation in certain cases. By section 128,131 the common law doctrine of relation in the law of powers was preserved, and by section 129132 it was provided,

"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."

Under these provisions, by the application of the doctrine of relation,133 an instrument in execution of a power may cause suspension of the power of alienation by creating a trust or by the limitation of a
future contingent interest, contingent as to the person.\textsuperscript{134} As was said by Denio, C. J. in \textit{Everitt v. Everitt}:\textsuperscript{135}

"But a perpetuity can no more be created by the execution of a power than by a direct devise or conveyance; and the period during which the power of alienation may be suspended by an instrument in execution of a power, is to be computed from the time of the creation of the power."

Furthermore, a power may cause suspension of the power of alienation where by its terms it is not vested in a person \textit{in esse}, or not to be exercised until a time too remote. This was well expressed by Judge Finch in \textit{Matter of Will of Butterfield},\textsuperscript{136} as follows:

"The power of sale conferred upon the executrix suspends the absolute power of alienation beyond the permitted period. It is limited not upon lives in being as the statute requires, but upon five minorities which may prevent a complete transfer for as many lives. No conveyance could give a perfect and absolute title while overshadowed by the trust power which might, at any time during the prescribed minorities, defeat the estate granted."

So also the existence or exercise of a power may contribute to cause a suspension where, for example, a power of sale is to be exercised after four years, and the proceeds paid over to a trustee upon a void trust.\textsuperscript{137} Other ways in which the existence of a power, or its exercise, may cause or contribute to the suspension of, the power of alienation will be considered below in connection with suspension by trusts.

\textit{Suspension by contingent future interests.} At common law a contingent future interest, in the nature of an executory devise or springing use, or a contingent remainder, which may by any possibility vest in interest after lives in being and twenty-one years and a possible period of gestation, is void in its creation.\textsuperscript{138} This is now known as

\textsuperscript{134}Genet v. Hunt, \textit{supra} note 57. A power to sell, or any power not inconsistent with alienation, cannot cause suspension. Tucker v. Tucker, 5 N. Y. 408 (1851); Henderson v. Henderson, 113 N. Y. 1, 20 N. E. 814 (1889); Matter of Young, 145 N. Y. 535, 40 N. E. 226 (1895); Steinway v. Steinway, \textit{supra} note 121.

\textsuperscript{135}Supra note 120, at p. 78.

\textsuperscript{136}133 N. Y. 473, 475, \textit{In re Christie}, 31 N. E. 515 (1892), power of sale not to be exercised until after five minorities. But where all interests are vested, and no trust intervenes, the beneficiaries of a power to sell and distribute the proceeds can override the power, unless a contrary intent appears. Hetzel v. Barber, 69 N. Y. 1, 11-12 (1877); Trask v. Sturges, 170 N. Y. 482, 497, 63 N. E. 534 (1902).

\textsuperscript{137}Garvey v. McDevitt, 72 N. Y. 556 (1878). \textit{Accord:} Van Vechten v. Van Vechten, 8 Paige, 104, 124 (N. Y. 1840).

\textsuperscript{138}Cadell v. Palmer, 1 Clark & F. 372 (H. L. 1833); Evans v. Walker, 3 Ch. D. 211 (1876); Abbiss v. Burney, 17 Ch. D. 211 (1881); London & S. W. Ry. Co. v. Gomm, 20 Ch. D. 562 (1882); \textit{In re Ashforth}, [1903] 1 Ch. 535; and see Gray, \textit{loc. cit. supra} note 2; KALES, \textit{op. cit. supra} note 112, Chaps. VI, XXVI.
the rule against remoteness of vesting.\textsuperscript{139} There has been a sharp dispute as to whether the common law rule in New York was, at the time of the adoption of the Revised Statutes in 1828, a rule against remoteness of vesting or a rule against the creation of inalienable future interests. We shall have occasion to refer to this matter again,\textsuperscript{140} but there can be no doubt that by section 42 of the Real Property Law, and section 11 of the Personal Property Law, as interpreted by the courts, there exists in New York a rule against the creation of contingent future interests, which may by any possibility vest in interest at a time too remote, and in respect of which the person in whom the interest may vest cannot be ascertained or may not be \textit{in esse} until a time too remote.\textsuperscript{141} If a testator should devise lands to B "until Gloversville shall be incorporated as a village," and then to the descendents of C then living, obviously the incorporation of the village might happen after the termination of more than two lives in being, and the descendents of C who could qualify to take could not be ascertained until the happening of the event, and might not be \textit{in esse}. Such a devise would occasion an illegal suspension of the power of alienation. B's estate would be good until the happening of the event named, but the remainder would fail, and a possibility of reverter result to the grantor and his heirs.\textsuperscript{142} So, where a testator directed his executors to keep $30,000 invested and to make certain dispositions of the income, and when his "youngest grandchild born, or that may within 20 years be born, shall arrive at full age, or if a granddaughter shall sooner be lawfully married," then to divide a portion of this fund between all his grandchildren then living, including those born after his death, the court found that no trust was created by this portion of the will, but the interests of the grandchildren were necessarily contingent since "the condition of survival attaches to the gift itself; who the legatees would in fact prove to be depended upon a future contingency. Those who were to take in the prescribed event were uncertain until it happened; might not be any one of those \textit{in esse} at testator's death; and might prove to be a grandchild born 20 years later. The ultimate vesting of this

