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PUBLIC POLICY AND THE RULE AGAINST PERPETUITIES

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THE phrase *public policy*, although in constant usage and application, has no fixed legal significance. It is said to vary with changing conditions and the laws of civilization and peoples.[1] What may be to the best present advantage of a society in terms of its economic, social, cultural and political character may constitute a complete disadvantage some years later. Whether the passage of time for such a metamorphosis is brief or protracted depends upon many factors, chief of which are the discoveries of science and the improvements of technology. Here in the United States, modern means of communication and transportation, together with an almost incredible increase in manufacturing and agricultural productivity, have occasioned such a change in our national character that our resemblance to the nation of one hundred years ago, is even less than that of a middle-aged man to the baby he was at birth.

These advances in our society have had their effect upon the law under which we live. Until relatively recent days, private ownership of land formed the keystone of our society. Wealth, social position, and political status were the proportionate incidents of such ownership; and the law relating thereto, were geared to the best advantage of a land-based society. Such was the general nature of the *public policy*, which influenced our jurisprudence in the early years of the nineteenth century. Actually, it was merely the trans-atlantic offspring of English public policy as it had developed throughout the era of the feudal system.

It was in the early days of this era, that the powerful, landed aristocracy of England, in their endeavors to maintain family holdings far into the hands of future descendants, and with a minimum of liability for such ownership, finally exceeded the bounds of the national welfare. A social need arose for liberalizing the restrictions with which the aristocracy had succeeded in burdening the free alienability of realty and limiting the absolute ownership of interests created to take effect in the future. One of the first instances of a remedial nature resulted from a decision in the famous case known as the *Duke of*

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[1] Chicago B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314 (1895); Picket Pub. Co. v. Carbon County Commissioners, 36 Mont. 188, 92 Pac. 524 (1907).

Norfolk's case.[2] The historical significance of this case was that it initiated the formulation of the common law rule against perpetuities, to the effect that the contingency upon which a future executory interest be created to take effect, must occur within the life of some person in being at the creation of the future interest. Subsequent cases sustained this principle of restricting attempts to fetter the alienability of property. However, they extended the period of the rule, until eventually, the case of *Cadell* v. *Palmer*,[3] established the modern common law time element within which a contingent future interest must vest, to consist of any number of lives in being, plus the period of gestation of a posthumous child, plus a flat period of twenty-one years.

Such specific restrictions, apparently, accorded with the *public policy* of the State of New York in the earliest years of the nineteenth century. The trend of this policy, however, progressed in the direction of even greater restriction. This was undoubtedly due to the fact that even after the Revolution, many of the owners of the great manors in the Hudson and Mohawk Valleys were attempting to maintain status similar to that of the aristocracy of England; and to exercise undue posthumous control of their holdings for the purpose of keeping them intact within their geneological lines. These owners, or patroons as they were known, had received patents to great tracts of colonial land from the King of England. They held these lands in feudal tenure as *mesne lords* and then sub-in-feuded them to *tenants paravail,* who occupied, tilled, and developed the land. After the American Revolution, the abolition of feudal tenure as between individuals, in 1787, did not completely eliminate all vestiges of feudalism in New York.[4] It was held that the state merely succeeded to the rights and holdings of the king.[5] As a matter of fact, it was not until

[2] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682). In this case, an attempt had been made to create a trust in a term of 200 years for the benefit of Henry, the second son of the Earl of Arundel and Surrey, but if Thomas, the first son of the Earl was to die without issue during Henry's life (in which case the earldom would descend to Henry), then the term was to be held for the benefit of a third son, Charles. The Chancellor, Lord Nottingham, held the provision over for the third son good, as it was limited to take effect upon a contingency that would occur within a life in being.

[3] 1 Clark & Fin. 372, 6 Eng. Rep. 956 (1833).

[4] The act regarding tenures which was adopted on February 20, 1787, abolished tenures by one citizen of another, and thus left tenure possible only by one holding immediately of the state.

[5] By statute passed Oct. 22, 1779, all rights formerly held by the king in lands in this state, were declared to be vested in the people of the state. These enactments were embodied in the constitution of 1846 (Art. I, Secs. 12, 13) and appear in our present constitution of 1938 as Section 10 of Article I.

the Revised Statutes took effect on January 1, 1830, that this status was abolished, and the holding of all land within the state declared to be allodial.[6]

