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Finally, if the Internal Revenue Service decided that the taxpayer had, without justification, exceeded the limits of the regulation, it would then, on the basis of these standards, apportion the corporation's debt structure between debt and equity for the purpose of interest deductions.

The benefit inherent in the proposed approach is that it does not arbitrarily impose upon the business community norms which are unrealistic in light of accepted business practice. Rather, it has as its basis, criteria used by businessmen themselves in the regulation of their corporate affairs.

IX. Conclusion

It is evident, even today, that this problem is far from being resolved. However, looking at the various approaches over the years, it appears that the courts have been tending toward a solution. In attempting to seal the obvious loophole left by the "four corners of the instrument" method, they seized upon the debt-equity test in the hope that this would provide an easy-to-use objective standard. Such was not the case and seemed only to add to the confusion. As the courts became disillusioned with the debt-equity test, the search for new solutions began. Some emphasized the intention of the parties, while others sought an objective standard through the use of various business purpose tests.[120]

Recently, in the *Nassau Lens* case, the Second Circuit suggested the most realistic approach to date. Essentially, each case is to be judged on its relation to commonly accepted business procedures. Rather than make the taxpayer's cause hinge on the presence or absence of some ill-defined business motive, the court looked to whether the facts before it conformed to substantial economic reality. Hopefully, the *Nassau Lens* opinion will spur regulatory action similar to that suggested herein which will alleviate the confusion that has surrounded the debt-equity question.

CONSTRUCTIONAL DEVICES AND THE NEW YORK RULE AGAINST PERPETUITIES

I. History

The English common law early recognized the need to regulate the fettering of property. To achieve this end various rules evolved. One, the Rule Against Perpetuities, established the period within which estates must vest.[1] A different set of rules arose which sought to insure that there would be "persons in

120. The application of the debt-equity guideline approach is a question of emphasis and it is not suggested that any of the other tests have been or should be completely discarded.

1. "Although the rule was framed by the courts to prevent undue suspension of the power of alienation, it was not worded in terms of alienation. It sought to accomplish its purpose indirectly by procuring the vesting of all property interests within one generation and a short time thereafter, on the theory that vested interests would surely be alienable . . . ." 1A Bogert, Trusts and Trustees § 213, at 344-45 (1935).

being by whom an absolute fee in possession can be conveyed."[2] These are the rules against restraining the power of alienation.[3] A succinct and generally accepted statement of the common law Rule Against Perpetuities is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[4] The New York Revised Statutes of 1829, however, profoundly altered this rule, which theretofore had been adopted in New York.[5] Section 15 of the Revised Statutes provided: "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 . . . ."[6]

New York Real Property Law Section 42, the perpetuities section, is couched in language of suspending the power of alienation.[7] This has led at least two authorities to surmise that the authors of the New York statutes were not aware of the distinction between the common law Rule Against Perpetuities and the rules against suspension of the power of alienation.[8] The statutory

2. N.Y. Real Prop. Law § 42. Matter of Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909), incorrectly states that "at common law the suspension of the power of alienation was no factor of the rule against perpetuities . . . . That rule was against remoteness in vesting . . . ." Id. at 296, 87 N.E. at 499. Contra, Law Revision Comm'n, Report, Recommendations and Studies, N.Y. Leg. Doc. No. 65(H), p. 52 (1936): "The underlying objective of the rule from the day of its conception was to protect the alienability of land." See also 4 Restatement, Property § 370, comment i (1944): "Thus the rule against perpetuities [destroys] future interests which interfere [with] . . . the power of alienation . . . ."

3. "A suspension of the power of alienation exists when there are no persons in existence who, by joining together, can transfer complete ownership of the subject matter." 5 Powell, Real Property ¶ 767, at 584 (1962). The power of alienation may be restrained by (a) inserting a provision in the conveyance that an attempt to alienate shall result in a forfeiture of the interest, (b) by a provision which makes an attempted alienation null and void, 6 American Law of Property § 26.1, or (c) by statute, N.Y. Real Prop. Law § 103.

4. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942) [hereinafter cited as Gray]. But see 5 Powell, Real Property ¶ 767A, at 588-93 (1962), wherein this statement of the Rule is qualified.

5. See, e.g., Wilkes v. Lion, 2 Cow. 333 (N.Y. Ct. Err. 1823); Moffat v. Strong, 10 Johns. R. 16 (N.Y. Sup. Ct. 1813); Stedfast v. Nicoll, 3 Johns. Cas. 18 (N.Y. Sup. Ct. 1802).

6. The Revised Statutes further altered the common-law rule by eliminating the twenty-one year period in gross entirely. In theory, this might be justified, as the common law never intended to include a period in gross. 2 Simes, Future Interests § 483 (1936). The Revised Statutes included a distinctive "restricted minority provision." 1 Rev. Stat. 773 § 16 (1829) provided: "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 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 their full age." 1 Rev. Stat. 773 §§ 1, 2 are the corresponding sections applicable to personal property with the exception of the minority provision which was not added until 1929 by N.Y. Sess. Laws 1929, ch. 229, § 18.

7. N.Y. Real Prop. Law § 42 is entitled "Suspension of the power of alienation." N.Y. Pers. Prop. Law § 11 is entitled "Suspension of ownership."

8. Gray § 748; 2 Simes, Future Interests § 484. But see 3 Rev. Stat. 563-69 (2d ed. 1896) for conclusive evidence to the contrary.

fusion and confusion[9] of these concepts has led to extensive litigation[10] and criticism.[11] One critic was prompted to state that "it is doubtful whether confining future estates to two lives in being was called for by any necessity or policy, since the candles were all lighted at the same time, let the lives be as numerous as caprice should dictate."[12] Be that as it may, for over a century these statutes kept the New York law, figuratively, in the dark—lighted by only two "candles." Then, in 1958, Prometheus came to Albany. Amendments passed in that year[13] started New York back to the common law fold by replacing the "two lives" limitations with the more liberal rule of "lives in being." Subsequent amendments not only restored the common law period, but also paved over some of the pitfalls along the common law path.[14]

One striking difference between the scopes of the two rules remains, and that is in the area of trusts.[15] Trusts for the receipt of rents and profits, formerly enumerated in Real Property Law Section 96,[16] are made spendthrift trusts

9. "[T]o suppose that the Rule against Perpetuities is needed to restrain a suspension of alienation . . . is to throw the fundamentals of the law into confusion." Gray § 278.