\textsuperscript{139}Gray, \textit{op. cit. supra} note 2, Chaps. I, VII.
\textsuperscript{140}\textit{Infra,} second installment of this article.
\textsuperscript{141}Schettler v. Smith, \textit{supra} note 114; Knox v. Jones, 47 N. Y. 389 (1872); Purdy v. Hoyt, 92 N.Y. 446 (1883); Greenland v. Waddell, \textit{supra} note 111, at 244-56.
\textsuperscript{142}Leonard v. Burr, \textit{supra} note 120.
portion of the principal of the special fund was, therefore, plainly postponed for 20 years, and not during designated lives in being, and must be declared invalid."113 This is a clear case of suspension of the power of alienation of a fund by future limitations contingent as to the person, for a period of years, or during possible unborn lives, in either of which cases it is illegal and void.

So also, where a testator, after having validly limited his estate in trust for the lives of his two youngest children, by a codicil attempted to provide that in case one daughter (not one of the two youngest) should marry X, then a certain portion should be held during her life also, to pay her an annuity, and upon her death to be divided among her surviving children, it was held, without deciding whether or not the annuity so given suspended the power of alienation, that the disposition to the grandchildren of the testator suspended alienation by reason of the fact that their interests were unvested and they would not be ascertained until after the termination of three lives in being. The whole codicil failed, but the will was saved.144

In many cases suspension of the power of alienation may be found either in the fact that a future interest, contingent as to the person, has been limited after more than two lives in being, or after a period in gross, or in the fact that a present trust has been created by the same instrument, suspending the power of alienation for more than two lives in being or for a period of years.145 This was the situation in Benedict v. Salmon,146 where a residence was devised to trustees to hold as a home for the use and occupation of any of eight daughters who should be unmarried or widows, until the death of the survivor, with remainders to the children of the daughters then living. The trust was held void as there was no one who could convey an absolute fee in possession, and the future estate given to the children was also void. Wherever the testator creates a trust for more than two lives

116Supra note 145.
SUSPENSION OF ALIENATION IN NEW YORK

in being, followed by a remainder contingent as to the person, the
disposition is held void, but there will be no illegal suspension of
alienation if the present interests are given absolutely and not by
way of trust, and the future estate must vest in interest within the
required period of two lives in being, even though possession or
payment over may be postponed.

In addition to the invalidity of future interests contingent as to
the person, which suspend the power of alienation for a period beyond
two lives in being, it seems to be established in New York today that
where there is no uncertainty as to the person to take and conse-
quently no period of inalienability, but only an uncertainty as to
the happening of the event upon which the future estate or interest
is to vest in designated persons, nevertheless such contingent interests
are void if vesting may be postponed beyond two lives in being.

This is nothing more nor less than the continuance of the common law
rule against remoteness of vesting.

Suspension of alienation by trusts. As has been pointed out, sus-
pension of the power of alienation may be caused by the creation of
certain kinds of trusts, and if they may by any possibility continue
beyond the period permitted by law, then the trusts fail ab initio.

It is apparent that trusts of the first and second classes do not
suspend the power of alienation, since they are expressly created
for the purpose of enabling the trustee to alienate the property,
and the interests of beneficiaries of such trusts are not inalienable
under section 63. Trusts of the fourth class generally cause sus-
pension of the power of alienation, but they are otherwise limited
so that this question does not usually arise. It is in respect of
trusts of the third class that suspension of the power of alienation
most often occurs. While the statement will be found in many cases
that the absolute power of alienation is suspended by the creation

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147Wilber v. Wilber, supra note 127, devise to grandchildren of whom one was
in being, subject to an estate for fifteen years in three named persons, there
being no trust. See also Durfee v. Pomeroy, 154 N. Y. 583, 49 N. E. 132 (1898);
Matter of Roberts, supra note 130.
148Matter of Ossman v. Van Roeer, 221 N. Y. 381, 117 N. E. 576 (1917);
149Dote v. Yost, supra note 144; Matter of Wilcox, supra note 111; Walker v.
Marcellus, etc. Ry., ibid.
150Coster v. Lorillard, 14 Wend. 265 (N. Y. 1835); Hertzog v. Title G. & T. Co.,
supra note 114.
Supra p. 33, 45.
Supra p. 43.
Supra p. 39-40.
of a trust vesting the estate in trustees upon an authorized trust, these dicta are obviously too broad. The only trusts which suspend the power of alienation are those in which the trustee and beneficiary are forbidden by statute to convey their respective interests, in other words, trusts of the third and fourth classes under section 55. Moreover, even in trusts of these classes if the trustee has power to alienate the property and terminate the trust, no suspension results. In Robert v. Corning, trustees were directed to sell the testator's real estate in New York after three weeks public notice, and other real estate in whatever manner they saw fit, with the privilege of delaying in their discretion for a period of not more than three years. It was held that whether the trustees took a trust estate or merely a power, no suspension of the power of alienation resulted, and the provision for three week's notice did not matter. These principles are expressed with unusual clarity by Andrews, Ch. J., in the case named:

"Construing sections 14, and 15, together, it is manifest, that where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute fee in possession, there is no suspension of the power of alienation.

