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TRUSTS — PERPETUITIES — RESTRAINTS ON ALIENATION OF PROPERTY HELD IN TRUST

The Wisconsin Supreme Court has recently reaffirmed the rule that our statutory prohibition of undue restraints on the alienation of property¹ is not violated as to property held in trust where the trustee has the power to sell the property and replace it with other assets.² Since this rule has been criticized as narrowing the policy foundations of the common law rules which invalidate such restraints,³ a comparison of the scope and purpose of the common law rules with the statutes designed to replace or supplement them is in order.

I. COMMON LAW RULE AGAINST DIRECT RESTRAINTS

The first of the common law rules, in point of time, is the rule against direct restraints on alienation. Such a direct restraint would be, for example, a devise or grant to A in fee simple, but providing that A was not to alienate the property until he reached a certain age.⁴ The Statute *Quia Emptores*⁵ established the right of tenants holding in fee simple to alienate their interest. As a corollary of this right, the courts developed the rule that a condition or limitation on the right to alienate a fee simple estate is void *ab initio*.⁶ There are two reasons advanced for the rule.

The first reason is that the restraint on alienation is repugnant to the estate granted. The law of property recognizes only certain fixed types of estates, and will not allow the creation of new ones because of the confusion it would cause in determining where title lay. In fixing the definition of a fee simple estate the courts assume that alienability is an inseparable incident of that estate. Since public policy forbids the creation of new estates, to avoid confusion of titles, and presuming that alienability is a necessary incident of the fee simple estate, then to recognize a restraint on alienation would be repugnant in the sense of being inconsistent with the doctrine of fixed types of estates.⁷ The

¹ WIS. STATS. (1951), sec. 230.14 "Suspension of the power of alienation. 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 chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property; . . ."

Sec. 230.15 "Limit of Suspension. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being at the creation of the estate and thirty years thereafter, . . ."

² Will of Walker, 258 Wis. 65, 45 N.W. 2d 94 (1950).

³ Note, 49 MICH. L. REV. 1239 (1951).

⁴ Zillmer v. Landguth, 94 Wis. 607, 69 N.W. 568 (1896).

⁵ 18 EDW. 1, c. 1 (1290).

⁶ SIMES, LAW OF FUTURE INTERESTS, Sec. 439 (1936) (hereafter cited as SIMES).

⁷ *Ibid.*, Sec. 442.

other reason is the public policy in favor of keeping land in commerce to meet the needs of the community.⁸ The latter is generally considered the main reason for the rule in its modern application, though the courts continue to base their decisions on the formal reasoning of repugnancy. Since in some cases restraints on alienation have been permitted (spendthrift trusts and married women's separate estates) it seems that such restraints cannot be truly repugnant if they are sometimes permissible.⁹

The rule against direct restraints is applied to restraints on both legal and equitable interests, but in America the majority of states allow restraints on the alienation of equitable life estates in the form of spendthrift trusts.¹⁰ Massachusetts and Illinois have extended this rule, based on the right of a settlor to dispose of his property as he wishes, to include spendthrift trusts of beneficial fee interests.¹¹ But usually any restraint on either a legal or equitable fee interest is considered void as a restraint on alienation.¹² The courts in dealing with restraints on equitable interests generally do not consider whether the subject matter of a trust is sufficiently alienable if the trustee can sell the corpus and thus keep it in commerce. The English rule against restraints on alienation of equitable life estates was laid down in *Brandon v. Robinson*¹³ where the court said the gift to the beneficiary must have all the incidents of the property given, and the attempt to deprive creditors of their rights against the beneficiary's estate was void. Counsel argued that the trustee, who had "an absolute interest," could dispose of the property, but the court gave no direct answer on this point. The case seems to be based on a policy of protecting creditors.¹⁴ The Pennsylvania court first considered the right of the trustee to sell trust property in validating a spendthrift trust, but based its decision primarily on the right of the settlor to dispose of his property as he chose.¹⁵ In *Broadway Bank v. Adams*,¹⁶ a leading case on spendthrift trusts, the court points out that the property is not inalienable since the trustee has the full legal title, including a power of sale.¹⁷ However, the court also based its decision on giving effect to the intent of the settlor and the view that the power

⁸ *Ibid.*, Sec. 440; BOGERT, TRUSTS AND TRUSTEES, Sec. 220 (1951) (hereafter cited as BOGART).