10. Id. § 750. See also N.Y. Leg. Doc. (1936) No. 65(H), supra note 2, at 570: "Predictability and certainty have been sacrificed to the two-life rule."

11. N.Y. Leg. Doc. (1936) No. 65(H), supra note 2, at 491-94.

12. 4 Kent, Commentaries 309 n.(c) (14th ed. 1896).

13. N.Y. Sess. Laws 1958, ch. 153 amended N.Y. Real Prop. Law § 42 by deleting the word "two" preceding the phrase "lives in being." N.Y. Sess. Laws 1958, ch. 152 performed a similar function with respect to N.Y. Pers. Prop. Law § 11.

14. N.Y. Real Prop. Law § 42 now provides: "Suspension of power of alienation. The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child begotten before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult." The twenty-one year period in gross was added to both the real and personal property statutes by N.Y. Sess. Laws 1960, ch. 448, §§ 1-2.

15. 5 Powell, Real Property ¶ 772 (1962): "It is commonly held that the rule against perpetuities [at common law] has no significance, and no regulatory force, with respect to the duration of private express trusts or of trust powers." But see Gray § 413: "When an estate is given to trustees, but it is possible that no equitable interest under it may arise within the limits of the Rule Against Perpetuities, the whole trust is bad." One anomalous feature of the New York statutes was Real Prop. Law § 103 which formerly provided: "1. (a) 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, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred." N.Y. Sess. Laws 1964, ch. 317 (eff. June 1, 1965) amends this section to allow the beneficiary to "transfer . . . any amount in excess of ten thousand dollars . . . ." to specified persons, including spouse, lineal descendants and ancestors. Compare N.Y. Pers. Prop. Law § 15. See N.Y. Leg. Doc. No. 65(H), supra note 2, at 528.

16. N.Y. Real Prop. Law § 96 formerly provided in part: "An express trust may be created for one or more of the following purposes: 1. To sell real property for the benefit of creditors; 2. To sell, mortgage or lease real property for the benefit of annuitants or other

by virtue of Real Property Law Section 103, which provides, in part: "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 . . . ."[17] Section 96 now provides: "An express trust of real and personal property or either of them, may be created for any lawful purpose or purposes."[18] The results under this amended rule are not changed: trusts for the receipt of rents and profits, or of income, are spendthrift trusts. They must comply with the Rule Against Perpetuities or fail. The purpose of this comment will be to examine, in light of the recent amendments, the courts' application of constructional devices when dealing with the Rule Against Perpetuities.[19]

The rule has been categorized as being not one of construction, but rather a pre-emptory command of law which is to be applied remorselessly.[20] Such a rigid policy, however, proved more suitable to the common law Rule than to the already remorseless "two lives rule" of New York. Although hesitant at first to tamper with the statute,[21] the courts soon answered the call for more flexibility. The resulting judicial contortions and distortions—constructional devices, formulated under the common law and applied by the New York courts—did much to extract the invalidating "teeth" of the Rule.[22]

II. The Constructional Devices

A. *Excision and Acceleration*

Where an estate is so limited that it may not, in certain instances, vest within the period allowed by the rule, the estate must fail.[23] It is not enough that the estate will most probably vest within this period. Theoretically, the rule demands absolute certainty of compliance.[24] This means that even the most

legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, 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." N.Y. Sess. Laws 1896, ch. 547, § 76.

17. See also N.Y. Pers. Prop. Law § 15; Matter of Knauth, 12 N.Y.2d 482, 238 N.Y.S.2d 942 (1963).

18. N.Y. Real Prop. Law § 96.

19. The amendments passed in 1958 and 1960 were not retroactive; cases involving construction under the old rule, therefore, will be appearing for some time. See Matter of Creveling's Will, 7 App. Div. 2d 150, 180 N.Y.S.2d 1008 (4th Dep't 1959).

20. Gray § 629; 2 Simes, Future Interests § 309 (1936). But see 2 Powell, Real Property ¶ 318, nn.51-53, to the effect that even under the common law there was a constructional preference for "completeness of disposition."

21. See Hawley v. James, 16 Wend. 61 (N.Y. Ct. Err. 1836); Coster v. Lorillard, 14 Wend. 265 (N.Y. Ct. Err. 1835).

22. Kahn v. Tierney, 135 App. Div. 897, 120 N.Y. Supp. 663 (2d Dep't 1909), aff'd, 201 N.Y. 516, 94 N.E. 1095 (1911). See also N.Y. Leg. Doc. No. 65(H), supra note 2, at 592.

23. Gray § 214.

24. "To render a trust valid, it must be so limited that in every possible contingency there

improbable consequence of events may render a settlor intestate.[25] The response to this requirement of certainty has been twofold. Some states have adopted "wait and see"[26] or *cy pres* legislation,[27] or both. In other states the judiciary has resorted to constructional devices. New York is in the latter category.[28]

Regarding the certainty requirement, what is to happen if it is not met? What, for example, is to be done with a testamentary provision for a valid life estate, followed by an invalid intermediary estate succeeded by valid remainders? Is the rule to be applied remorselessly and invalidate the entire bequest? The court in *Kalish v. Kalish*,[29] when faced with this problem, was able to abide by the rule, while validating the greater part of the bequest. Applying the device of excision, the court stated that "when it is possible to cut out the invalid portions, so as to leave intact the parts that are valid and preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy."[30]

The device of excision will be employed, then, where the court finds an affirmative answer to the fundamental question: will the general testamentary plan be better served by excision rather than by total invalidity?[31] In some instances the device of excision alone would be sufficient to preserve the testator's plan. Such was the situation where successive estates for more than two lives were created,[32] or where a primary trust, validly limited on one or two

will be an absolute termination thereof within the period prescribed by statute." Matter of Hitchcock, 222 N.Y. 57, 71, 118 N.E. 220, 223 (1917).