"If the suspension is effected by the creation of future contingent estates, the validity of the limitation depends upon the question whether the contingency upon which the estates depend, must happen within the prescribed period. If the suspension is effected by the creation of an express trust to receive the rents and profits of land, under section 55 of the statute of uses and trusts (R. S. 728), the lawfulness of the suspension, depends upon the question, whether the trust term is in respect of duration, lawfully constituted. But the mere creation of a trust, does not, ipso facto, suspend the power of alienation. It is only suspended by such a trust, where a trust term is created, either expressly or by implication, during the existence of which, a sale by the trustee, would be in contravention of the trust. Where the trustee is impowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed, by the non-action of the trustee, or, in consequence of a discretion reposed in him, by the

183 Supra p. 53 et seq.
184 Supra note 19.
185 At pp. 235-6; and at p. 238 he continued, "The direction that the real estate in this state should be sold at public sale, on three weeks' notice, was a prudential arrangement to insure a fair sale, and prevent a sacrifice of the property, and in no proper sense suspended the power of alienation... The statute of perpetuities is not violated by directions which may involve some delay in the actual conversion or division of the property, rising from the necessity of giving notice, or doing other preliminary acts... Such delays are not within the reason or policy of the statute."
creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason, that the trustees are persons in being, who can, at any time, convey an absolute fee in possession."

Robert v. Corning settled the law on this point and has been followed in many cases. But if the trustee has a mere power to exchange the trust property for other property, or to sell and reinvest in other property which is to continue subject to the trust, we have seen that this is not such a power of alienation as will satisfy the statute and obviate suspension of the power of alienation.

Power of revocation by settlor, or power in trustee to convey to settlor or beneficiary. Where the trustee has an absolute power to reconvey the trust property to the settlor, there can be no suspension of the power of alienation, and the same result fellows where the settlor reserves a power of revoking the trust. So also, there will be no suspension of the power of alienation where the trustee has an absolute power to convey the property to the beneficiary. If, however, the trustee is given only a right to terminate the trust or to

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But see In re Perkins Estate, supra note 2, where a trust for three lives was held void although the trustees were expressly given power in their discretion to terminate the trust during one of the lives if in their discretion they deemed the beneficiary able to take care of the property, considering his habits, capacity and other circumstances. The majority of the court thought the case distinguishable from Robert v. Corning. Two judges dissented.

187Supra p. 48.
188Van Cott v. Prentice, supra note 56.
189Von Hesse v. MacKay, supra note 25, such power could not be for purpose of defrauding creditors of settlor; Schreyer v. Schreyer, supra note 105, power of revocation not inconsistent with continuance of trust; Equitable Trust Co. v.
convey the property to the *cestui que trust*, when in his discretion the latter stands in need of the *corpus* for his support or when the trustee deems the *cestui que trust* of sober habits and capable of taking care of the property, it has been held that the statute is not satisfied.\(^6\)

If the power of the trustee to terminate the trust is dependent upon contingencies, it is obviously not an absolute power of alienation, and does not satisfy the statute. Thus, where the trustee had power to sell only for a given sum,\(^6\) or with the consent of the Supreme Court,\(^6\) the statute was not satisfied, since he may not be able to sell for the sum named, and the Supreme Court is not free to consent unless the facts warrant it.\(^6\) But where the trustee has power to terminate the trust with the consent of designated persons who are *in esse* and free to consent, the statute is satisfied.\(^6\)

So also, while it seems to be settled that the statutory prohibition against alienation by the *cestui que trust* is absolute, and the settlor or testator cannot give him power to alienate, yet he may be given power to demand or consent to a conveyance or sale and termination of the trust by the trustee, and this will obviate suspension of the

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Pratt, *supra* note 105, reserved power of revocation obviated suspension during life of settlor.

See also Marvin v. Smith, *supra* note 103, settlor cannot revoke unless right of revocation reserved, even with consent of beneficiary; Arthur v. Gordon, *supra* note 103, to same effect; Matter of Masury, *supra* note 104, existence of power to revoke in settlor does not make property taxable as inheritance on his death; Matter of Bostwick, *supra* note 104, *aliter*, where grantor reserves entire control and enjoyment during his life; Brown v. Spohr, *supra* note 25, reservation of power to revoke or modify and recital that beneficiaries took through settlor's bounty not illegal in personal property trust; Matter of Carnegie, 203 App. Div. 91, 196 N. Y. Supp. 502 (1922), aff'd, 236 N. Y. 517, 142 N. E. 266, where settlor reserved right to revoke as to part and right to change beneficiaries, not subject to transfer tax on his death.