During this period, from the Revolutionary War to the adoption of the Revised Statutes of 1830, *public policy* of the State of New York most vivdly reflected the aversion of the people for any form of social order patterned upon the English system of land-holding which might continue or, even looking to the future, countenance the rise of an aristocracy with superior privileges based upon their ownership of land. With the foregoing as a background, the Revisers of 1830, presumably in the best interests of the people, established the period during which the inalienability of land might be continued, as not to exceed more than two lives in being at the creation of any future estate suspending alienability.[7] Thus, the Revisers cut down the permissible period of the rule against perpetuities from the "any number of lives" to the "two lives" limit. Actually, it was hardly the radical reduction that many in the legal profession might think at first impression. As a matter of cold logic, the requirement that the lives had to be in being at the creation of the interests, meant that the life of only one person, the longest liver of those designated, measured the actual suspension. All that the change accomplished was to reduce the opportunity of selecting any one life out of quite a large group who might live for a long time. By the same token, there never was, nor can there ever be, any assurance that any *one of a group* of people might live for a longer time than any *one of only two* persons. Thus, without too radical a change in the common law rule of perpetuities, the Revisers maintained the *trend of public policy* towards elimination of all feudal semblance, by minimizing the probable number of *chances* for suspending the power of alienation of property.

In all likelihood, if the Revisers had not made certain other changes relating to express private trusts which subsequently were judicially determined[8] as being within the rule against perpetuities, the measuring period of the rule probably might even have been shortened without serious objection from any landed source. This proposition is based upon the fact that our society was changing from one in which

[6] Revised Statutes, Pt. II, C. I., tit. 1, Sec. 3.

[7] Revised Statutes, pt. II, C. I., tit. 2, Secs. 14-16; now Sec. 42 of the Real Property Law. The provision for the extension of the period by a minority is an exception in a specified instance only.

[8] Coster v. Lorillard, 14 Wend. 265 (N. Y. 1835); Hawley v. James, 16 Wend. 61 (N. Y. 1836).

land was the basis of wealth and affluence, to one where wealth is commonly measured in units of intangible chattels such as bonds, stocks and similar choses in action. Accordingly, the weight of objection which formerly was voiced against the "two-life" rule as it applied to the alienability of land, shifted and concentrated its force against such restraint upon alienability occasioned by trusts of personal property.

The history of this transition begins with the Revised Statutes of 1830 which enumerated the only allowable types of express private trusts.[9] Within the enumerated group, two particular types of trusts are the ones which are at the root of the problem. These are the so-called *spendthrift trusts* and *trusts for accumulations*. They are now subdivisions three and four of section ninety-six of the Real Property Law which provides that an express trust may be created:

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

"4. To receive the rents and profits of real property and to accumulate the same for the purposes, and within the limits prescribed by law."

Coincident with the foregoing enactments, two other statutes of great significance pertaining to the duration of these trusts were also adopted.[10] These are now sections one-hundred three and one-hundred five of the Real Property Law. Section one-hundred three provides:

"1. The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise . . . "

Section one-hundred five provides:

"If the trust is expressed in the instrument creating the estate of the Trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as outlined in this article, shall be absolutely void."

Prior to the adoption of these latter two statutes, express private trusts were not considered within the purview of the rule against undue suspension of the power of alienation. Accordingly, there was

[9] Revised Statutes, Pt. II, C. 1, tit. 2, Sec. 55, now Sec. 96 of the Real Property Law.

[10] Revised Statutes, pt. II, C. I., tit. 2, Secs. 63 & 65.

no restriction upon the alienation of equitable interests such as the beneficial rights of cestuis que trust. However, after the adoption of the above statutes, namely, sections one-hundred three and five, the so-called *spendthrift trusts* became indestructible in New York. Pursuant to section one-hundred five, the trustee could not of his own volition terminate a trust in any manner whatsoever. Of course, he might be given power to sell or exchange the trust property but unless he was also given absolute power to distribute the corpus, the trust had to be continued with only the corpus changed in form. Furthermore, pursuant to section one-hundred three, a beneficiary was forbidden to alienate his equitable interest. Thus, he could not join to convey his interest as R.P.L. forty-two and P.P.L. eleven specified, if the property were not to be deemed inalienable. As a consequence of these statutory enactments, shortly after, it was judicially determined that the private income trust suspended the power of alienation and, accordingly, was subject to the Rule against Perpetuities, i.e., section forty-two of the Real Property Law and section eleven of the Personal Property Law.

This judicial determination was expressed as previously noted,[11] in the case of *Coster* v. *Lorillard,* and further in *Hawley* v. *James.* In the case of *Coster* v. *Lorillard,* the question arose whether the testamentary trust created by George Lorillard for the benefit of twelve nephews and nieces, was valid. It was held that despite the fact that the beneficiaries and the trustee were physically able to join for the purpose of terminating the trust, nevertheless, since no express power of complete termination had been given to the trustee, he was prohibited by Section 105 from doing so, and the beneficiaries were prohibited by Section 103 from joining their equitable interests. Accordingly, it was held that the intended trust was an attempt to suspend the power of alienation for a period of twelve lives, and was therefore void.