25. See notes 101, 102 infra and accompanying text.

26. Pa. Stat. Ann. tit. 20 § 301.4(b) (1950) provides that the period is to be "measured by actual rather than possible events." Accord, Mass. Ann. Laws, ch. 184A, §§ 1-3 (1955). See also Tudor, The Impact of Recent Statutory Adoption of the "Wait and See" Principle on the Common Law Rule Against Perpetuities, 38 B.U.L. Rev. 540 (1958).

27. E.g., Vt. Stat. Ann. tit. 27 § 501 (1959): "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest." See also Quarles, The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation, 21 N.Y.U.L. Rev. 384 (1946).

28. N.Y. Leg. Doc. 65(G), pp. 43-44 (1960). N.Y. Real Prop. Law § 42-c and N.Y. Pers. Prop. Law § 11-b represent New York's initial statutory acknowledgment of the "wait and see" doctrine. As for judicial acknowledgment of this doctrine in New York, see note 84 infra and accompanying text.

29. 166 N.Y. 368, 59 N.E. 917 (1901).

30. Id. at 375, 59 N.E. at 919. See Matter of Hitchcock, 222 N.Y. 57, 118 N.E. 220 (1917); Matter of Mount, 185 N.Y. 162, 77 N.E. 999 (1906). In Matter of Gallien, 247 N.Y. 195, 200, 160 N.E. 8, 9 (1928), the court stated that it "struggles to preserve, and surrenders to nothing short of obvious compulsion."

31. See Benedict v. Webb, 98 N.Y. 460 (1885), where the invalidity of a trust for one of testator's children resulted not in excision but in the failure of the trusts for all four of testator's children because excision would have resulted in too great a distortion of the testamentary plan.

32. Van Schuyver v. Mulford, 59 N.Y. 426 (1875). See also In re Jutkovitz' Will, 139 N.Y.S.2d 120 (Surr. Ct. 1954), where the principal was to be distributed on the death of the

measuring lives, was to be separated and held in further trust beyond the period of the rule.[33]

In other cases, after expunging the invalid portions of the bequest, the courts were left with valid remainders separated from the now preceding estate by a period of time not measured by any lives in being and during which the power of alienation was suspended. Were these remainders, otherwise valid, to become victims of the rule also? To preserve these remainders the courts applied the principle of acceleration.[34] Acceleration merely accomplishes in the present what would have taken place in the future; *i.e.*, it gives the remainderman the present possession and enjoyment of the future estate.[35] However, before the remainders can be accelerated they must "qualify for acceleration." The necessary qualification is that the remainders be vested.[36] The persons who are to take and the time at which they are to take must be presently ascertainable.[37] Contingent remainders, therefore, cannot be accelerated.[38]

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beneficiary or a specified date, whichever was later. The court was "of the opinion that excision of the date certain will not substantially distort the testamentary plan . . . ." Id. at 122.

33. Matter of Trevor, 239 N.Y. 6, 145 N.E. 66 (1924); Murray v. Muller, 178 N.Y. 316, 70 N.E. 870 (1904). See also Matter of Barnes, 196 Misc. 775, 92 N.Y.S.2d 702 (Surr. Ct. 1949); Matter of Oppenheim, 175 Misc. 634, 24 N.Y.S.2d 599 (Surr. Ct. 1941).

Where the primary trust is for only one life, a valid residuary trust may be created if measured by only one other life. In re Weissman's Will, 95 N.Y.S.2d 88 (Surr. Ct. 1950). Where the primary trusts exhaust the permitted two lives, the residuary trusts will be expunged. Matter of Squiers, 161 Misc. 257, 291 N.Y. Supp. 871 (Surr. Ct. 1936), modified mem. 253 App. Div. 732 (2d Dep't 1937), aff'd mem. sub nom. Matter of Squires, 278 N.Y. 580, 16 N.E.2d 111 (1938); In re Wells' Will, 104 N.Y.S.2d 354 (Surr. Ct. 1951).

34. See 3 Simes, Future Interests § 753 (1936).

35. Kalish v. Kalish, 166 N.Y. 368, 59 N.E. 917 (1901). The court stated, after citing English cases applying the device of acceleration: "It has been suggested that the reason for the English rule favoring the acceleration of remainders is that in England the failure of the prior estate almost invariably destroys the remainders limited upon it." Id. at 379, 59 N.E. at 920-21.

36. Smith v. Chesebrough, 176 N.Y. 317, 68 N.E. 625, (1903); In re Phelps' Estate, 45 N.Y.S.2d 621 (Surr. Ct. 1943). N.Y. Real Prop. Law § 40 provides: "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." This section has been held to apply to personal property also. Stringer v. Young, 191 N.Y. 157, 83 N.E. 690 (1908); In re Munger, 22 N.Y.S.2d 187 (Sup. Ct. 1940). The various tests which have been applied by the courts in determining whether an estate is vested or contingent are discussed in Schuyler, Should We Abolish The Rule Against Perpetuities?, 41 Chicago B. Record 139, 147-49 (1959).