O'Donaghue v. Smith, 184 N. Y. 365, 374, 77 N. E. 621 (1906).

power of alienation. If the cestui que trust were free to convey or release his interest to the trustee, the trust could be destroyed by merger, and there would be no suspension of the power of alienation, even though the trustee could not alienate before such release. It does not matter that the power of alienation rests in many persons, all of whom must join to convey a perfect title. As was said by Vann, J., in Williams v. Montgomery,

"There was no suspension of absolute ownership, because the statute expressly declares that the 'power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed' (R. S. 723, sec. 14.). While this applies primarily to real estate, by a subsequent chapter it is made applicable to personal property also (R. S. 773, sec. 2.). The test of alienability of real and personal property is that there are persons in being who can give a perfect title... Where there are living parties who have unitedly the entire right of ownership, the statute has no application... The ownership is absolute whether the power to sell resides in one individual or in several. If there is a present right to dispose of the entire interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation. The ownership, although divided, continues absolute."

Revocation or destruction of the trust under statutory provisions. Under the provisions of section 23 of the Personal Property Law the creator of a trust is authorized to revoke the same "upon the written consent of all the persons beneficially interested in a trust of personal property or any part thereof." It is obvious that suspension of alienation cannot be avoided under this provision in respect of testamentary trusts or real property trusts. Where, however, the grantor or settlor of a personal property trust is in esse, and the consent in writing of all the persons beneficially interested in such trust can be secured, it is apparent that there is no suspension of the power of alienation during the lifetime of the settlor. It does not matter that such trust can only be revoked by the consent of many

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165Marvin v. Smith, supra note 103, and cases cited supra note 164. See also Crooke v. County of Kings, supra note 61, at 447.


167L. 1909, c. 247, not in R. S.
persons, and it has been held that under this section it is impossible and therefore unnecessary to secure the consent of contingent remaindermen who are not in esse, since the court can provide for the protection of their future contingent interests. Section 23 is applicable although the trust is in terms declared to be irrevocable.

In 1893 section 63 of the Revised Statutes was amended to permit the beneficiary of a real or personal property trust, who was entitled to receive rents and profits or income for his life or a shorter period, and who was also entitled to the remainder in the whole or a part of such trust fund, to release his interest in the rents and profits or income and thereby destroy the trusts. We will not examine in detail the provisions of this amendment, but attention should be called to the fact that for a period of ten years while this statute was in force it was possible for the cestui que trust to buy in the remainder and then destroy the trust. So it would seem that during this period the power of alienation of real property and the absolute ownership of personal property was not in any case suspended by the creation of a trust for beneficiaries for their lives except when the remainder was inalienable. When the old law was restored in 1903, a saving clause was inserted preserving the right to terminate such a trust by merger where it existed on that date. Merger under these statutes was not confined to cases where the remainder had devolved on the beneficiary by operation of law.

168 Hammerstein v. Equitable Tr. Co., supra note 166.
173 Mills v. Mills, supra note 166; Matter of U. S. Trust Co., 175 N. Y. 304, 67 N. E. 614 (1903), right of life beneficiary to remainder must be absolute before he can destroy trust; Metcalfe v. Union Trust Co., supra note 57, whether provision retroactive.
174 L. 1903, c. 88.
176 Mills v. Mills, supra note 166.
Suspension is not obviated by merger, laches, waiver or estoppel. But before 1893, and since 1903 no merger results where the life beneficiary of a trust acquires the remainder by purchase or otherwise. His right to the remainder may be vested and alienable, but cannot vest in possession until the prior trust runs its normal course. This prohibition against destruction of a trust by merger was not applied in Matter of Bloodgood, which was not a trust to receive income. And where the beneficial interest in the trust fund, or in a divisible share thereof, is vested in the trustee by virtue of the instrument creating the trust, a merger results since the proposition "that the legal and beneficial estates can exist and be maintained separately in the same person is an inconceivable proposition." Some doubt was cast on this point in Losey v. Stanley, and certainly no merger results by reason of the fact that the trustee is also the beneficiary unless he was so designated by the will or instrument creating the trust.

The rules as to suspension of alienation of the interest of a cestui que trust are not obviated by the possibility of a bar by estoppel, laches, or waiver, or by compromise or conveyance under the authority of the Supreme Court. Thus, in Matter of Wentworth

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178Greene v. Greene, 125 N. Y. 506, 26 N. E. 739 (1891), devise of lands to three sons in trust to receive and retain rents and profits, remainder to heirs, subject to certain charges. Accord: Woodward v. James, 115 N. Y. 346, 357, 22 N. E. 150 (1889); Rose v. Hatch, 125 N. Y. 427, 26 N. E. 467 (1891). But see Rogers v. Rogers, 111 N. Y. 228, 237, 18 N. E. 636 (1888), fact beneficiary was one of several trustees does not cause merger even when he becomes sole trustee as court will appoint others or will itself administer trust; Robertson v. De-Brulatour, 188 N. Y. 301, 317, 80 N. E. 938 (1907), to same effect; Major v. Major, 177 App. Div. 102, 163 N. Y. Supp. 925 (1917), aliter, where sole trustee with power to pay over to self.
179147 N. Y. 560, 568, 42 N. E. 8 (1895).
180Rogers v. Rogers, supra note 178.
182Genet v. Hunt, supra note 57, at 172; Cuthbert v. Chauvet, supra note 73.
183Supra note 68, at 183. See also the report of the same case when it was before the Appellate Division, 190 App. Div. 829, 181 N. Y. Supp. 442.
where the trustee with the consent of the cestui que trust conveyed
the trust property with the object of freeing it from the trust and
to enable the cestui que trust to speculate with the proceeds, and as
a result the money was lost, it was held that the trustee must account
for the property, Chief Judge Hiscock saying:

"We are all agreed upon what seems to be an obvious view that
if the interest of the cestui que trust in and under this trust was
by statute inalienable, the prohibition of the statute could not be
circumvented by any process of estoppel... The cases in this
court which he (appellant) cites... are those where a court of
equity has refused to approve the inequitable attempt of a cestui
que trust to hold a trustee personally responsible for doing what
he himself had asked, or where under peculiar circumstances
... the court has refused to disregard the conduct of the cestui
que trust and hold the trustee responsible for some feature of
mere mismanagement. On the contrary, the principle that
estoppel may not be employed as a means of accomplishing the
violation of a statute in the case of a trust is expressly recognized
in Douglas v. Cruger (80 N. Y. 15, 20)."

The possibility that the legislature may in certain cases authorize
a sale or partition by the trustee or cestui que trust, or both, does not
save a trust which is otherwise void for illegal suspension of the power
of alienation. Under statutes specifically authorizing the bene-
ficiary in certain cases to end the trust and acquire or convey an
absolute title, all suspension of the power of alienation is obviated.
The Supreme Court has no authority to authorize destruction of a
trust for the receipt of rents and profits or income, even with the
consent of the trustee and cestui que trust.

V. Period During Which Suspension of the Power of
Alienation Permitted

The period must be measured by not more than two lives in being.
As appeared from section 42 of the Real Property Law the power
of alienation cannot be suspended "for a longer period than during
the continuance of not more than two lives in being at the creation
of the estate," and in one exceptional case which is not of particular
importance for our present problem, for the period of an actual

185Leggett v. Hunter, supra note 72, at 460-3.
186Supra note 73.
187Supra p. 50.
minority thereafter.\textsuperscript{188} The language of section \textsuperscript{11} of the Personal Property Law\textsuperscript{189} is slightly different but in substance means the same thing as the Real Property Law. Under these provisions it was early determined that suspension of the power of alienation for a reasonable period of time, or for a period equivalent to the average duration of a life, was not permitted.\textsuperscript{190} It is now firmly established that the power of alienation cannot be legally suspended for any period in gross,\textsuperscript{191} however short, nor for a reasonable period,\textsuperscript{192} unless the duration of such suspension is also limited on not more than two

\textsuperscript{188}Following the portion quoted \textit{ supra}, \textsection 42 provides "except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of 21 years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority." Except for the last sentence, this portion of \textsection 42 is substantially a reenactment of R. S. \textsection 16. For a case in which it was involved, see Manice v. Manice, \textit{ supra} note 11, at 374-381.

In no case may the absolute ownership of personal property be suspended beyond the period of two lives in being. \textit{Ibid.} 381-3; Greenland v. Waddell, \textit{ supra} note 111, at 245.

Likewise, a trust for the accumulation of the income of personal property is limited to two lives in being. Manice v. Manice, \textit{ supra} note 11, at 381; Gilman v. Reddington, \textit{ supra} note 63, at 19.

It is doubtful whether a trust of real property can be created to continue for a minority after two lives, followed by an ultimate gift over. See Chaplin, \textit{New York Trusts to Apply Rents during a Minority after Two Lives} (1926) 26 Col. L. Rev. 674, where the cases are discussed.

\textsuperscript{189}\textit{Supra} p. 50.

\textsuperscript{190}Hawley v. James, \textit{ supra} note 18, at 119-126, and 166-174. See the argument \textit{contra} by Chancellor Walworth when this case was before him, 5 Paige, 318, 460 (N. Y. 1833).


\textsuperscript{192}\textit{Supra} notes 190, 191.
lives in being.\textsuperscript{183} It is, however, true that a trust may be limited for a period of years if the trustees have power to destroy the trust at any time, or at any time after two lives in being, since there would be no suspension where the trustees could destroy the trust and convey the property.\textsuperscript{194} Suspension of the power of alienation may lawfully continue during two lives in being at the creation of the estate or interest, and the minority of an infant in being, or other fraction of a life in being, is held equivalent to one life if the suspension is expressly or impliedly to cease upon the majority or death of such person.\textsuperscript{195} But no trust can be limited to continue during more than two lives in being, whether running concurrently or in succession,\textsuperscript{196} nor during one life and the minority of one or more