In *Hawley* v. *James,* the court held where a trust was created to continue until the youngest survivor of thirteen children and grandchildren reached the age of twenty-one years, that the same was subject to the Rule against Perpetuities; and since the trust provision was so worded that the term might possibly continue after the death of two of the group of beneficiaries, that it illegally extended the period of possible suspension of the power of alienation beyond the allow-

[11] See note 8, *supra.*

able statutory period of two lives in being at the creation of the estates.

These decisions and subsequent reiterative ones[12] definitely determined the question that the Rule against Perpetuities applied to income trusts of real property. As to personal property, Section 11 of the Personal Property Law[13] which prohibits suspension of the absolute ownership of personal property, provides that in all other respects, limitations of future or continuing interests in personal property, are to be subject to the rules prescribed in relation to future estates in real property.

Then, not too long after the cases of *Coster* v. *Lorillard* and *Hawley* v. *James,* were decided, we find judicial determination with respect to personal property trusts being subject to the Rule against Perpetuities. Thus, in the case of *Graff* v. *Bonnett,* the court was of the opinion that the beneficiary's equitable interest in a personal property trust was inalienable. Cases such as *Cole* v. *Lowery*[14] and *Cochrane* v. *Schell,*[15] similarly held and determined for all practical purposes that income trusts of personal property, just like trusts of real property, suspended the absolute power of alienation. As a matter of fact, eventually Section 15 of the Personal Property Law was adopted, and this section prohibited the trustee from doing anything in contravention of the trust, similarly to Section 105 of the Real Property Law. Although no Personal Property statute corresponding to Section 103 of the Real Property Law prohibiting the alienation of the beneficiary's interest has been enacted, nevertheless, as a result of the foregoing cases, there is no question that such inalienability is an accepted fact.[16]

As a result of the foregoing adjudication, the newer wealthy classes of our society were confronted with the obstacle of the Rule against Perpetuities, whenever they attempted to preserve their wealth, now in the form of personalty, for too long an interval of time. This was the same obstacle which barred the path of inalienability of land to the older landed aristocracy.

As the transition from landed wealth to chattel wealth progressed, the fight against the laws limiting the objectives of these influential segments of our society, continued; but soon a powerful particular in-

12 Tucker v. Tucker, 5 N. Y. 408 (1851); Radley v. Kuhn, 97 N. Y. 26 (1884).
13 Originally Revised Statutes, pt. II, C. 4, tit. 4, Secs. 1, 2.
14 95 N. Y. 103 (1884).
15 140 N. Y. 516, 35 N. E. 971 (1894).
16 Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); Matter of Merritt, 94 Misc. 425, 159 N. Y. Supp. 558 (Spec. Term 1916).

terest group composed of corporate fiduciaries and financial institutions joined in the fight against the Rule. This latter group were those who profited by fee and commission for the services rendered in the administration of trusts. Naturally, it was to their financial advantage that a trust should continue as long as possible. The struggle grew in intensity as the wealth of our society in New York continued its change from realty to personalty.

The success of this struggle to change the "Rule" was manifested in later court holdings with regard to multiple trusts. In many instances, the Rule against Perpetuities was avoided by judicial construction which went to unusual lengths to save such trusts. Thus, where trusts were set up for multiple beneficiaries, the courts, wherever possible, applied the so-called "doctrine of separability". This resulted in a holding that instead of one indivisible illegal trust for more than two lives in being, individual trusts, each measured by the separate life of a single beneficiary, had been the valid intention of the settlor. Such holding was generally followed especially in cases where the trust corpus was directed to be ultimately distributed in separate shares.[17] The courts even went so far that where some alternative distribution of a separate share might be illegally continued in trust, it might be "excised" if the "dominant purpose" of the settlor indicating separability, was found from valid directions to pay over a share of the trust corpus to each beneficiary as he reached a certain age, or to his issue if he died before then.[18]

These "doctrines" of separability and excision have been repeatedly applied in the modern application of the Rule against Perpetuities so as to save many multiple type trusts.[19] However, the difficulty of administering such trust property where the necessity for partial termination existed, was obvious. It might require unusually liquid short term investments producing a lower rate of return to the beneficiary, and incidentally, more work and smaller commissions for the corporate trustee. Furthermore, as Professor Powell pointed out in an article published in the New York Law Journal,[20] "much business was being lost by New York to the trust companies of the ad-

[17] Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924).
[18] Matter of Trevor, 239 N. Y. 6, 145 N. E. 66 (1924).
[19] In re Neill's Estate, 195 Misc. 105, 89 N. Y. S. 2d 394 (1949); In re Barnes' Estate, 196 Misc. 775, 92 N. Y. S. 2d 702 (1949); In re Caplin's Will, 98 N. Y. S. 2d 800 (1950).
[20] N. Y. L. J. 3-25-58; 4, 1.