37. Matter of Eveland, 284 N.Y. 64, 29 N.E.2d 471 (1940); Matter of Maloney, 11 Misc. 2d 96, 171 N.Y.S.2d 176 (Surr. Ct. 1958), rev'd on other grounds mem., 8 App. Div. 2d 756, 185 N.Y.S.2d 588 (4th Dep't), aff'd mem. 7 N.Y.2d 863, 164 N.E.2d 867, 196 N.Y.S.2d 996 (1959). It is to be noted that even though the remainder be vested it might not be accelerated if it would result in too great a distortion of the testamentary plan. See Matter of Saunders, 176 Misc. 654, 28 N.Y.S.2d 274 (Surr. Ct.), aff'd, 262 App. Div. 578, 31 N.Y.S.2d 40 (3d Dep't 1941).

38. In Oliver v. Wells, 254 N.Y. 451, 173 N.E. 676 (1930), the court stated: "The problem

Under the present amended law, where an intermediate estate violated the rule the court may still resort to the device of excision. However, with the sphere of "valid" trusts broadened by the inclusion of lives in being plus twenty-one years, it is to be expected that fewer bequests will require excision. Where an intermediate estate is expunged, under the amended rule, the remainder will, as before, be accelerated if it is vested.[39]

B. *Duration of Trust Measured in Years*

Prior to 1960 the New York statutes did not include any period in gross. Thus, a trust measured solely by a period of years was void.[40] However, where the courts were able to find an alternative measurement in terms of one or two lives the trust would be sustained. For example, where a trust was created for one or two beneficiaries who were to receive the income for a period of years, remainder to another in fee, the courts sustained the trust by finding, implicit in the trust for years, an earlier termination at the death of the beneficiaries.[41] In this case the trust could not endure longer than the statutory "two lives."[42]

Under the present law, a trust for a number of beneficiaries, even in excess of two, which is measured solely by a period of years, will meet the requirements of the statute if such a construction, *viz.*, finding an earlier termination at the death of the beneficiaries, is applied.[43]

If, prior to the amendments, property was to be held in trust for twenty-one years, distribution of the corpus to await the end of this period, the trust could be sustained by finding an earlier termination at the death of the beneficiary only if there were a provision for payment of income during this period.[44] In such a case, the income beneficiary's life is the measuring life. Without a provision for the payment of income during this period the property would be held in trust for a period of time not measured by any life, and during which

of severance is at times obscure and baffling when the consequence of excision is to accelerate a remainder bequeathed to someone other than a residuary legatee. Even in such circumstances acceleration is permitted when the plan and purpose of the will are better served thereby than they are by total sacrifice." Id. at 457, 173 N.E. at 678. See also Matter of Halsey, 286 N.Y. 154, 36 N.E.2d 91 (1941); Matter of Conklin, 30 Misc. 2d 495 (Surr. Ct. 1961); In re Jutkowitz' Will, 139 N.Y.S.2d 120 (Surr. Ct. 1954).

39. Matter of Maloney, 11 Misc. 2d 96, 171 N.Y.S.2d 176 (Surr. Ct. 1958), rev'd on other grounds mem., 8 App. Div. 2d 756, 185 N.Y.S.2d 588 (4th Dep't), aff'd mem., 7 N.Y.2d 863, 164 N.E.2d 867, 196 N.Y.S.2d 996 (1959).

40. Matter of Roe, 281 N.Y. 541, 24 N.E.2d 322 (1939); Matter of Wernick, 12 Misc. 2d 276 (Surr. Ct. 1958). The decree in Wernick was later held ineffective on jurisdictional grounds. 12 Misc. 2d 475, 177 N.Y.S.2d 153 (Surr. Ct. 1958).

41. Farley v. Secor, 167 App. Div. 80, 152 N.Y.S.2d 787 (2d Dep't 1915); see Matter of Klein, 39 Misc. 2d 960, 242 N.Y.S.2d 241 (Surr. Ct. 1963).

42. In cases where the trust, as originally intended, was to last for three lives and one of the three persons died before the testator, the trust will be found to be measured by only two lives. In re Schluechterer's Estate, 90 N.Y.S.2d 867 (Surr. Ct. 1949); In re Ginn's Estate, 49 N.Y.S.2d 443 (Surr. Ct. 1944).

43. Matter of Allar, 36 Misc. 2d 405, 232 N.Y.S.2d 173 (Surr. Ct. 1962).

44. Matter of Buchner, 153 Misc. 407, 274 N.Y. Supp. 936 (Surr. Ct. 1934). Without such a provision there is, in effect, a trust for X when he becomes twenty-one.

the power of alienation would be suspended. This trust would violate the rule and therefore fail.[45] Under the amended rule, a testamentary trust providing for the distribution of the corpus twenty-one years or less after the death of the settlor with no provision for the payment of income during this period will be valid under New York Real Property Law Section 42, and Personal Property Law Section 11.[46] However, if the corpus were to be distributed more than twenty-one years after the death of the settlor the trust would fail.[47] The period during which the power of alienation is suspended would be greater than twenty-one years, and not measured by any lives in being. The trust would not be salvaged by virtue of Real Property Law Section 42-b, since that section is specifically confined to invalidity resulting from "any person attaining or failing to attain an age in excess of twenty-one years . . . ."[48]

Another bequest, frequently encountered by the courts, was that of a trust "to X until he becomes" a specified age.[49] In such cases, the courts consistently sustained the trust by construing the limiting phrase as "until he becomes that age *or sooner dies*."[50] Such a construction, admitting of an earlier termination at the death of the beneficiary,[51] brought the trust squarely within the "two

45. See Matter of Goriup, 4 Misc. 2d 140, 156 N.Y.S.2d 875 (Surr. Ct. 1956) where such a trust was salvaged by utilizing the device of excision. A trust of this type would also have violated the statutes against accumulations. N.Y. Sess. Laws 1915, ch. 670, § 61 required that accumulations terminate at or before the majority of the beneficiary. See also N.Y. Sess. Laws 1928, ch. 172, § 16. These statutes have been amended to allow accumulations provided they terminate at or before "the time allowed for the vesting of future estates . . . ." N.Y. Real Prop. Law § 61; N.Y. Pers. Prop. Law § 16.