\textsuperscript{183}Schermerhorn v. Cotting, 131 N. Y. 48, 29 N. E. 980 (1892), "a limitation of a trust estate for an arbitrary period of time, such as fifty years, is valid, provided a termination at an earlier period is called for by the expiration of two lives in being at the creation of the trust"; Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719 (1895), trusts for years measured by lives; Coston v. Coston, 118 App. Div. 1, 103 N. Y. Supp. 307 (1907), "until youngest of said children shall attain the age of twenty-five," construed to mean until he attain that age or die, valid; Kahn v. Tierney, 135 App. Div. 897, 120 N. Y. Supp. 663 (1906), aff'd, 201 N. Y. 516, 94 N. E. 1095, trust for fixed period but one which must terminate within two lives, valid; Matter of Lally, 136 App. Div. 781, 121 N. Y. Supp. 467 (1910), aff'd, 198 N. Y. 608, 92 N. E. 1089, to same effect; Anthony v. Van Valkenburgh, 154 App. Div. 380, 139 N. Y. Supp. 599 (1912), trust for 19 years or during lives of wife and daughter, valid; Goldsmith v. Haskell, 181 App. Div. 510, 169 N. Y. Supp. 185 (1918), "until 25 years from date of will, providing my wife Clara is not living," held valid as trust for life of wife.

\textsuperscript{194}Cases cited, supra notes 155, 156. But see Underwood v. Curtis, 127 N. Y. 523, 28 N. E. 585 (1891), probably wrong on the point of construction.

\textsuperscript{195}Oxley v. Lane, supra note 119, at 345, for two minorities valid; Benedict v. Webb, 98 N. Y. 460 (1885), "until my said children, or the youngest survivor of them, shall have attained the age of 21," valid where only two children under 21 at testator's death, and could direct that share of one of the two be held for her life, but not the share of a third child for its life; Jacoby v. Jacoby, 188 N. Y. 124, 80 N. E. 676 (1907), "after the youngest . . . shall have attained the age of 21," construed to mean youngest living at testator's death and valid; Boecher v. Smoda Realty Co., 164 App. Div. 837, 150 N. Y. Supp. 263 (1914), to same effect.

See also Coston v. Coston and Matter of Lally, supra note 193.

infants who might not be in esse at the creation of the trust, infalthough the life of a child en ventre sa mere is a proper measuring life. It is a matter of construction to determine whether a trust is properly measured by lives in being, or on some other basis. It is not required that the measuring lives be those of beneficiaries. A trust may be validly limited on the lives of strangers, or on the life of the trustee, or of any beneficiary, and when so limited, any number of persons may share in the income and profits. So where a trust of residue was created for the life of the widow, during which time the income was to be divided into three parts, one for the wife and one for a daughter and one for a son; and upon the death of the wife the whole was to be divided into two trusts for the two children, with certain other dispositions on the contingencies of deaths, the arrangement was held legal. Peckham, J., expressed the matter in the following words:

"A trust may suspend the power of alienation for a period of two selected lives in being at the creation of the estate, and during that time he may make such disposition of the annual income

197 Greenland v. Waddell, supra note 111, income of trust to A for life, then on a contingency for her lawful issue until they reach 21, void; Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130 (1903). See also Matter of Wilcox, supra note 111.

198 Schettler v. Smith, supra note 114; Genet v. Hunt, supra note 57; Read v. Williams, 125 N. Y. 560, 26 N. E. 730 (1891), perpetual trust for charity void; Hoyt v. Hoyt, 125 Misc. 95, 210 N. Y. Supp. 155 (1925); In re Chittick's will, supra note 2.


200 See, for example, Matter of Allen, 111 Misc. 93, 181 N. Y. Supp. 398 (1920), aff'd, 236 N. Y. 503, 142 N. E. 260, trust of capital stock to continue business, with discretion to sell and apply corpus to widow, she to have one-half of income before sale and all after, step-daughter to have income after death of widow, provisions for employees and for various charges, ultimate remainder to religious corporation. The trust was held measured on lives of widow and step-daughter, and not so long as business profitable. Cf. Freeman v. Hanna, 178 App. Div. 630, 165 N. Y. Supp. 388 (1917), trust to hold stock and vote and collect dividends not properly limited; and Matter of Toch, 178 App. Div. 544, 165 N. Y. Supp. 559 (1917), for such a trust properly limited.

201 Bailey v. Bailey, 97 N. Y. 460 (1884); Cochrane v. Schell, supra note 9; Bird v. Pickford, 141 N. Y. 18, 35 N. E. 938 (1894).

202 Crooke v. County of Kings, supra note 61; Crehan v. Megargel, supra note 166, business trust to invest in limited partnership.


204 In Crooke v. County of Kings, supra note 202, trustee was measuring life for nine beneficiaries. Judge Finch suggested a distinction between the natural term and the stipulated term (at p. 436). Accord: Kahn v. Tierney, supra note 193.

205 Schermerhorn v. Cotting, supra note 193, at 58.
among as many persons as he sees fit. Thus having created a trust term which must end within the period required by the statute, he may provide that the income shall be paid during that time to A for life, remainder to B for life, remainder to C for life, and so on for as many different lives as he chooses, provided the whole first term must end with the death of the survivor of the two lives.