jacent states of Connecticut and New Jersey where more sensible rules can be found." In the face of such criticism and the constricting influence which the "Rule" had upon the financial operations of corporate trustees, it is not surprising that the organized efforts of the particular interest groups to have the "Rule" modified, finally proved successful. In 1958, the New York State Legislature adopted chapters 152 and 153 of the laws of 1958, which amended respectively, Section 11 of the Personal Property Law and Section 42 of the Real Property Law. The new amendments extended the period of possible suspension of the power of alienation by eliminating the "two lives limitation" and substituting therefor, "any number of lives". As a result, after more than one hundred years, the *trend* of our *public policy* in the field of perpetuities has been reversed. Just whether or not the original concept of the Revisers of 1830 to prevent undue limitations upon the free alienability of land has ceased to be the public policy of New York State, only time and history will tell.

Before concluding this brief review of the Rule against Perpetuities in relation to *public policy,* a few words with regard to certain other aspects of the modifying legislation of 1958 might be in order. Considering the amendments purely on their prospective effectiveness, their chief benefit lies in the potential extension of trust terms. Thus, where one establishes a trust either by will or deed after September 1, 1958, for several children, there will no longer be a need to create separate trusts for the children, or have one trust fund construed as being divisible in order to insure that in no event will the duration exceed two lives in being. Thereafter, one trust fund may be established to last, if desired, until the last surviving child dies.

Unfortunately, in the opinion of the writer, the new amendments include, as a standard of proof authorized to establish the measuring lives of suspension, the provision that: "In no case shall the lives or minorities measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult." This provision appears by implication to authorize continuing the practice of creating trusts to be measured by the lives of people other than the beneficiaries. Incidentally, the New York State Surrogate's Association expressed its disapproval of this provision on the ground that this so-called "evidence test" would be the source of substantial litigation.

Had the provision limited the measuring lives to those of the

designated beneficiaries or owners of intermediate interests, it would not only have offered a fixed standard, but one that could be reasonably applied. It would have invalidated the present questionable practice of creating trusts measured by lives other than the beneficiaries, and avoided the type of litigation resulting therefrom in order to determine whether or not the "natural" or so-called "stipulated" terms measured the trust duration. Such problems are illustrated by cases like *Crooke* v. *County of Kings*,[21] *In re Gardner's Estate*,[22] and, most recently, *In re Schirmeister's Estate*.[23]

Another possible avenue of litigation may be opened by these amendments as a result of their effect upon that phase of the New York "Rule Against Perpetuities" which is not expressly declared in our statutes, i.e., the prohibition against the remoteness of the vesting of a future estate. Thus, our courts have established the principle that although our statutes are partly silent in such regard, "it is a firmly established principle that every future limitation of an estate is void as too remote unless it is apparent that it must take effect and vest, if at all, within the period allowed by the rule."[24] Presumably, it is expected that on and after September 1, 1958, where the validity of a contingent future estate (other than one created on a term of years) is questioned as to the postponement of vesting, the courts will apply the revised time element by implication.

As to a contingent remainder on a term of years, section 46 of the Real Property Law, which has not been amended to date, still specifically requires that the remainder must vest within two lives in being at the creation thereof. Although instances of such remainders are not common now, the growing practice of long-term leases in connection with tax moderation plans may encourage their creation hereafter. The failure of the Legislature to amend section 46 may then present a problem for the courts. Shall they deem this section ineffective and apply the new time limit specified in section 42 as amended? If so, then they may well be charged with encroaching upon the legislative function. On the other hand, they may decide, since the Legislature confined its amendment specifically to section 42,

21 97 N. Y. 421 (1884).
22 4 Misc. 2d 435, 158 N. Y. S. 2d 403 (1956).
23 10 Misc. 2d 988, 169 N. Y. S. 2d 130 (1957).
24 Matter of Roe, 281 N. Y. 541, 24 N. E. 2d 322 (1939); Walker v. Marcellus & O. L. Ry., 26 N. Y. 347, 123 N. E. 736 (1919); Matter of Wilcox, 194 N. Y. 288, 87 N. E. 497 (1909).

that section 46 is still operative. In that event we would be confronted with the inconsistent and undesirable situation of having a different time limit for suspending the power of alienation than one for postponing the vesting of a future estate.

These, and other inconsistencies which have been presented by the new amendments were summarized by the writer in an article which appeared in the New York Law Journal.[25] Presumably, certain corrective legislation will be introduced in the current session of the State Legislature to eliminate such inconsistencies in this highly complex and technical branch of our law. It would be in gratifying conformity with good legislative public policy if such objectives can be achieved.

[25] N. Y. L. J. 4-9-58; 4, 1.