46. This is a result of the inclusion of a twenty-one year period in gross.

47. In Matter of Hitchcock, 222 N.Y. 57, 72, 118 N.E. 220, 223, the court noted that the "codicil provide[s] for a trust for a period of years and not based upon lives, and it does not therein in terms dispose of the income. Such trust is invalid." Nevertheless, the court applied the devices of excision and acceleration, stating that "the failure of the trust should not affect her testamentary dispositions . . . . The lawful wishes of the testatrix would be defeated if the testamentary dispositions are not sustained." Id. at 73, 118 N.E. at 223. If construction of this trust were sought today the court might resort to the same devices and give the beneficiary the present enjoyment of his vested interest. As an alternative the court might, in an attempt to carry out most closely, the intention of the testator, reduce the duration of the trust to twenty-one years.

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

49. Matter of Rounds, 105 Misc. 273, 172 N.Y. Supp. 758 (Sup. Ct. 1918); Matter of Allar, 36 Misc. 2d 405, 232 N.Y.S.2d 173 (Surr. Ct. 1962); Matter of Goriup, 4 Misc. 2d 140, 156 N.Y.S.2d 875 (Surr. Ct. 1956); Matter of Fishberg, 158 Misc. 3, 285 N.Y. Supp. 303 (Surr. Ct. 1936).

50. Jacoby v. Jacoby, 188 N.Y. 124, 80 N.E. 676 (1907) (a term measured by a minority will terminate with the death of that minor); Appell v. Appell, 177 App. Div. 570, 164 N.Y. Supp. 246 (1st Dep't), aff'd mem. 221 N.Y. 602, 117 N.E. 1060 (1917); In re Colletti's Will, 155 N.Y.S.2d 48 (Surr. Ct. 1956). See also note 49 supra.

51. The person whose age measures the trust duration need not be a beneficiary. Crooke

lives rule" by making explicit what the settlor left implicit but unexpressed.[52] This construction could not save the trust if it were to continue until my youngest child attains twenty-one *or would attain that age if living*,[53] or other limitation which, expressly or impliedly, might have exceeded the permissible period.

Where a trust was for the benefit of a group until the "youngest" became twenty-one, the courts construed the word "youngest" as meaning the youngest at the time the instrument creating the trust spoke.[54] After thus defining "youngest" in terms of a specific individual, the courts then added the phrase "or sooner dies" so that the trust would be validly limited on only one *life*, rather than for a period of years as the form of the limitation seemed to indicate. At common law, however, the youngest child was construed as meaning the last-born child.[55]

As the period in gross may be used as a limitation without reference to any life or minority[56] the addition of the phrase "or sooner dies" to measure the bequest in terms of a life, will not be necessary.[57] The trust will, nevertheless, still terminate where the beneficiary dies before attaining the specified age. Where the trust is for "X until he becomes twenty-five" the courts will apply Real Property Law Section 42-b[58] and reduce the age contingency to twenty-one if, but only if X is less than four years old at the death of the settlor.[59]

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v. County of Kings, 97 N.Y. 421 (1884). Therefore, only the measuring lives need be in being at the time the creating instrument speaks; the beneficiaries need not be. Gilman v. Reddington, 24 N.Y. 9 (1861).

52. Appell v. Appell, 177 App. Div. 570, 574-75, 164 N.Y. Supp. 246, 250 (1st Dep't) (dissenting opinion), aff'd mem., 221 N.Y. 602, 117 N.E. 1060 (1917). The court of appeals did not question the necessity of finding an intent on the part of the settlor which would justify the addition of the phrase "or sooner dies." It affirmed on the grounds that such an intention could not be shown from the facts.

53. Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 N.Y. Supp. 228 (1st Dep't 1904); Matter of Muro, 98 N.Y.S.2d 732 (Surr. Ct. 1950).

54. Matter of Rounds, 105 Misc. 273, 172 N.Y. Supp. 758 (Sup. Ct. 1918); In re Gallagher, 10 Misc. 2d 422, 169 N.Y.S.2d 271 (Surr. Ct. 1957); Matter of Bahrenburg, 130 Misc. 196, 224 N.Y. Supp. 183 (Surr. Ct. 1924), aff'd mem., 214 App. Div. 792, 210 N.Y. Supp. 824 (2d Dep't 1925), aff'd mem., 244 N.Y. 561, 155 N.E. 897 (1927). See also In re Mallouk, 195 Misc. 996, 91 N.Y.S.2d 306 (Surr. Ct. 1949), where "when the last of my grandchildren . . . living at my death" was held to admit of multiple lives and therefore the trust violated the statute.

55. 3 Powell, Real Property ¶ 364, nn.42, 43 (1952).

56. Matter of Klein, 39 Misc. 2d 960, 242 N.Y.S.2d 241 (Surr. Ct. 1963); Cadell v. Palmer, 1 Cl. & F. 372 (1833) (no mention of a minority is necessary).

57. See Matter of Molyneaux, 44 Misc. 2d 159, 253 N.Y.S.2d 75 (Surr. Ct. 1964).

58. See note 48 supra.

59. Matter of Pendleton, 41 Misc. 2d 831, 246 N.Y.S.2d 531 (Surr. Ct. 1964). The life beneficiary, exercising a power of appointment, established a trust for his six children, the principal to be paid to each when he became thirty years of age. Three of the children were not in being at the death of the donor. However, the permissible period for the duration of a trust at the time of the donee's death was "lives in being plus twenty-one years." The court, construing the trusts as separable, applied Pers. Prop. Law § 11-a and reduced the age contingency as to the only child whose interest would otherwise not vest within

C. *Entire or Separable Trusts*

The constructional devices previously discussed may be considered merely "warm-up" exercises for the courts. For it was in the field of "separable trusts" that they were required to exercise their ingenuity to its fullest extent. If a testamentary bequest was made to "X, Y, and Z until they became twenty-one," the courts' insertion of the phrase "or sooner dies" would have been to no avail. The trust could very possibly continue beyond the period of two lives in being.[60]