“A limitation of a trust estate for an arbitrary period of time, such as 50 years, is valid, provided a termination at an earlier period is called for by the expiration of two lives in being at the creation of the trust.”

Nor is it ground for objection, where the trust is properly limited, that the beneficiaries are not ascertained and will or might include unborn persons.206

Where suspension of the power of alienation is caused by the limitation of a trust to commence in futuro,207 such trust must commence and terminate within two lives in being at the creation of the interest. Illegal suspension of the power of alienation may also be caused by a remainder, contingent as to the person, which may vest in interest at a time too remote, after the termination of a prior trust.208

A trust may be divisible. Even where a trust appears, at first glance, to be measured by the lives of more than two persons, it is often possible to find that the testator or settlor has in fact created two or more trusts in one undivided fund, which is kept in solido for convenience only. In Leach v. Godwin,209 Chase, J., said:

“In cases where a trust for the benefit of several persons is held in one fund it is necessary for the purpose of holding that they constitute separate and independent trusts that every part of the principal fund should be liberated from the trust fund upon the termination of the lives in being at the death of the testator for which the trust is held and also to find from within the will itself that such was the intention of the testator.”

In that case it appeared that the testator intended only a division of income into shares, and that the corpus should not be held in separate

206Gilman v. Reddington, supra note 63; Woodgate v. Fleet, 64 N. Y. 566, 571 (1876). In the latter case Rapallo, J., said: “A trust to receive and apply the rents and profits of lands, the duration of which cannot extend beyond the lives of two designated persons, in being at the time of the creation of the trust, is permitted by the statute, and its validity is not impaired by the circumstance that during this authorized period of suspension of the power of alienation more than two persons are to enjoy the benefit of the income, or even that some of the designated beneficiaries are not in esse at the time of the creation of the trust.”

207Carvey v. McDevitt, supra note 137.

208Fargo v. Squires, supra note 19; Benedict v. Salmon, supra note 145.

209N. Y. 35, 41, 91 N. E. 288 (1910), citing the leading cases.
shares, and so it was held to be one indivisible trust. As to when the intention to create separate trusts will be found, the language of Cardozo, J., in Matter of Horner is illuminating:

"If the dominant purpose is the creation of a single trust subsisting during four minorities, absolute ownership is illegally suspended, and the trust in its entirety is void, even though in some contingencies it may end within the statutory term (Central Trust Co. of N. Y. v. Egelston, 185 N. Y. 23; Leach v. Godwin, 198 N. Y. 35). On the other hand, if the dominant purpose in the creation of the trust is that of division into separate shares terminable by separate minorities or lives, trusts to that extent may be upheld, even though in some other contingency it is to be illegally prolonged (Matter of Cosgrove, 221 N. Y. 455). We must say whether unity or pluralism is the predominating note.

"The will in all its provisions is instinct with the thought that each of the four children has a share or interest of his own, which upon majority or death must be distributed anew."

So in this case in which there was a trust for the benefit of children of R, wherein they were named and it was directed that each should receive his or her interest in the trust fund on reaching the age of 21, or the issue of each should receive the portion should any die before 21, it was held that separate trusts were created. But as to a similar trust for the children of G, where the children were not named, and only one was in being at the death of the testator, and the trust was so worded as to include afterborn children, it was held that no separation of the share of the one child could be made since the shares were "in a state of flux, the provisions for the living child hopelessly commingled with those for the use of children to be born in the future."

By the application of these principles a trust for the benefit of the testator's widow and after her death for the children, or a trust for the benefit of several children, may be treated as separate trusts, and as a result no suspension of alienation will continue beyond two lives in respect of any trust share. But if the intention is that the corpus of the fund shall be held in solido during all the named lives,

210237 N. Y. 489, 493, 143 N. E. 655 (1924).
211Ibid. 500.
and only the income is divided, and no part or share of the corpus is to be released upon the death of each beneficiary, then the trust will be entire and indivisible and may as a result suspend the power of alienation illegally.\textsuperscript{213}

\textit{Illegal provisions of trust may be separable.} By an analogous principle, where a testamentary trust offends the rule against suspension of the power of alienation as to some share or portion, or as to some ultimate limitation, and the offending part can be severed from the balance of the trust without changing the character of the settlement or defeating the probable intention of the testator, the court will cut off the void portion and preserve the balance of the trust.\textsuperscript{214} It should be noted that in this situation the court has found it possible to separate the good from the bad, and thereby preserve the valid portion of a trust; whereas it is generally true that a trust which may by any possibility offend the rule, is declared wholly void. The principle is illustrated by the cases in which invalid cross remainders between children, who are beneficiaries of separate trusts, are destroyed, and thereby the principal parts of the testamentary scheme preserved. As was said by Judge Cardozo in \textit{Matter of Horner:} \textsuperscript{215}

"The line of cleavage thus drawn between what is to be kept and what destroyed . . . follows seams and contacts suggested by the will itself. In the thought of the testator, the death of a

\textsuperscript{213}Central Tr. Co. v. Egleston, 185 N. Y. 23, 77 N. E. 989 (1906); Leach v. Godwin, \textit{supra} note 209; Matter of Magnus, 179 App. Div. 359, 166 N. Y. Supp. 497 (1917); Matter of Thaw, 182 App. Div. 368, 169 N. Y. Supp. 430 (1918), in which the trust fund was directed to be "held by my executor and trustee so long as any of the above three friends shall be living," and only after the death of the survivor was the fund given over to a son; Matter of Horner, \textit{supra} note 210; \textit{In re Chittick's Will, supra} note 2.