⁹ SIMMS, Sec. 442.

¹⁰ A spendthrift trust is usually a life estate or term for years given in trust, which the beneficiary cannot voluntarily assign or convey, nor can it be reached by his creditors. BOGERT, Sec. 222.

¹¹ *Boston Safe Deposit and Trust Co. v. Collier*, 222 Mass. 390, 11 N.E. 163 (1916); *Wagner v. Wagner*, 249 Ill. 101, 91 N.E. 66 (1910).

¹² BOGERT, Sec. 220.

¹³ 18 Ves. 429, 34 Eng. Rep. 379 (1811).

¹⁴ It was so construed in *Tillinghurst v. Bradford*, 5 R. I. 205 (1858).

¹⁵ *Fisher v. Taylor*, 2 Rawle 33 (1829).

¹⁶ 133 Mass. 170 (1882).

¹⁷ In most jurisdictions the trustee has no power of sale unless the trust instrument specifically gives it to him. Leach, *Powers of Sale in a Trustee*, 47 HARV. L. REV. 948 (1934).

of alienation is not a necessary incident to a life estate in real property.¹⁸

Except in the cases mentioned, the courts in considering direct restraints on equitable interests do not look to the power of sale in the trustee as an aid in determining alienability. The cases involving spendthrift trusts of equitable life estates are governed by either a policy of favoring creditors or giving the settlor a free hand in the disposition of his property.¹⁹ The cases involving equitable fees are decided on the repugnancy ground.²⁰

II. COMMON LAW RULE AGAINST INDIRECT RESTRAINTS

The other type of restraints against alienation is the indirect restraint. An indirect restraint arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the action would, if valid, restrain practical alienability.²¹ These indirect restraints arise on the creation of two types of future interests.²² In one type there is an uncertainty as to the person who will ultimately take the property; for instance, a grant to A for life, remainder in fee to the heirs of B, a living person.²³ Here there is an uncertainty as to the person who will take the remainder since B's heirs are not determined until B dies. Alienation is restrained because, until B dies, there is no one who can combine with the possessor of the present estate to convey a full fee simple. Although the grantor probably did not intend a restraint there are no persons in being who can, by acting together, convey the fee simple.²⁴

The second type of future interest involving an indirect restraint is when there is no uncertainty as to the person who has the future interest, but it is uncertain when, and if, he will ultimately take the property; for example, a grant to A in fee simple, but to C if A dies with no sons surviving him.²⁵ In such a situation the alienation technically is not restrained for the future interest can be released by the person who might eventually take the property as he is here determined. But here the law aims at practical alienability so even this future interest is

¹⁸ Here the court followed *Nicholas v. Eaton*, 91 U.S. 716, 13 L.Ed. 254 (1875), where Justice Miller held that the doctrine that income from trust property could not be enjoyed by the beneficiary without being liable for his debts was engrafted on the common law to protect creditors and is of comparatively modern origin. He did not agree with Lord Eldon (in *Brandon v. Robinson*, *supra*, note 13) that the right of alienation is a necessary incident of a life estate in real property.

¹⁹ BOGERT, Sec. 222.

²⁰ *Ibid.*, Sec. 220.

²¹ GRAY, RESTRAINTS ON THE POWER OF ALIENATION, Sec. 180 (2nd Ed., 1895).

²² SIMES, Sec. 437.

²³ See *Thelluson v. Woodford*, 11 Vesey Jr., 112 (1805), where the devise was to the eldest male descendant of testator's son, Peter, at the death of the survivor of seven sons and their sons.

²⁴ SIMES, Sec. 479.