To circumvent this possible invalidity the testator might select the second measuring life after the termination of the first by providing, for example, "a trust of his entire estate for the benefit of his wife during her life and then for the benefit of his children during the life of the youngest child alive at the death of the wife."[61] This type of provision had one serious shortcoming: the youngest child alive at the death of the wife might predecease the other children, thereby terminating the trust and thwarting the testator's intentions.[62] If, however, the testator provided for separate trusts for each of the several beneficiaries, the courts sustained the bequest, since each trust was validly limited on only one measuring life—that of the named, individual beneficiary.[63]

Where the testator failed to make an express provision for separate trusts the matter was somewhat more difficult to resolve. The only avenue open to the courts was to find somehow that the trusts created for the three or more beneficiaries were, in fact, three or more separate trusts, each determinable on the death of the individual beneficiary, in which case the period of suspension would not be greater than a single life. The statute, as construed by the courts, provided: united you fail, divided you stand.

The courts had early established that a finding of separate trusts would not be precluded by the settlor's direction to distribute the income and principal from one fund, kept *in solido*.[64] Two factors soon became essential to a finding

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twenty-one years after the life of the donee (the measuring life which was in being at the death of the donor).

In Matter of Molyneaux, 44 Misc. 2d 159, 253 N.Y.S.2d 75 (Surr. Ct. 1964), the court reduced the age contingency and thereby rendered the interest of the beneficiary indefeasibly vested (the divesting contingencies could not occur before the beneficiary attained an age in excess of twenty-one). The contingent remainders were also thereby excised.

60. Cf. Provost v. Provost, 70 N.Y. 141 (1877). Where the bequest is to X and Y for a period of years the trust may be sustained by adding the phrase "or sooner dies." In re Ayres, 76 N.Y.S.2d 897 (Surr. Ct. 1947). Where there are separate trusts created for a period of years the courts may imply a sooner termination at the death of the beneficiary. In re Mitchell, 73 N.Y.S.2d 910 (Surr. Ct. 1947).

61. See Schermerhorn v. Cotting, 131 N.Y. 48, 29 N.E. 980 (1892); In re Bridgman, 142 N.Y.S.2d 644 (Surr. Ct. 1955).

62. See Cooper v. Heatherton, 65 App. Div. 561, 73 N.Y. Supp. 14 (2d Dep't 1901), where the youngest child was en ventra sa mere at the time of the testator's death, and which child died less than one year after birth.

63. Provost v. Provost, 70 N.Y. 141 (1877). See also Oliver v. Wells, 254 N.Y. 451, 173 N.E. 76 (1930); Matter of Trevor, 239 N.Y. 6, 145 N.E. 66 (1924); Lewisohn v. Henry, 179 N.Y. 352, 72 N.E. 239 (1904).

64. Leach v. Godwin, 198 N.Y. 35, 91 N.E. 288 (1910).

of separate trusts in the absence of an express division of the trust into shares. The instrument creating the trust(s) had to contain directions (a) to pay a specified share of the income to each of the beneficiaries, and (b) to pay a corresponding share of the corpus[65] to each of the beneficiaries[66] (or their issue,[67] or other specified persons)[68] at majority[69] (or death,[70] or other specified time).[71] It was not essential that the whole corpus be released at the termination of any two specified lives,[72] since the validity of each trust would be dependent solely on its own terms and not on the fate or validity of the others.[73]

In *Matter of Horner*,[74] Judge Cardozo, speaking for the majority, set down a new test: "the dominant purpose." He stated: "[I]f the dominant purpose in the creation of the trust is that of division into separate shares terminable by separate minorities or lives, the trust to that extent may be upheld . . . . We must say whether unity or pluralism is the preponderating note. The choice at best is between two obscurities, and yet the stress, it would seem, is upon shares into which an aggregate is conceived of as at least constructively divided, and not upon an aggregate in which shares have been submerged."[75] In this case, there was a provision for the payment of income to the individual beneficiaries.[76] There was also a provision that in a certain contingency "a share shall fall back into the general body of the trust and remain unsevered from the bulk."[77] Therefore, the trust would not, in every case, necessarily terminate within the statutory period. To circumvent the invalidating potential of this provision, the court held that it was "so subordinate in importance and so

65. Id. at 41, 91 N.E. at 289. See also Matter of Halsey, 286 N.Y. 154, 36 N.E.2d 91 (1941).

66. E.g., Matter of Colegrove, 221 N.Y. 455, 117 N.E. 813 (1917); In re Goldstein, 145 N.Y.S.2d 823 (Surr. Ct. 1955), aff'd, 3 App. Div. 2d 16, 157 N.Y.S.2d 778 (2d Dep't 1956).

67. E.g., Matter of Horner, 237 N.Y. 489, 143 N.E. 655 (1924); Matter of Green, 187 Misc. 434, 60 N.Y.S.2d 705 (Surr. Ct. 1946).

68. E.g., Matter of Gallien, 247 N.Y. 195, 160 N.E. 8 (1928); Crooke v. County of Kings, 97 N.Y. 421, 436 (1884).

69. E.g., Matter of Horner, 237 N.Y. 489, 143 N.E. 655 (1924); Matter of Goriup, 4 Misc. 2d 140, 156 N.Y.S.2d 875 (Surr. Ct. 1956).

70. Matter of Gorham, 283 N.Y. 399, 28 N.E.2d 888 (1940).

71. In re Goldstein, 145 N.Y.S.2d 823 (Surr. Ct. 1955).

72. Oliver v. Wells, 254 N.Y. 451, 173 N.E. 76 (1930).

73. Ibid.

74. 237 N.Y. 489, 143 N.E. 655 (1924).