\textsuperscript{214}The valid parts of the will can be separated from those that are invalid without defeating the general intent of the testator to the extent of the valid parts. (Matter of Hitchcock, 222 N. Y. 57, 73; Carrier v. Carrier, 226 N. Y. 114.)" Matter of Silsby, \textit{supra} note 196.—This was a trust to pay income to widow for life, then in three equal shares to children for their respective lives, then each share absolutely to surviving grandchildren, but if any die without surviving grandchildren, then cross remainders. It was held that the interests of grandchildren were not vested, and cross remainders were void, but rest of will was upheld. \textit{Accord:} Kennedy v. Hoy, 105 N. Y. 134, 11 N. E. 390 (1887); Matter of Colegrove, 221 N. Y. 455, 117 N. E. 813 (1917); Matter of Trevor, \textit{supra} note 148; Hill v. Simonds, 125 Mass. 536 (1878). For cases where the court was unable to separate the good from the bad part of the will, and so the whole will failed, see Bailey v. Buffalo, etc., Co., 213 N. Y. 525, 536, 107 N. E. 1043 (1915); Mann-Vynne v. Equitable Tr. Co., \textit{supra} note 49.

\textsuperscript{215}\textit{Supra} note 210, at 499.
child during minority is the signal for a halt and new reckoning (Carrier v. Carrier, 226 N. Y. 114, 124)."

On the same principle a provision for an illegal accumulation may be destroyed and a trust for life preserved, or if continuation of a trust for minorities of children after two lives is directed, it may be sustained for the legal period and the balance cut off. Or an added illegal suspension by a codicil may be eliminated and the will proper preserved. These cases illustrate the principle that "courts lean in favor of the preservation of such valid parts of a will as can be separated from those that are invalid without defeating the general intention of the testator." Void cross remainders or illegal ultimate limitations, though invalid, "will not be allowed to invalidate the primary disposition of a will, but will be cut off in the case of a trust which is not an entirety." Moreover, when it can be done consistently with the language of the will under established rules of construction, courts favor that construction which will preserve the will as against one under which it would be defeated.

Effect of postponing payment. It is established that if the beneficial future interests under a will or settlement are vested in interest, and the property is not held on a trust which vests the title in trustees, void cross remainders or illegal ultimate limitations, though invalid, "will not be allowed to invalidate the primary disposition of a will, but will be cut off in the case of a trust which is not an entirety." Moreover, when it can be done consistently with the language of the will under established rules of construction, courts favor that construction which will preserve the will as against one under which it would be defeated.

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but possession only is withheld from the owner, or payment over to him is postponed to a future time, then no suspension of alienation results. Thus in Matter of Murphy\textsuperscript{222} after providing for certain bequests, the testator directed his executors to divide the residue equally between his wife and children, “the principal of each child, however, not to be paid until they respectively arrive at the age of thirty,” and it was held that no trust was created and the interests of the children were vested and only payment over was postponed, so that on the death of one of the children before thirty her share passed to her next of kin. So in many cases where payment only is postponed, it has been held that no suspension of alienation is caused, thereby illustrating the proposition that the mere creation of a power does not ordinarily occasion any suspension of the power of alienation.\textsuperscript{223} In any given case it may be difficult to determine whether the property is held by the executors under an “administrative title,”\textsuperscript{224} giving them possession and actual management until the time of payment arrives, or under a trust giving them the same control and management, but with entirely different results, but the cases have made this distinction.\textsuperscript{225} The distinction is, however, clear where the delay in payment is incidental merely, or where the executor can in his discretion make payment at a time earlier than that indicated.\textsuperscript{226}

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\bibitem{223} Warner v. Durant, 76 N. Y. 133 (1879), payment of legacies postponed five years; Bliven v. Seymour, 88 N. Y. 469, 478 (1882); Orr v. Orr, 147 App. Div. 753, 133 N. Y. Supp. 48 (1911), \textit{aff’d}, 212 N. Y. 615, 106 N. E. 1037; Matter of Hitchcock, \textit{supra} note 114, payment of legacies postponed; Matter of Chittick, \textit{supra} note 2; \textit{In re Seif’s Will}, \textit{supra} note 24, possession of realty by devisees postponed until legacies paid. Converse v. Kellogg, 7 Barb. 596 (N. Y. 1849), was overruled by Bliven v. Seymour, \textit{supra}.
\bibitem{225} \textit{Cf.} Matter of Hitchcock, \textit{supra} note 114, with Matter of Trevor, \textit{supra} note 148.
\bibitem{226} Robert v. Corning, \textit{supra} note 19; and cases cited \textit{supra} note 156.
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