²⁵ See the *Duke of Norfolk's case*, 3 Ch. Cas. 1 (1682), where an executory interest was limited to C if T died during the lifetime of H without sons surviving.

regarded as an indirect restraint since it diminishes the probability of the land being alienated until it can be determined if the holder of the future interest will actually receive the property.²⁶ Since the courts looked, in both of these cases, to how long it would be before the future interest vested, some writers have denominated this rule against indirect restraints as a rule against remoteness in vesting, but it is more commonly called the rule against perpetuities.²⁷

The rule against perpetuities took form as a rule in the *Duke of Norfolk's Case*²⁸ when Lord Nottingham held that a contingency which was to be determined at the end of one life was all right, but stated that he would not allow them if they would continue so long as to cause "visible inconvenience." Later cases held that it was immaterial how many lives were involved if all were in being at the time of the grant or devise,²⁹ and then added a period of twenty-one years as a period of minority³⁰ which later became a period in gross without reference to the minority of any person.³¹

Thus the common law rule against perpetuities finally allowed future interests to be created which would vest within lives in being and twenty-one years. If it is possible that the future interest may not vest within this time it is void, although vesting actually occurs in the time allotted.³²

Though the rule is discussed in terms of vesting, its primary purpose was always to promote alienability.³³ Alienability is impaired by an indestructible interest in a person not presently ascertained or in a person who may never take possession of the property. The law has determined that an indirect restraint for a selected period, which has been varied by statute in some states,³⁴ is all right, but will not allow a restraint if it may last longer than the period. Such restraints are labelled perpetuities and are held void.³⁵

The beneficial interest in a trust may contain a future interest which will indirectly suspend the power of alienation, and so violate the rule against perpetuities.³⁶ A power of sale in the trustee is not accepted as a reason for saving a trust containing a "perpetuity" in the beneficial

²⁶ Report of the New York Law Revision Commission, 512 (1936).

²⁷ Rundell, *Suspension of the Absolute Power of Alienation*, 19 MICH. L. REV. 235, 240 (1921); SIMES, Sec. 479.

²⁸ *Supra*, note 25.

²⁹ Scatterwood v. Edge, 1 Salk. 229 (1736).

³⁰ Stephens v. Stephens, Cas. Temps. Talb. 228 (1736).

³¹ Cadell v. Palmer, 1 Cl. & F. 362 (1833).

³² SIMES, Sec. 474.

³³ Report of the New York Law Revision Commission, 512 (1936); SIMES, Sec. 474.

³⁴ SIMES, Sec. 560.

³⁵ *Ibid.*, Sec. 479; Maxcy v. City of Oshkosh, 144 Wis. 238, 128 N.W. 899 (1910).

³⁶ Saxton v. Webber, 83 Wis. 617, 53 N.W. 905 (1892); GRAY, RULE AGAINST PERPETUITIES, Sec. 411 (Fourth Ed., 1942) (hereafter cited as GRAY).

interest.³⁷ Nor does the fact that the beneficiary can alienate his future interest save it from being declared void if it might not vest within the period allowed by the rule.³⁸

Since the courts and writers have usually held to the formal rules based on remoteness of vesting, it appears that a power in a trustee to alienate the items of a trust corpus will not save the trust from a perpetuity in the beneficial interest under the common law rule, though the basic purposes of the rule against restraints appears to be satisfied in such cases. The lengths to which the courts will go in applying their formal reasoning is shown in the English cases holding that a power of sale that would arise in a trustee on an event which would occur beyond the period of the rule against perpetuities was a restraint on alienation, as it was a future interest which would not "vest" in the trustee within the period of the rule.³⁹

III. THE NEW YORK STATUTES

Both of these common law rules against restraints on alienation existed in New York prior to 1830.⁴⁰ In that year a new Real Estate Code became effective. The code was the work of a commission of three revisors who had been appointed to codify existing statutes concerning real property.⁴¹ The code as finally completed covered areas where previously there was no statute in effect. One of these areas was that of restraints on alienation.⁴² The revisors stated the common law rule against perpetuities as a rule against suspension of the power of alienation, with a change in the period of allowable suspension.⁴³ In Section 14 the revisors aimed at restraints caused by the creation of future interests in persons not ascertainable until some future date.⁴⁴ To cover cases where a future interest was given to an ascertained person, but limited on an uncertain future event, they used the last sentence of Section 24.⁴⁵ Generally it can be said that the revisors intended that their statutory rule would be only a restatement of the common law rule as it existed in 1830,⁴⁶ and their change in the rule's language can be laid to their idea that the rule was aimed at those remote

³⁷ GRAY, Sec. 269; *Wheeler v. Fellows*, 52 Conn. 238 (1884).

³⁸ GRAY, Sec. 269.

³⁹ *Goodier v. Johnson*, 18 Ch. Div. 441 (1881).

⁴⁰ Report of the New York Law Revision Commission, 515 (1936).