75. Id. at 493-94, 143 N.E. at 656.

76. The provision was for the support of the testator's grandchildren during their minorities, although there was no direction for division of either the corpus or the income into shares. The court remarked that "the only direction for division to be found in the will is one proportioning the shares to the number of children surviving when majority is reached." Id. at 496, 143 N.E. at 657.

77. Id. at 495, 143 N.E. at 656. The contingency on which this provision was predicated was the death of a beneficiary during minority without surviving issue.

separable in function that we are at liberty to cut it off and preserve what goes before."[78]

Bequests which received the "separability treatment" were frequently of this variety: *T* leaves his estate in trust for his children *X*, *Y* and *Z* until they become twenty-one, with a provision for the payment of income during this period. If any child should die under twenty-one, with issue surviving him, his share will pass to his issue *per stirpes*. If any child should die under twenty-one without issue surviving him, his share is to be held in further trust for the surviving children of the testator.[79] Finding separate trusts will validate the principal trusts by making them terminable on the death of the primary beneficiaries. The problem arises next with respect to the subshares.[80] If *X* should die under twenty-one without issue surviving him, his original one-third is to be equally divided between *Y* and *Z* and held in trust until their majority. In the case of both *X* and *Y* dying during minority without issue surviving them, the entire principal might, if *Z* is still a minor, be held in trust for a period in excess of that permitted by the statute. If all three beneficiaries should die without issue surviving them, the residuary clause of the will would not be given effect until after the termination of *three* lives.

The courts have not been consistent in their treatment of these subshares. Three basic patterns are noticeable. In some cases the cross limitations have been declared invalid *in toto*.[81] In others the courts have allowed a division of the share of the beneficiary first to die during minority without issue, which subshare is to be held for the surviving primary beneficiaries.[82] If a second beneficiary should subsequently die during minority without issue, his primary share could also be held in further trust for the surviving beneficiary. However, the subshare acquired by the second beneficiary on the death of the first cannot further be held in trust. Thus all the trusts, with the exception of the one-half subshare of the first beneficiary to die, are held valid.[83] The third category consists of cases in which the court finds the problem to be "academic" at the present time, and consequently forebears from ruling on the issue.[84]

78. Ibid.

79. See Matter of Horner, 237 N.Y. 489, 143 N.E. 655 (1924). See also notes 81, 83, & 84 infra.

80. It is pointed out in Law Revision Comm'n, Report Recommendations and Studies, N.Y. Leg. Doc. No. 65(H), p. 93 (1936) that a "differentiation" between primary shares and subshares "is attributable directly to the pressure on our courts to preserve essentially reasonable limitations, notwithstanding the difficulties introduced by our two-life rule."

81. Matter of Gorham, 283 N.Y. 399, 28 N.E.2d 888 (1940); Matter of Colegrove, 221 N.Y. 455, 117 N.E. 813 (1917).

82. See Matter of Horner, 237 N.Y. 489, 143 N.E. 655 (1924).

83. Matter of Horner, supra note 82; Matter of Drake, 153 Misc. 691, 275 N.Y. Supp. 836 (Surr. Ct. 1934), aff'd mem., 246 App. Div. 758, 283 N.Y. Supp. 930 (2d Dep't 1935); cf. Matter of Friend, 283 N.Y. 200, 28 N.E.2d 377 (1940). Compare Matter of Bridgman, 142 N.Y.S.2d 644 (Surr. Ct. 1955); In re Chapman, 94 N.Y.S.2d 325 (Surr. Ct. 1950); Matter of Green, 60 N.Y.S.2d 705 (Surr. Ct. 1946).

84. In re Smith, 149 N.Y.S.2d 856 (Surr. Ct. 1956); In re MacPhail, 127 N.Y.S.2d 114 (Surr. Ct. 1953). N.Y. Surr. Ct. Act § 145 (formerly, Code Civ. Proc. § 2624), provides

D. *Doctrine of Separability and the Recent Amendments*

It is to be expected that the recent amendments will have a profound effect on the use of the doctrine of separable trusts. The inclusion of any number of lives in being plus twenty-one years will prevent, in many cases, the invalidating "disease." The cure will have become superfluous.[85] Thus in the case of a trust for "*X*, *Y* and *Z* for life, remainder in fee to their issue" the courts will not have to decide whether *X*, *Y* and *Z* are the beneficiaries of separate trusts or of one, indivisible trust. The problems which caused the courts to invoke the aid of the doctrine of separability may still arise under the new rule. These problems will, however, arise at a later date, *viz.*, with respect to the cross limitations or remainders or, in the case of a class gift capable of reopening to admit afterborn members, as in *Matter of Horner*.[86] There, the additional trust for the children of the testator's daughter was to continue until these children became twenty-one. At the death of the testator the daughter had only one child. The court held this trust invalid "as its duration is measured by the lives or minorities of persons not in being."[87]

A similar trust, created today, would also violate the statutory rule which retains the requirement that the measuring lives be in being at the creation of the estate.[88]

E. *Postponement of Vesting or of Enjoyment*

Although they do, however begrudgingly, acknowledge the fact that "they are not going to take it with them," testators have found ways of keeping others from getting "it"—for a time, at least. Trusts have been established which defer payment until a specified period of time after the death of the settlor,[89] or until the occurrence of an event after the death of the settlor.[90] One issue to be determined by the courts in such cases is whether the estate vests in the beneficiaries on the death of the settlor, with only the enjoyment postponed, or whether the estate itself is contingent upon the beneficiaries surviving to the time specified in the will. This issue is crucial since the Rule Against Perpetuities, with one exception, does not apply to vested interests.[91]

In some cases the courts are able to treat the provision to delay payment as

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that an executor may present to the surrogate's court a petition for construction of a will. This section is not mandatory. See Matter of Mount, 185 N.Y. 162, 77 N.E. 999 (1906).

85. Where, however, the testator specifically provides for separate trusts, such effect will be given to the bequest.

86. 237 N.Y. 489, 500-01, 143 N.E. 655, 658-59 (1924) (trusts "for the children of Grace").

87. Id. at 500, 143 N.E. at 659. The court did sustain the trust during the minority of the only grandchild alive at the testator's death.

88. See matter of Molyneaux, 44 Misc. 2d 159, 163, 253 N.Y.S.2d 75, 80 (Surr. Ct. 1964).

89. Matter of Hitchcock, 222 N.Y. 57, 118 N.E. 220 (1917); In re Wilber, 202 N.Y. Supp. 760 (Surr. Ct. 1923). See note 40 supra and accompanying text.

90. Manice v. Manice, 43 N.Y. 303, 364-65 (1871); Matter of Graves, 194 Misc. 394, 86 N.Y.S.2d 382 (Surr. Ct. 1949); In re Herts, 1 N.Y.S.2d 528 (Surr. Ct. 1937).

91. Gray §§ 205-205.2. The exception being a gift to a class which is capable of reopening.

an invalid intermediary estate, to which the constructional devices of excision and acceleration may be applied.[92] As in the cases previously discussed in connection with acceleration, the bequests, in these cases, must also be vested.[93] In other cases the courts have found the delay merely represented an "administrative contingency" which did not necessarily invalidate the bequest.[94] However, whether the courts would find that this delay amounted to an administrative contingency could not be predicted with any degree of certainty.[95]

Recognizing the uncertainty surrounding provisions of this sort, the legislature enacted Real Property Law Section 42-c(4) which provides:

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

This section will salvage many bequests which would not have been held valid under the prior law. It will also dispense with the need for constructional devices with respect to these bequests.

F. *Amendments Respecting Presumptions*

A bequest to the "widow of *X*" need not, under all circumstances, vest within the period prescribed by the rule. Even though *X* is married at the time of the settlor's death, his wife may die and *X* might remarry a woman who was not "a life in being" at the death of the settlor.[96] In *Matter of Friend*[97] the court upheld a bequest to the "widow" of the settlor's son on the theory that the woman to whom the son was married at the time the instrument was created was the same person referred to in that instrument as the son's "widow." Such an interpretation could not be made, obviously, where the bequest was to the widow of a person who was unmarried at the time the instrument was created. In such a case the bequest would fail for remoteness.[98]

Bequests of this type are not attempts to "fetter property" but rather the natural desires of a testator to provide for his family, which desires were

92. See note 89 supra.

93. In connection with this question of vested or contingent interests, see Matter of Crane, 164 N.Y. 71, 58 N.E. 47 (1900), for a discussion of the "divide-and-pay-over" rule.

94. See notes 89 & 90 supra.

95. Compare Robert v. Corning, 89 N.Y. 225, 238 (1882) with Matter of Roe, 281 N.Y. 541, 24 N.E.2d 322 (1939). See also Maynard v. Farmers' Loan & Trusts Co., 208 App. Div. 112, 203 N.Y. Supp. 83, aff'd mem., 238 N.Y. 592, 144 N.E. 905 (1924); Matter of Adler, 193 Misc. 19, 83 N.Y.S.2d 153 (Surr. Ct. 1948); Matter of Dean, 167 Misc. 238, 3 N.Y.S.2d 711 (Surr. Ct. 1938).

96. Matter of Vingut, 10 Misc. 2d 160, 172 N.Y.S.2d 32 (Sup. Ct. 1958).

97. 283 N.Y. 200, 28 N.E.2d 377 (1940).

98. In re Schluechterer's Estate, 90 N.Y.S.2d 867 (Surr. Ct. 1949).

thwarted by the omnipresent rule. This natural desire was recognized by the legislature when it passed Real Property Law Section 42-c(3) which provides:

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

A recent case, *Matter of Williams*,[99] has held this section to apply even in cases where the "widower-to-be" is unmarried at the death of the settlor. The court stated that the section is to be read as though it stated: the widow will be deemed to refer to a person who is *or will be* a life in being on the effective date of the instrument.[100]

Under the common law, people were presumed to be capable of procreating or childbearing so long as they lived.[101] At the opposite extreme, the English courts have noted that a five year old child might be capable of bearing children.[102] Real Property Law Section 42-c(2) provides that in construing an instrument "It shall be presumed that such person [creating the instrument] intended the estate or interest to be valid." The Law Revision Commission stated, in referring to the so-called "fertile octogenarian" and "precocious toddler" cases, that many factors, including artificial insemination and a broadening of adoption statutes prevent the creation of a statutory presumption with regard to procreativity and childbearing.[103] Whether the courts will see fit to apply section 42-c(2) in such cases remains to be seen.[104]

III. Conclusion

In its recommendations for changes in the Rule against Perpetuities, the Law Revision Commission of 1936 stated that "These . . . [constructional] devices by which the New York permissible period may be extended to three or more lives could have no place in a jurisdiction allowing suspension of the power of alienation for multiple lives."[105] With the recommended changes now part of the law the courts will have to decide whether these devices are to be discarded. Certainly they are landmarks to the ingenuity of the courts—something more than a reaction, something less than a panacea.

In proposing the 1960 amendments, the Law Revision Commission stated that "There is no reason to suppose that this approach [utilizing the construc-

99. 41 Misc. 2d 297, 245 N.Y.S.2d 672 (Surr. Ct. 1964).

100. Id. at 301, 245 N.Y.S.2d at 676.

101. Jee v. Audley, 1 Cox 324 (Ch. 1787).

102. Re Gaite's, 1 All E.R. Ann. 459 (Ch. 1949).

103. N.Y. Leg. Doc. No. 65(G), p. 62 (1960).

104. See discussion in ABA, Section of Real Property, Probate and Trust Law, Legislators' Handbook on Perpetuities, at 30-33, advocating the adoption of such "rebuttable" presumptions.

105. Law Revision Comm'n, Report, Recommendations and Studies, N.Y. Leg. Doc. No. 65(H), p. 108 (1936).