⁴¹ *Ibid.*, 517; *Rundell*, *supra*, note 27, 565; 3 N.Y.R.S. (2d. ed.) 571.

⁴² Report of the New York Law Revision Commission, 515 (1936).

⁴³ SIMES, Sec. 565.

⁴⁴ NEW YORK REVISED STATUTES, (1830), REAL ESTATE CODE, Sec. 14: "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period that 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."

⁴⁵ NEW YORK REVISED STATUTES (1830), REAL ESTATE CODE, Section 24: ". . . And a fee may be limited on a fee, upon a contingency which if it should occur, must happen within the period prescribed in this article."

⁴⁶ Report of the New York Law Revision Commission, 516 (1936).

future interests which were restraints on alienation. The revisors did not consider the rule as one against remoteness in vesting as such, but as a rule against the suspension of the power of alienation, relying on the statement in *Scatterwood v. Edge*⁴⁷ that if all having an interest in particular property can join to convey a fee simple then there is no perpetuity. Hence, if each interest in the property was alienable there was no violation of the statute.⁴⁸ This view of the common law was subsequently rejected in England in *London Ry. v. Gomm*⁴⁹ as being an old error, for the fact that the future interest is theoretically alienable is of no help to the possessor of the present estate, when there is, practically speaking, no probability of such an alienation.⁵⁰ The only change in the common law intended by the revisors was a reduction of the period allowed for a restraint to continue to only two lives in being, eliminating the period in gross of twenty-one years, and permitting it as a period of minority in only one instance.⁵¹

The statute was not intended by the revisors to replace the common law rule against direct restraints, but it has been applied to direct restraints by the New York court,⁵² although other cases still rely on the common law rule against repugancy.⁵³ It is said that since the courts, whether using the common law rule against direct restraints or the statute, only hold the restraint void and not the grant itself, this lends support to the view that the statute as applied to direct restraints goes no farther than the common law rule against direct restraints.⁵⁴

In cases of indirect restraints the early decisions followed the revisors' intent and did not find the statute violated simply because of remoteness in vesting.⁵⁵ But in 1909, the New York court in *Matter of Wilcox*⁵⁶ held that the revisors intended that there also be a continuance of the rule against remoteness of vesting, and that the statute contained both that rule and the rule against suspension of the power of alienation. The court based its decision on Section 24⁵⁷ of the Code which it interpreted as a rule against remoteness, and did not consider the previous cases⁵⁸ which held that alienation was suspended only when

⁴⁷ *Supra*, note 29.

⁴⁸ *Graham v. Graham*, 49 Misc. 4, 7 N.Y.Supp. 779 (1905); RUNDELL, *supra* note 27, 254.

⁴⁹ L.R., 20 Ch. Div. 562 (1882).

⁵⁰ SIMES, Sec. 567.

⁵¹ NEW YORK REVISED STATUTES (1830) REAL ESTATE CODE, Section 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. . . ."

⁵² *Re Walker's Will*, 122 Misc. 905, 202 N.Y.Supp. 760 (1924).

⁵³ *Hacker v. Hacker*, 153 App. Div. 270, 138 N.Y.S. 194 (1912).

⁵⁴ SIMES, Sec. 570; BOGERT, Sec. 219.

⁵⁵ *Sawyer v. Cubby*, 146 N.Y. 192, 40 N.E. 869 (1895).

⁵⁶ 194 N.Y. 288, 87 N.E. 497 (1909).

⁵⁷ *Supra*, note 45.

⁵⁸ *Supra*, note 55.

there are no persons in being by whom an absolute estate in possession can be conveyed. It seems that the present state of the New York law is in accord with the later decisions under the common law rule against perpetuities,⁵⁹ at least in so far as it holds that contingent future interests suspend alienation.⁶⁰ But the New York rule against remoteness in vesting is even more stringent than the common law rule, as the allowable period is only for two lives.⁶¹ In addition, the court in the *Wilcox* case⁶² also decided that "vesting" under the New York statute meant vesting in possession and enjoyment, and not merely vesting in interest. The rules laid down in the *Wilcox* case were applied to all future estates in *Walker v. Marcellus and Otisco Lake Ry. Co.*⁶³ where the court stated that the revisors intended that all future estates depending on a contingency should vest in possession within a reasonable time.

The common law rule against perpetuities was always considered as applying only to future interests,⁶⁴ but in 1835 the New York court applied their statutory form of the rule to a present trust interest, which would last for the lives of twelve persons, saying that the statute applied to all inalienable interests, whether present or future, and irrespective of the cause of inalienability.⁶⁵ The court reasoned that since the trustee could not sell the property until the end of twelve lives the trust violated the statute, although all three revisors appeared and argued to the contrary.⁶⁶ A year later the court was faced with a trust giving the trustee a power of sale, but here it concluded that sale of the trust property by the trustee would not be a true alienation under the statute unless the trustee also had the power to terminate the trust.⁶⁷ The result was that most trusts are invalid in New York if they may last for more than two lives in being.⁶⁸

IV. THE WISCONSIN STATUTES

Wisconsin adopted the New York Code in 1849 but without a provision covering interests in personalty.⁶⁹ In 1887 the period of permissible suspension was increased from two lives in being to two lives and twenty-one years.⁷⁰ In 1925 the statute was amended so as to

⁵⁹ *London Ry. v. Gomm*, *supra*, note 49.

⁶⁰ SIMES, Sec. 567.

⁶¹ RUNDELL, *supra* note 27, 261.

⁶² *Supra*, note 56

⁶³ 226 N.Y. 347, 123 N.E. 736 (1919).

⁶⁴ RUNDELL, *supra* note 27, 250.

⁶⁵ *Coster v. Lorillard*, 14 Wend. 265 (1835). The suspension of alienation, in the case of trusts, results from another statute making the beneficiary's interest inalienable. See BOGERT, Sec. 219.

⁶⁶ Report of the New York Law Revision Commission, 517 (1936).

⁶⁷ *Hawley v. James*, 16 Wend. 61 (1836).

⁶⁸ BOGERT, Sec. 219.

⁶⁹ WIS. REV. STAT. (1849), ch. 56; Sec. 14-21, 23.

⁷⁰ Wis. Laws (1887), ch. 551.

cover interests in personalty as well as realty.⁷¹ In 1927 the period was again changed and it is now for any lives in being and 30 years.⁷²

Prior to the dual rule laid down by the New York court in the *Wilcox* case,⁷³ the Wisconsin court adopted the position that our statute was not aimed at remoteness in vesting as such but only at unlawful restraints upon the power of alienation.⁷⁴ "We adopt the doctrine that the absolute power of alienation is not suspended within the meaning of the statute so long as absolute power is located somewhere to alienate, . . ."⁷⁵ This doctrine was expressly reaffirmed by the court in 1941.⁷⁶ "This court has declined to follow the court of appeals of the state of New York and hold that the rule against perpetuities in this state depends upon the remoteness of vesting. . . . Forty years' experience under the rule involved in *Becker v. Chester* does not seem to have produced any undesirable results."⁷⁷ Wisconsin is in accord with New York, however, in applying the statute to present estates⁷⁸ and to both vested and contingent future estates.⁷⁹

The Wisconsin court, following the lead of New York, has applied our statutes to trusts.⁸⁰ The early cases involved only trusts of income of land since, until 1925, Wisconsin had no statutory or common law rule against perpetuities in personal property.⁸¹ The suspension of alienation resulted from the fact that the beneficiary's interest in such a trust is made inalienable under another statute.⁸² Since the latter does not apply to trusts of income from personalty,⁸³ there would appear to be no suspension of alienation in such trusts since 1925 except where the beneficiaries are not ascertained.⁸⁴ Contrary to the New York view, the Wisconsin court considers a power of sale in the trustee sufficient to prevent suspension of the power of alienation of property held in trust.⁸⁵ The result is that trusts in Wisconsin never violate our statute so long as the trustee has either an express or implied power of sale.⁸⁶

V. CONCLUSIONS

A review of the cases dealing with the common law rule against

⁷¹ Wis. Laws (1925), ch. 287.

⁷² Wis. Laws (1927), ch. 341. The present Wisconsin Statutes are set forth, *supra*, note 1.

⁷³ *Supra*, note 56.

⁷⁴ *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902).

⁷⁵ *Ibid.*, 115 at Wis. 115.

⁷⁶ *Will of Butter*, 239 Wis. 249, 1 N.W. 2d 87 (1941).

⁷⁷ *Ibid.*, 239 Wis. at 255.

⁷⁸ *Saxton v. Webber*, 83 Wis. 617, 53 N.W. 905 (1892).

⁷⁹ *Ford v. Ford*, 70 Wis. 19, 33 N.W. 188 (1887).

⁸⁰ First case invalidating a trust is apparently *De Wold v. Lawson*, 61 Wis. 469, 21 N.W. 615 (1884).

⁸¹ *Supra*, note 74.

⁸² Wis. STATS. (1951), Sec. 231.19.

⁸³ *Lamberton v. Pereles*, 83 Wis. 449, 58 N.W. 776 (1894).

⁸⁴ *Will of Baker*, 258 Wis. 65, 45 N.W. 2d 94 (1950).

⁸⁵ *Supra*, note 74.

⁸⁶ In *Will of Walker*, *supra* note 84, the court found an implied power of sale.

direct restraints on alienation indicates that inalienability of the beneficiary's interest is permissible, under the majority view, where that interest is no greater than a life estate.⁸⁷ No attempt appears to have been made to strike down trusts as direct restraints simply because the trustee's interest is inalienable.⁸⁸ So it would seem that trusts with no spendthrift provisions do not violate the common law rule against direct restraints. In Wisconsin, trusts of income from lands are made inalienable by statute but our court considers such trusts valid if the trustee has a power of sale.⁸⁹ Since most states permit spendthrift trusts of beneficial life estates the result in Wisconsin does not conflict with the policy behind the common law rule against direct restraints.

The common law rule against perpetuities invalidates only those trusts which contains future interests which will not vest within the time allowed by the rule.⁹⁰ Under Wisconsin law, future interests in an ascertained person but contingent upon an uncertain event do not violate the Wisconsin statute, since a fee simple can be conveyed by persons in being,⁹¹ although such future interests would be void at common law if they did not vest within lives in being and 21 years.⁹² This difference in result is not due to the effect Wisconsin accords to a power of sale in the trustee but rather to the Wisconsin view that our statute is not aimed a remoteness in vesting as such.⁹³ It is only with respect to future interests in unascertained persons that both the Wisconsin statute and the common law rule apply. Here a power of sale in the trustee saves future interests in Wisconsin which would be invalid at common law if too remote in vesting.⁹⁴ Does the Wisconsin law violate the policy foundations behind the common law rule against perpetuities when such future interests are held valid? It is generally recognized that the purpose of the common law rule was and is to promote the practical alienability of land so that if the present owner cannot use the property advantageously, he can sell it to someone who will make a better use of it.⁹⁵ It would seem that this purpose is adequately served by a power of sale in the trustee. The contrary New York view seems opposed to the continuance of trusts as such. The Wisconsin court has properly indicated that any limitation on the duration of trusts as such is a problem for the legislature.⁹⁶

⁸⁷ *Supra*, note 10.

⁸⁸ RUNDELL, *supra*, note 27, 250.

⁸⁹ *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902).

⁹⁰ GRAY, Section 269.

⁹¹ *Supra*, note 89.

⁹² *Supra*, note 90.

⁹³ *Will of Butter*, 239 Wis. 249, 1 N.W. 2d 87 (1941).

⁹⁴ *Will of Walker*, 258 Wis. 65, 45 N.W. 2d 94 (1950).

⁹⁵ SIMES, Sec. 439; BOGERT, Sec. 220.

⁹⁶ *Supra*, note 94. Justice Vinson's difficulty in attempting to determine how long accumulation of income by a trustee should be permitted in *Gertman v.*

An additional argument in favor of the Wisconsin rule in a jurisdiction where any trust, whether containing present or future interests, must comply with the statutory prohibitions is that New York, which does not follow the Wisconsin rule, has been criticized as being unduly restrictive on the creation of trusts.⁹⁷ Michigan, which also refused to follow the Wisconsin rule,⁹⁸ recently felt compelled to repeal their statute and go back to the common law rule.⁹⁹

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Burdick, 123 F. 2d 924 (1941), illustrates the handicaps upon judges who attempt to determine broad policy questions.

⁹⁷ GRAY, Sec. 750.

⁹⁸ Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901).

⁹⁹ 8 MICH. STAT. ANN. (1949 Cum. Supp.), Sec. 26.49